

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

QUALITY HEALTH SERVICES OF P.R., INC.  
D/B/A HOSPITAL SAN CRISTOBAL

Respondent

and

UNIDAD LABORAL DE ENFERMERAS(OS) Y  
EMPLEADOS DE LA SALUD

Charging Party

Cases 24-CA-11782  
24-CA-11884

**ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

Comes now Counsel for the Acting General Counsel and respectfully submits to the Board this Answering Brief to Respondents' Exceptions to the Administrative Law Judge's Decision whereby it requests that Respondent's exceptions be dismissed in their entirety and the Administrative Law Judge's decision in this case be affirmed. In support of this position, Counsel for Acting General Counsel offers the following:

**I. PROCEDURAL STATEMENT**

The Regional Director for the 24<sup>th</sup> Region of the National Labor Relations Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on August 31, 2011, based charges filed by Unidad Laboral de Enfermeras(os) y Empleados de la Salud ("Union") against Quality Health Services of P.R., Inc., d/b/a Hospital San Cristobal ("Respondent") in Cases 24-CA-11782 and 24-CA-11884. The Consolidated Complaint alleges Respondent violated Section 8(a)(1) and (5) of the Act by making unilateral changes in the Respiratory Therapy Department without prior notice to the

Union and/or affording it an opportunity to bargain to impasse, including changing the vacation policy, subcontracting unit work and laying off the respiratory therapists. The Consolidated Complaint further alleges Respondent violated Section 8(a)(1) by distributing a memo to its employees prohibiting them from engaging in protected concerted activity. The hearing on this matter was held before Judge Geoffrey Carter from November 17 to 18 and December 13 to 14, 2011, in San Juan, Puerto Rico.

On February 2, 2012, Judge Carter issued his decision in this case whereby he found that Respondent violated Section 8(a)(5) and (1) of the Act by a) on or about March 25, 2011 subcontracting bargaining unit work performed by respiratory therapy technicians without first giving notice to and bargaining with the Union; and b) unilaterally discharging eight respiratory therapy technicians on July 8, 2011 and subcontracting the work that they previously performed without first bargaining with the Union to impasse. Judge Carter further found that Respondent violated Section 8(a)(1) of the Act by issuing and distributing a memorandum on March 31, 2011, that prohibited discussions among employees related to the Respondent's subcontracting of work performed by its respiratory therapy technicians. Finally, in light of Respondent's recent history of engaging in similar unfair labor practices, Judge Carter found that the Board should issue a broad remedial order requiring Respondent to cease and desist from interfering with employees' Section 7 rights.

On February 27, 2010, Respondent filed exceptions to Judge Carter's decision. Thus, Counsel for the Acting General Counsel now files the instant Answering Brief to Respondent's Exceptions.

## II. ISSUES RAISED BY RESPONDENT IN ITS EXCEPTIONS

Exception #1, 2 & 9: Respondent is excepting to Judge Carter's decision that it unilaterally terminated Respiratory Therapists without first bargaining with the Union to impasse.

Exception #3: Respondent is excepting Judge Carter's determination that March 31, 2011, memorandum to employees violated Section 8(a)(1) of the Act.

Exception #4 & 8: Respondent is excepting to Judge Carter's decision not to credit its Human Resources Director's testimony regarding the bargaining process and not making an adverse inference over the non-appearance of the Union's President and the Executive Director to testify on said matter.

Exception #5: Respondent is excepting to Judge Carter's decision not to rely on *Westinghouse Electric Corp.* 150 NLRB 1574 (1964) in finding that Respondent failed to offer credible evidence that its decision to subcontract *per diem* employees in March 2011 was supported by an established past practice.

Exception #6: Failure to consider testimony on Respondent's financial hardship on which its decision to subcontract was relied on.

Exception #7: Respondent is excepting to Judge Carter's recommended order to issue a broad remedial order.

## III. EXCEPTIONS #1, 2 AND 9: Respondent Unilaterally Terminated Respiratory Therapists Without Bargaining to Impasse.

Respondent does not dispute that an employer's "replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" is a mandatory subject of bargaining. O.G.S. Technologies, Inc., 356 NLRB No. 92 (2011) citing Fiberboard Corp. v. NLRB, 379 U.S. 203 (1964). Nor does Respondent dispute that an employer generally may not change or discontinue a mandatory subject of bargaining, such as subcontracting unit work, without

first bargaining with the union to *impasse* or agreement. NLRB v. Katz, 369 U.S. 736, 747 (1962).

Nevertheless, Respondent's argues that Judge Carter failed to consider that it had given notice to the Union had the final deadline to reach an agreement on its decision to subcontract was July 8, 2011, and that Union representative had expressed their unwillingness to compromise. However, Judge Carter correctly determined that the parties had engaged in meaningful bargaining and had yet to reach a final deadlock when it decided to lay-off the unit employees. Particularly, on the day Respondent implemented its decision to subcontract the department, the Union had submitted a proposal, which was clearly within the realm of the saving that Respondent sought to obtain. In fact, upon further negotiations, albeit after Respondent had already discharged the respiratory therapists, the Union's last financial offer surpassed the amount of savings that Respondent represented would avoid subcontracting the department. Furthermore, Respondent's insistence that all the therapists rotate was not based on any economic considerations nor had it been raised until the day Respondent implemented its decision despite the fact that it had been its intention to eliminate the permanent shifts all along (tr. 163, 166). Nevertheless, Respondent decided to immediately discharge the respiratory therapists and subcontract the department, a decision it had been postponing for over four months, without affording the Union any further opportunity to continue bargaining.

**IV. EXCEPTION #3: March 31, 2011, Memorandum Violated Section 8(A)(1) of the Act.**

As discussed in our post-trial brief, upon reading Respondent's memo an employee could reasonable interpret that Respondent sought to prohibit and/or limit employees from talking among each other about the possibility that Respondent may

subcontract another department. Thus, it has the effect of coercing and threatening employees from engaging in protected concerted activity. Lafayette Park, 326 NLRB 824, 825 (1998). Furthermore, Respondent's memo is also tantamount to soliciting employees to report protected concerted activity. Niblock Excavating, Inc., 337 NLRB 53, 61 (2001) (finding unlawful an employer letter to employees urging them to report feeling "threatened or harassed" to sign a union card, noting lack of any credible evidence that any union supporters "employed any unprotected tactics in soliciting support for the Union"). Therefore, Respondent's memo violated Section 8(a)(1) of the Act.

**V. EXCEPTION #4 & 8: Credibility Determinations**

Respondent is excepting to Judge Carter's decision not to credit its Human Resources Director's testimony regarding the bargaining process and his failure not to make an adverse inference over the non-appearance of the Union's President and the Executive Director to testify on said matter. However, the record evidence in the instant case does not support the Board overruling Judge Carter's credibility findings. In first place, although Judge Carter held that portions of Respondent's Human Resources Director to lack credibility since she provide testimony "...that stretched the facts to bolster the Respondent's theory of the case..." (ALJ decision, page 13), the facts related to the parties' bargaining process prior to implementing its decision to subcontract were essentially undisputed (ALJ decision, page 16). Thus, the fact that Union Representative Ariel Echevarria was the only witness on behalf of the charging party to testify about the parties' bargaining is inconsequential. Finally, the Board has consistently held that it will not overrule an administrative law judge's credibility resolutions unless the clear

preponderance of all the relevant evidence convinces the Board otherwise. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Since such is not the case here, Respondent's exceptions should be dismissed.

**VI. EXCEPTION #5: Refusal to Rely on Westinghouse Electric**

Respondent's position is that Judge Carter should have relied on Westinghouse Electric Corp., supra, as it argued in its post-trial brief, to find that it offered credible evidence that its decision to subcontract *per diem* employees in March 2011 was supported by an established past practice. As correctly analyzed by Judge Carters, the employer in Westinghouse Electric Corp. effectively demonstrated that subcontracting was an established practice that it had relied on for over 20 years and that it had made the disputed subcontracting decisions in a manner consistent with its past practice. In the present case, however, Respondent failed to present any credible evidence that its decision to subcontract with Respiratory Therapy Management Testing and Consulting Services PSC ("RTM") to provide *per diem* employees was supported by an established past practice. Rather, the evidence showed that while there is no dispute about its prior use of *per diem* employees, the flaw in Respondent's defense was in the manner in which it hired *per diem* personnel prior to March 2011 when compared to when it started to hire RTM personnel, which was significantly different.

In first place, Respondent admitted that, prior to subcontracting RTM personnel in March 2011, it had not hired *per diem* respiratory therapists since August 2010 (tr. 84). Furthermore, during the past two years prior to hiring RTM personnel, Respondent only hired one or two *per diem* therapists (JX-52). However, when Respondent began hiring

RTM personnel, it hired up to three RTM employees a day to perform unit work (tr. 88, GC-2).

While the use of *per diem* or temporary personnel was nothing new for Respondent, the expired collective bargaining agreement expressly limited the circumstances under which it may hire said temporary employees to perform unit work (tr. 85, JX-1). Such allowed circumstances include emergency projects or to substitute regular employees in case of sickness, vacations, or any other similar reason. However, contrary to Respondent's contention otherwise, the record is devoid of any evidence to corroborate that any therapist was on sick or vacation leave at the time RTM personnel was subcontracted. (tr. 83-89, 124, 188-189, JX-29 and 56).

**VII. EXCEPTION #6: Failure to consider testimony on Respondent' financial hardship**

As an alternative defense to further justify its unilateral decision to subcontract, Respondent claims it was under financial hardship and, thus, Judge Carter failed to consider evidence in this regard. However, although the Board recognizes that economic exigencies compelling prompt action is a narrow exception which allows an employer to implement a change in working conditions when there is not an overall *impasse* on bargaining as a whole, the employer is still required to bargain to *impasse* over the particular matter. RBE Electronics of S.D., 320 NLRB 80, 82 (1995). The Board has explicitly limited these economic exigencies to "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action". *Id.*, at 81; Hankins Lumber Co., 316 NLRB 837, 838 (1995); Angelica Health Care Services, 284 NLRB 852, 853 (1987).

Applying the above principles to the present case, even if Respondent's decision to subcontract could provide some economic relief, such a fact, even if true, does not fall under the definition of economic exigencies as defined by the Board. Respondent did not make any assertion that it was unable to pay the wages of the unit employees. According to Respondent, its primary concern in deciding to subcontract was to seek a way in to obtain some economic relief in order to reduce its ongoing deficit. However, "...production cost matters, which by their very nature include wages, fringe benefits, and other employment costs, over which the union can exercise substantial control, are particularly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the collective interest." Bob's Big Boy Family Restaurants, 264 NLRB 1369 (1982) citing Fibreboard Corp. v. NLRB, 379 U.S. 203 at 213-214 (1964).

In conclusion, the record clearly reflects that the parties had yet to reach an impasse when Respondent decided to finalize negotiations and implement its decision to subcontract. Furthermore, Respondent failed to show any lawful reason to bypass its obligation to continue bargaining with the Union. The truth of the matter is that Respondent never intended to allow that the respiratory therapists to be assigned to a permanent shift as mandated by the Board's order and sought to circumvent said order by subcontracting the department.

#### **VIII. EXCEPTION #7: Broad Remedial Order**

Respondent argues that a broad cease and desist order is not warranted because it "...conflicts with [its] right of a due process and review". However, the fact remains that

the Respondent is a proven recidivist employer involved in engaging in multiple unilateral changes in a period of less than two years. Respondent does not dispute that in Case 24-CA11438 et seq, the Board issued a decision finding that it violated Section 8(a)(1) and (5) of the Act by making numerous unilateral changes to terms and conditions of employment, none of which, as Judge Carter noted in his decision, occurred at the same time. And while Respondent argues that it has allegedly complied, albeit partially, with said decision, it should be noted that the facts in the present case tend to show that by subcontracting the Respiratory Therapy department, it has essentially circumvented the Board's order to reinstate the permanent shifts in said department. Moreover, while in Case 24-CA11630 the Board has yet to issue its decision, the fact remains that Judge George Aleman found that Respondent committed further unilateral changes without any prior notice to the Union or affording it an opportunity to bargain. The record in both prior cases, as in the present one, shows that Respondent's violations were intentional and its defenses in all instances were frivolous and/or nonexistent. Moreover, Respondent's unlawful actions, which have resulted in a significant reduction of income for respiratory therapists in particular, were made without any regard for its obligation to deal with the employees' chosen collective-bargaining representative.

Since Respondent has shown a proclivity for violating the Act, because of the serious nature of the violations, and due to Respondents' unyielding and egregious misconduct, demonstrating a general disregard for the prior Board order and the employees' fundamental rights all while the Union is trying to negotiate its first collective bargaining agreement, it is of utmost importance that the Board issue a broad order in an effort to dissuade Respondent from continuing its blatant disregard for Board orders and

from further infringing the rights guaranteed employees by Section 7 of the Act. Hickmott Foods, 242 NLRB 1357 (1979).

**IX. CONCLUSION**

For the foregoing reasons, Counsel for the Acting General Counsel respectfully requests that Respondents' Exceptions to the Administrative Law Judge's Decision be dismissed.

Dated at San Juan, Puerto Rico this 12<sup>th</sup> day of March 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that the “GENERAL COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION” has been served on by e-mail to Jose A. Oliveras at [JAOliveras@Caribe.Net](mailto:JAOliveras@Caribe.Net) and Harold Hopkins at [snikpohh@yahoo.com](mailto:snikpohh@yahoo.com).

Dated at San Juan, Puerto Rico this 12<sup>th</sup> day of March 2012.

/s/ Jose L. Ortiz-Marciales  
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