

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

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**1621 ROUTE 22 WEST OPERATING  
COMPANY, LLC d/b/a SOMERSET  
VALLEY REHABILITATION & NURSING  
CENTER**

**And**

**Case Nos. 22-CA-69152  
22-CA-74665**

**1199 SEIU UNITED HEALTHCARE  
WORKERS EAST, NEW JERSEY  
REGION**

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**RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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## I. INTRODUCTION<sup>1</sup>

Respondent 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center (“Somerset” or “Respondent”), submits this Brief in Support of its Exceptions to the January 15, 2013 Decision and Order issued by Administrative Law Judge Lauren Esposito (“ALJ”). For all the reasons set forth below, the ALJ’s findings of fact and conclusions of law are not supported by a preponderance of all of the relevant evidence in the record and/or are contrary to established Board law or policy. Accordingly, the ALJ’s Decision and Order should be reversed, Judgment should be entered in favor of Respondent on all counts, and the Third Amended Consolidated Complaint (“Complaint”) should be dismissed in its entirety.<sup>2</sup>

## II. STATEMENT OF THE CASE

The Acting General Counsel (“AGC”) issued a Complaint on January 24, 2012. (GC-1). Respondent filed and served its Answer on February 6, 2012. (GC-1). The AGC amended the Complaint on March 12, 2012. (GC-1). Respondent filed and served its Answer to the Amended Complaint on March 26, 2012. (GC-1). The AGC issued the Second Amended Consolidated Complaint on March 22, 2012. (GC-1). Respondent filed and served its Answer to Second Amended Consolidated Complaint on April 6, 2012. (GC-1). The AGC issued the Third Amended Consolidated Complaint on April 26, 2012. (GC-1). Respondent filed and served its Answer to Third Amended Consolidated Complaint on May 4, 2012. (GC-1).

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<sup>1</sup> The ALJ’s Decision is cited “(ALJD \_\_)””; the transcript is cited “(Tr. at \_\_)””; and hearing exhibits are cited “(R-1, GC-1, etc.)””. The page and line numbers of the ALJ’s Decision cited herein are from the copy of the Decision served on Respondent. Respondent notes that the line numbers listed on the left side of the pages of that Decision do not always line up with the actual number of lines on the page. Respondent further notes that the page and line numbers of the Decision on the Board’s website differ from those in the copy served on Respondent.

<sup>2</sup> Contemporaneously with its Exceptions and Brief in Support, Respondent filed a Motion to Stay Proceedings based upon the Board’s lack of a quorum. Accordingly, the Board should take no further action in this matter until a constitutionally valid quorum exists.

The ALJ conducted the hearing on May 7, 8, 9, 10, and 11, 2012, at which time the record was closed. After receiving an extension, the parties filed post-hearing briefs on June 25, 2012. The ALJ issued her Decision and Order on January 15, 2013. The case was transferred to the Board by Order dated January 15, 2013. By Order dated January 24, 2013, Respondent obtained an extension of time to file Exceptions and a Supporting Brief until March 5, 2013.

### III. QUESTIONS PRESENTED

1. Whether the ALJ erred in finding that HealthBridge Management and CareOne Management own Respondent and a group of health care facilities? [Exceptions 1, 2].
2. Whether the ALJ erred in finding that HealthBridge Management and CareOne Management are “Inc.”s? [Exceptions 1, 3].
3. Whether the ALJ erred by relying upon the District Court’s finding in *Lightner v. Somerset Valley Rehabilitation and Nursing Center*, 2012 U.S. Dist. LEXIS 52896 (D.N.J. Apr. 16, 2012), that former employees Shannon Napolitano and Sheena Claudio should be reinstated and/or by making her own finding to that effect? [Exception 4].
4. Whether the ALJ erred by refusing to follow and apply the legal analysis set forth in *Dorsey Trailers, Inc. v. NLRB*, 134 F.3d 125 (3d. Cir. 1998), and *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240 (3d Cir. 1994)? [Exceptions 13, 33].
5. Whether the ALJ erred in finding that Respondent violated Sections 8(a)(1) and (5) of the Act by eliminating the Licensed Practical Nurse (“LPNs”) job classification and adopting an all-RN care delivery model to address critical patient care issues?” [Exceptions 5-17, 21-26, 31-33, 35-36, 40].
6. Whether the ALJ erred in finding that Respondent violated Sections 8(a)(1) and (3) of the Act by eliminating the LPN job classification and adopting an all-RN care delivery model to address critical patient care issues? [Exceptions 5-27, 35, 37, 40].

7. Whether the ALJ erred in finding that Respondent violated Sections 8(a)(1), (3) and (5) of the Act by discharging LPNs Irene D'Ovidio and Maharanie Mangal as part of its move to an all-RN model? [Exceptions 5-28, 31-33, 35-38, 40].

8. Whether the ALJ erred in finding that Respondent violated Sections 8(a)(1) and (5) of the Act by refusing to provide the Union with access to its facility? [Exceptions 29-30, 34, 39, 40].

9. Whether the ALJ's recommended remedies are supported by the evidence, otherwise appropriate under the facts and controlling law, and/or against public policy? [Exceptions 41-42].

#### **IV. STANDARD OF REVIEW**

The Board reviews the ALJ's findings of fact *de novo*. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 544-45 (1950), *enfd*, 188 F.2d 362 (3d Cir. 1951). While the Board generally affords some deference to credibility determinations based on the demeanor of the witnesses, even those determinations cannot be rubber-stamped. *Permaneer Corporation*, 214 NLRB 367, 369 (1974) (an ALJ "cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word 'demeanor'"). The Board must review the record in its entirety and determine whether the clear preponderance of all the relevant evidence supports the ALJ's credibility determinations. *Standard Dry Wall Products, Inc.*, 91 NLRB at 545. When it does not, those findings must be reversed. *Id.*

#### **V. SUMMARY OF EXCEPTIONS**

The ALJ erred as a matter of law in finding that Respondent was required to bargain with the Union about its change to an all-RN health care delivery model. Many of the ALJ's underlying factual findings on this issue are either contrary to the evidence or not supported by the weight of the evidence. Additionally, the ALJ erred in finding Respondent acted with

union animus in making the change to an all-RN model. Further, Respondent did not violate the Act with respect to refusing to allow the Union access to Somerset's facility and there is no evidence of any Union interest that trumps Respondent's private property rights.

## **VI. LAW AND ARGUMENT**

### **A. Introduction**

Somerset is a skilled nursing facility with a history of poor nursing care by its Licensed Practical Nurses ("LPNs"). Following a seriously deficient annual compliance survey from the New Jersey Department of Health and Senior Services ("NJDOH") in December 2009 – in which the State of New Jersey found, among other things, that a patient suffered actual harm because of the nursing care she received at the facility – Somerset spent more than a year trying to improve the quality of care provided by the LPNs, its primary care-givers. It repeatedly educated LPNs in proper nursing procedures. It began to rigidly enforce its rules governing proper nursing care. It disciplined LPNs who made significant nursing mistakes. But these efforts did not result in a material improvement in the quality of care. Somerset received another poor annual compliance survey from the NJDOH in December 2010, and its LPNs continued to make serious errors that put the health and safety of Somerset's patients at risk.

After still more efforts to raise the quality of nursing care at Somerset were unsuccessful, Somerset ultimately came to the conclusion that LPNs lacked the skills and qualifications needed to safely and competently care for its frail and elderly, and increasingly subacute, patient population. Thus, beginning in May 2011, Somerset decided to transition to a clinical staffing model that used only Registered Nurses ("RNs"). This move was designed to address the serious patient care and nursing issues that continued to plague the facility; better serve its subacute patients; and ultimately reposition itself in the market as a dedicated subacute nursing facility. RNs are far more skilled and credentialed than LPNs, and every

competent witness who testified on the issue agreed that Somerset's move to an RN-only model was a positive development for Somerset's patients. The move to an RN-only model is consistent with a trend in subacute care, and the evidence at the hearing demonstrated beyond dispute that this move has resulted in a significant improvement in patient care at Somerset. Through attrition and employee terminations, LPNs left the facility and were replaced by RNs. By October 18, 2011, Somerset no longer employed any LPNs.

Instead of applauding Somerset's efforts to provide the highest quality patient care – as Somerset is required to do under federal and state law – the AGC contends that these efforts violated the National Labor Relations Act ("Act"). In Case No. 22-CA-069152, the AGC claims that Somerset violated Section 8(a)(5) because it did not bargain with the Union over its decision to move to an RN-only model. The AGC also alleges that Somerset's move to an RN-only model and decision to discharge the last two LPNs who worked at the facility (Irene D'Ovidio and Maharanie Mangal), constitutes retaliation for Union activity in violation of Section 8(a)(3). In Case No. 22-CA-074665, the AGC asserts that Somerset unlawfully denied the Union's unnecessary request for "access" to Somerset's facility.

The ALJ found in favor of the AGC on each of the charges. However, the ALJ's findings in favor of the AGC are not supported by a preponderance of all of the relevant evidence in the record and/or are contrary to established Board law or policy. The 8(a)(5) violation should have been dismissed because there was no duty to bargain with the Union over Somerset's decision to move to an RN-only model. The decision was accompanied by a fundamental change in the nature, scope and direction of its business and had nothing to do with labor costs. Moreover, compelling economic circumstances – Somerset's need to improve patient care and position itself in the marketplace as an all-subacute facility – required Somerset to act while its objections to the Union election were pending. Additionally, there is insufficient evidence of a causal link between Somerset's patient-

motivated decision to move to an RN-only clinical staffing model and any union activity; therefore, the 8(a)(3) allegations must fail. However, even if there was evidence of such a causal link, Somerset would have adopted this model for reasons unconnected with any union activity at the facility – its need to address the serious and longstanding patient care problems at the facility. Finally, the denial-of-access allegations also must fail because Somerset’s private property interests, as a nursing home, far outweigh the Union’s interest in representing the employees of the facility, particularly where, as here, the Union had more than adequate alternative means of representing the employees’ bargaining unit.

Thus, the ALJ’s Decision and Order should be reversed, Judgment should be entered in favor of Respondent on all counts, and the Complaint should be dismissed.

**B. The ALJ Erred in Finding that Respondent Violated Sections 8(a)(1), (3) and (5) by Eliminating the LPN Job Classification**

**1. Facts underlying Somerset’s decision to adopt an all-RN health care delivery model**

Somerset’s actions do not exist in a vacuum. They directly affect human lives at a time when they are at their most vulnerable. It is necessary to understand something about the patients Somerset cares for, as well as the environment in which Somerset operates, before discussing the decisions Somerset made to care for those patients.

**a. Somerset’s non-delegable duty to provide safe and competent patient care**

Somerset operates a 64-bed skilled nursing facility in Bound Brook, New Jersey, that provides subacute and skilled nursing care. Somerset is a separately formed LLC. HealthBridge Management, LLC (“HealthBridge”), provides management services to Somerset. (Tr. at 353, 494). Contrary to the ALJ’s findings, there is no evidence in the record that HealthBridge or CareOne Management, LLC own Somerset or any other health care facility. (ALJD 2:23-24, 2:29-31). Indeed, there is no evidence in the record of any

“ownership” of Somerset. Further, contrary to the ALJ’s findings, there is no evidence that either HealthBridge or CareOne Management is an “Inc.” (ALJD 2:23-24, 2:35-37). Rather, it is undisputed that both entities are LLC’s. (See Tr. at 230).

Somerset has a non-delegable duty under state and federal law to provide safe and competent patient care. See, e.g., 42 U.S.C. §1395i-3(b)(1)(A) (“must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident”); 42 U.S.C. §1395i-3(b)(2) (“must provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident”). See also 42 U.S.C. §1395i-3(c); 42 C.F.R. Part 483.

**b. Somerset’s provision of patient care is subject to annual government compliance surveys**

To ensure compliance with its statutory mandate, Somerset is heavily regulated by NJDOH and the United States Centers for Medicare & Medicaid Services (“CMS”). (Tr. at 288, 421). NJDOH administers and monitors compliance with both federal and state laws and regulations pertaining to the delivery of health care services in nursing homes and skilled nursing centers in New Jersey. In its oversight role, NJDOH conducts annual surveys of patient/resident care of every nursing home and long-term care facility in the state “to determine that the facility is in compliance with the rules and regulations set down by the State and Federal Government.” (R-20 at 103:9-12). A survey team remains on-site for an average of five days per survey. (R-20 at 109). Facilities must pass these surveys to accept new residents and receive Medicare and Medicaid payments. Survey deficiencies can result in fines, required plans of correction, loss of reimbursement, a moratorium on new admissions, and termination of a facility’s provider agreement with Medicare. (R-9 at 3, R-10 at 3).

### **c. The degrees of medical care needed by patients**

Acuity is the intensity of services that a patient or resident requires and the complexity of his or her medical condition. (Tr. at 258-59). Traditionally, patients in medical and other skilled care facilities have been loosely categorized into four groups based upon their acuity – assisted living, long-term care, subacute, and acute. Assisted living is generally thought of as the lowest level of required care. Assisted living residents are basically independent. While in need of assistance with activities of daily living (“ADL”), they typically do not require 24-hour nursing care. (Tr. at 293-95). Long-term care is considered more “traditional nursing care” (Tr. at 259) or “custodial care” (Tr. at 420) and the nursing home becomes the patient’s home. (Tr. at 285, 545). In addition to needing assistance with ADLs, long-term care residents may require constant nursing care and 24-hour monitoring. (Tr. at 259, 293-94). Subacute care is a more intensive or higher level of care provided on an in-patient basis immediately after discharge from the hospital, and sometimes instead of hospitalization, and often involves post-surgery rehabilitation services. (Tr. at 259, 295-96, 420). Patients in the broad “subacute” category have varying degrees of acuity, some higher and some lower, *i.e.*, some subacute patients have more complex medical conditions and need a higher level of nursing care than others. (Tr. at 259). The average length of stay for a subacute patient at Somerset is 28-30 days. (Tr. at 374). Finally, acute care is care provided in a hospital setting. (Tr. at 347).

Increasingly, changes in Medicare reimbursements and the requirements of other health care payment providers have resulted in acute care patients being discharged from hospitals earlier than in the past. These factors, among others, are driving higher acuity patients to lower and lower levels of care providers. (Tr. at 294-96). In the past, subacute care primarily was simple post-surgery orthopedic rehabilitation, *i.e.*, post-knee surgery. (Tr. at 563). Now, acute care patients, once treated in hospitals, are being discharged to

subacute facilities like Somerset much sooner. However, they still need substantial medical care for serious, complex, and often multiple conditions. Patients in subacute facilities now require more care than the sort of maintenance traditionally thought of in such facilities. (R-21, tab 2 at 13). Treating patients in today's subacute facilities "is almost like rounding ... as if you were in the hospital." (Tr. at 563). Subacute facilities have become "mini-hospitals," caring for very sick patients with multiple conditions – cardiac, bypass, pneumonia, and emphysema to name but a few. (Tr. at 563). These facilities, therefore, need a high degree of nursing assessment skills to care for these patients. (Tr. at 563).

**d. Readmissions to a hospital can be harmful to patients**

As stated above, subacute patients are admitted to a skilled nursing facility after being discharged from a hospital. A "readmission" or "acute discharge" occurs when a skilled nursing center cannot care for a patient and has to send the patient back to a hospital to receive services. (Tr. at 444). An unexpected, unplanned acute transfer under any circumstances is not good for the patient. (Tr. at 292-93, 444, 485-86, 530). Patients in skilled nursing facilities, generally, are elderly and often frail, debilitated, cognitively impaired, and susceptible to infections. It can be detrimental and disorienting to be moved back and forth from anywhere, especially hospitals which are full of germs. When they return to the facility it takes them longer to return to their prior level of functioning and sometimes they never return to the same level. They should not be sent to a hospital unless it is absolutely necessary. (Tr. at 292-93; R-20 at 172; R-20, tab 3 at 128-129). Accordingly, there is a need for skilled nursing facilities to develop protocols and provide the level of nursing care required to minimize unplanned transfers and keep patients out of hospitals. (Tr. at 575). Decreasing readmission rates is a good thing for patients. (R-20 at 172; R-20, tab 3 at 129-30).

Additionally, skilled nursing homes already are facing the consequences of forthcoming federal health care reform and changes in Medicare reimbursement practices.

Hospitals are Somerset's primary referral source for patients. (Tr. at 272). Medicare will stop reimbursing hospitals for the admission and treatment of patients who are readmitted to a hospital within 30 days after being discharged to a skilled nursing center for patients diagnosed with congestive heart failure (CHF), diabetes, and/or myocardial infarction, and the list is set to expand to other conditions. (Tr. at 261, 271-72, 292-93, 574). To prepare, hospitals are developing preferred provider networks of skilled nursing centers to whom they will refer their patients. Skilled nursing centers that are unable to provide the level of care required to keep these higher acuity patients from being readmitted to the hospital will stop getting referrals. (Tr. at 261, 288-89). Therefore, skilled nursing centers have begun to make even more of an effort to reduce readmission rates. (Tr. at 585).

**e. Under their license, RNs are better qualified to provide care for higher acuity subacute patients**

The mix of patients at skilled nursing facilities – between long-term care and subacute patients – can make a difference with respect to staffing, because subacute patients generally require more intensive and more skilled care. (R-21, tab 2 at 13:24 – 14:19). LPNs have their role in providing care to long-term care residents (R-21 at 202), but can provide treatment to subacute patients only under the direction of an RN. (Tr. at 291-92). RNs have more education than LPNs. (R-21 at 203; Tr. at 192-93, 275-76). RNs have more training in sciences and assessments. (R-21 at 200:4-9; R-21, tab 2 at 129:24 – 130:3; R-20, tab 3 at 125). RNs, therefore, can do things under their license that LPNs cannot do. (Tr. at 598).

The first step of a plan of care is a comprehensive medical assessment – a capital “A” assessment as it was described. Only an RN can perform this kind of medical assessment of a patient. (Tr. at 274, 291). The NLRB's own expert witness recently testified that RNs know how to do medical assessments coming out of school (R-21 at 64:9-11) and are more adept at assessments. (R-21 at 201:10-11). Indeed, RNs can create or modify a patient's plan of

care as they are monitoring and assessing the patient. (Tr. at 290, 564-65). An RN is looking at the big picture – signs, symptoms, strengths, weaknesses – and “connecting the dots” to develop or modify a plan of care to meet the patient’s individualized needs. (Tr. at 274, 291). An RN can implement treatments and interventions immediately after making an assessment if necessary, thus, resulting in better care (Tr. at 273-74, 290, 291, 564), even at 2:00 a.m. (when doctors routinely are not at the facility). (Tr. at 576). RNs are trained to think conceptually and provide a more holistic approach to patient care. (Tr. at 292). Research shows that when a nurse has more education, it results in better patient outcomes. RNs are more skilled at assessing residents who have multiple conditions and many different illnesses. They are more skilled to identify when a resident is getting sicker and needs intervention quicker. (R-20, tab 3 at 127). Additionally, an RN, but not an LPN, can perform an IV push and mix TPN to be injected into a patient. (Tr. at 138, 150, 158, 190, 275).

LPNs, on the other hand, are licensed only to observe and record. (Tr. at 274-75, 291-92). Indeed, the basis of their education is to complete tasks (Tr. at 292) and their courses are not as medically in-depth. (Tr. at 192-93, 275-76). LPNs take vital signs; pass out medications; monitor equipment; perform basic treatments such as cleaning, applying salves, and changing bandages on wounds and surgical sites; assist with breathing treatments; transcribe doctor’s orders; and complete Medication and Treatment Administration Records (“MAR” and TAR”). (Tr. at 113-115, 117-20, 146, 153-55, 157-58). LPNs, however, cannot perform a capital “A” medical assessment. (Tr. at 274, 291). An LPN can take vital signs, but they cannot “assess” what is going on with a patient, especially today’s subacute patient who has multiple co-occurring conditions. Only an RN can do this. (Tr. at 564). One of the LPNs who testified candidly admitted that an LPN cannot perform a medical assessment or develop a plan of care. (Tr. at 145). Rather, the only “assessments” performed by LPNs involve collecting data by observation, asking questions, and recording the data on forms to be used

by other medical staff. (Tr. at 115-17, 146, 155-56, 194-95, 274). This is not a true medical assessment. (Tr. at 274). Finally, an LPN cannot create or modify a plan of care under his or her license or the standards of nursing practice. (Tr. at 290).

In sum, RNs are fundamentally able to provide more complex care to subacute patients than LPNs by virtue of their license. (Tr. at 382). This was most dramatically illustrated when an LPN formerly employed by Somerset testified that her duties for patients with congestive heart failure consisted only of assisting with their ADLs and making sure they got plenty of rest. (Tr. at 121).

**f. Somerset's continuing efforts to care for its patients**

Historically, Somerset marketed itself as a provider of both long-term care services and subacute rehabilitation services. (Tr. at 439-41, R-13). The "subacute" care provided was primarily simple post-surgery orthopedic rehabilitation (Tr. at 563), which LPNs are equipped to provide. Accordingly, Somerset utilized a health care delivery model in which LPNs were the primary providers of nursing care (floor nurses) on each shift – distributing medications, taking vital signs, and administering treatments. (Tr. at 113-14, 151-52). Each LPN typically had responsibility for 20-22 patients per shift. (Tr. at 114). Under this model, Somerset only assigned one RN to each of the three clinical shifts. RNs primarily performed supervisory and other services, but generally did not work as one of the floor nurses. (Tr. at 123, 152). Therefore, contrary to the ALJ's findings (ALJD 5:25-26), LPNs and RNs did not all work as floor nurses and did not perform the same tasks at Somerset prior to the spring of 2011. Indeed, the ALJ herself found that only RNs are permitted under their licenses to administer an "IV push," develop a plan of care using an "interpretive as opposed to observational assessment," and make a pronouncement of death, and "are permitted to perform more sophisticated evaluations of patient status and a wider range of procedures

than LPNs.” (ALJD 5:46-47, 5:38 – 6:7, 13:27-30, 17:29-31). However, as demonstrated above, these were not the only differences between the tasks performed by RNs and LPNs.

**i. The 2009 State Survey and its aftermath**

As hospitals began discharging patients with higher acuity levels to skilled nursing centers, Somerset began admitting more medically complex subacute patients, often having multiple conditions. In December 2009, NJDOH visited Somerset to conduct its annual inspection for compliance with state and federal regulations (“State Survey”). (Tr. at 421-22, R-9). Its subsequent report was critical of the nursing care and practices at Somerset. NJDOH found that Somerset was “not in compliance with the Federal requirements for nursing homes ... [and] the most serious deficiency include[d] findings that constitute[d] ... actual harm.” (R-9 at 1). Specifically, NJDOH found that Somerset committed six violations of controlling regulations, including those pertaining to Quality of Care. For example, NJDOH found that Somerset failed to properly assess the pain experienced by a newly admitted rectal cancer patient and failed to administer pain medication. (R-9 at Somers005306-10). NJDOH cited Somerset for several “D-level” deficiencies and two “G-level” deficiencies. (Tr. at 422, R-9). A G-level deficiency is a very serious violation and indicates that a patient suffered actual harm during and because of the care rendered at Somerset. (Tr. at 422, R-9 at 1). Contrary to the ALJ’s findings (ALJD 42-44 (n. 12)), the 2009 survey did not attribute any deficiencies in the nursing department to management or physicians. (See R-9). Somerset focused increased scrutiny on the nursing department thereafter. Somerset made efforts on a continuing basis to improve the quality of care, including management changes, education, training and discipline of employees who failed to meet standards. (Tr. at 423). Thus, the Administrator, Director of Nursing, and most of the supervisory/managerial staff were replaced. Also, Somerset enforced company rules and nursing protocols more consistently and held employees accountable for their actions,

resulting in the termination of numerous LPNs and CNAs. The new Administrator, who arrived later in 2010, reviewed the 2009 survey results and observed the nursing care being provided. She testified credibly that, after her review, she formed the professional belief that patient acuity levels were too high for LPNs and that LPNs were not able to take care of the patients being admitted. (Tr. at 422-23, 476-77).

**ii. The union organizing campaign**

Months after the seriously deficient 2009 State Survey, one of Somerset's LPNs contacted the 1199 SEIU United Healthcare Workers East, New Jersey Region ("Union"), about the possibility of representing employees at Somerset. On July 22, 2010, the Union filed a petition with the NLRB seeking to represent a unit of Somerset's employees. The Somerset workforce voted in favor of the Union by a vote of 38-28, with 5 challenged votes. After the election, Somerset raised a number of objections to the Union's conduct in the course of the election, which the Regional Director deemed sufficiently meritorious to warrant an evidentiary hearing. Following an evidentiary hearing, the hearing officer recommended overruling Somerset's objections, and Somerset filed exceptions to the Board. In its Decision and Certification of Representative dated August 26, 2011, reported at 357 NLRB No. 71 (2011), the Board, in a 2-1 vote, certified the Union as the exclusive collective bargaining representative of the unit of employees at issue in the election. The Board issued the Certification over the dissent of Board Member Brian Hayes, who agreed with Somerset that a number of pre-election misrepresentations by the Union warranted setting the election aside, and despite undisputed testimony that observers could see actual votes as they were being cast and that voters believed their votes could be seen. The validity of the Board's 2-1 decision to certify the Union is currently on appeal in *1621 Route 22 West Operating*

*Company, LLC, d/b/a Somerset Valley Rehabilitation and Nursing Center v. National Labor Relations Board*, Case Nos. 12-1031, 12-1505 (3d Cir.).<sup>3</sup>

**iii. The 2010 State Survey shows no improvement**

Despite taking aggressive measures to address the facility's performance shortcomings, the 2010 State Survey showed no improvement. Indeed, one Somerset management official testified that the 2010 State Survey was worse (Tr. at 423-24, 477, R-10) and fell well below the level of care Somerset expected from its clinical staff. (Tr. at 424-25). NJDOH again found that Somerset was "not in compliance with the Federal requirements for nursing homes" (R-10 at 1) and again was critical of the nursing care and practices. While it did not issue any G-level deficiencies this time, NJDOH cited Somerset for a total of 21 deficiencies, including deficiencies based on an unacceptably high number of instances involving nursing staff.<sup>4</sup> These included:

[F279] Develop Comprehensive Care Plans (R-10 at Somers005345): see R-10 at Somers005346 (the "interventions [listed on the care plan] were not appropriate in light of the resident's cognitive status"); R-10 at Somers005347 (appropriate pain scale to be used "was not listed on the care plan" and "nurses were not consistently using the same assessment tool to determine the resident's level of pain");

[F332] Medication Error Rates of 5% or More (R-10 at Somers005359): see R-10 at Somers005360 – No. 1 (failure to transcribe medication on the patient's MAR, resulting in incorrect medication on the cart and patient "receiving the wrong dose"); R-10 at Somers005360-61 – No. 2 (improper preparation of medication dosages); R-10 at Somers005361 – No. 3 (administration of medication without regard to physician's instructions);

[F333] Residents Free of Significant Med Errors (R-10 at Somers005361): see R-10 at Somers005361-62 ("significant error occurred during medication pass");

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<sup>3</sup> To preserve the issue while its Petition for Review is pending before the Third Circuit, Respondent excepts to the ALJ's finding that the Union has been the certified collective bargaining representative of a unit of employees at Respondent since August 26, 2011. (ALJD 25:1-14).

<sup>4</sup> Respondent objects to the ALJ attributing any deficiencies identified in the December 2010 survey which were committed by patients' physicians to Respondent. (ALJD 8:46-47 (n.10); R-10). Respondent and patients' physicians are separate entities. (Tr. at 270-71, 284-85).

[F281] Services Provided Meet Professional Standards (R-10 at Somers005347): see R-10 at Somers005347 (failure “to accurately transcribe medical information in the resident’s medical record”); R-10 at Somers005348 (failure to accurately indicate patient’s allergies and medication interactions on admitting medical records); R-10 at Somers005348 (medication “order was never transcribed onto the MAR nor was it ever ordered from the pharmacy [which] resulted in the resident receiving the wrong dose of medication for 8 days”);

[F329] Drug Regimen is Free of Unnecessary Drugs (R-10 at Somers005357): see R-10 at Somers005357-59 (no serum levels recorded in medical record “which is needed to evaluate” patient’s continued use of mixture of antipsychotic drugs given possible interactions);

[F309] Provide Care/Services For Highest Well Being (R-10 at Somers005348): see R-10 at Somers005349-51 (patient’s primary nurse gave incorrect instructions on pain scale to other nurses); R-10 at Somers005351 (despite proof of having been trained on “how to correctly choose a pain scale”); R-10 at Somers005351 (nurses used incorrect pain scale for dementia patient and “at least two nurses were using the pain scale incorrectly”);

[F514] Records-Complete/Accurate/Accessible (R-10 at Somers005373): see R-10 at Somers005373-74 (incomplete and inaccurate clinical records completed by nurses relating to patient’s allergies to medication); and

[F323] Free of Accident Hazards/Supervision/Devices (R-10 at Somers005353): see R-10 at Somers005353-54, Tr. at 479 (in-room hazard created by placement of nurse call cord).

After being advised by the survey team in exit interviews of the deficient and unacceptable practices, Somerset made additional management changes. (See, e.g., Tr. at 503-06). Somerset’s Administrator also held a series of meetings with the nursing staff to discuss the unacceptable care being provided and the severity of the survey team’s findings. (Tr. at 425-28, 432-35, R-11, and R-12). In those meetings, the Administrator told the nursing staff “we failed to” provide services in accordance with state and federal standards (Tr. at 432, R-12); that she was troubled by issues with not providing high quality care, failure to comply with minimum standards, failure to provide a pain free environment, significant medication errors, not assessing patients properly, not monitoring and addressing changes with patients, and overall carelessness (Tr. at 432-33, R-12); and that they could not continue

to make these types of mistakes going forward. (Tr. at 434, R-12). The Administrator further warned that the nursing staff was part of the plan of correction; that the lack of caring “must end today”; and that effective immediately medication administration errors, resident rights issues, and failure to follow nursing policies and professional standards of practice would be addressed through the disciplinary process. (Tr. at 433-34, R-12). Danette Manzi, Executive Vice-President of Operations for the company that provides management services to Somerset, became very concerned about Somerset’s patients and the potential for harm to them from the deficient practices noted in the survey report. (Tr. at 536-37, 540).

**iv. Somerset becomes an all-subacute facility and patient care impels Somerset to adopt an all-RN care delivery model**

Notwithstanding Somerset’s efforts in continued education, training, mentoring, and discipline, there was little improvement in the care given to patients. (Tr. at 435, 542). Again, the conclusion was that the LPNs on staff just could not handle the level of care the patients needed. (Tr. at 435; see *also* Tr. at 445, 499 and R-14, p. 3 – one of the root causes for the facility’s failure to meet basic standards was not staffing to the acuity level of its patients).<sup>5</sup> Indeed, Somerset had a bad reputation in the community and among its patients for the quality of nursing care it provided. (Tr. at 562).

In response to these issues, Manzi decided in May 2011 to transition the facility to an all-RN model to address the patient care and nursing issues that existed and reposition the facility in the marketplace as an all-subacute facility. (Tr. at 435-37, 540-42). Manzi testified credibly, and without contradiction, that “go[ing] to all subacute” requires a 24/7 level of support that meets the intensity of the types of patients admitted and it was “imperative” that

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<sup>5</sup> The ALJ erroneously found the 2011 Objectives had little probative value because Illis could not explain all of the data on the form. (ALJD 19:38-47). Illis testified she directed Jackie Engram to complete the form and explained almost all of the data, particularly the portion cited showing that Respondent concluded that one of the root causes for the facility’s failure to meet basic standards was not staffing to the acuity level of its patients. (Tr. at 443-52, 521-25, R-14, p. 3).

all RNs be used because of the assessment skills they have under their license to deal with disease protocols that would come with an all-subacute model. (Tr. at 540-42). Somerset did not fire all the LPNs at that time, however. Rather, Manzi directed that open nurse positions be filled with RNs through attrition. (Tr. at 437-38, 514, 542, 545). The goal of this effort was “to drive quality” (Tr. at 263) and “improve the quality of care [and] raise the standards.” (Tr. at 514). Manzi believed this would be “a good thing for the patients and the care that they received.” (Tr. at 438). Neither the outcome of the representational election in September of 2010 nor any union activity at the facility factored into Manzi’s decision. (Tr. at 542-43).

Over the next several months, some LPNs voluntarily resigned and others were discharged for cause. (Tr. at 193, GC-7). Somerset initially used an agency to provide RNs and over time directly hired permanent RNs. (Tr. at 123-24, 164-65, 439). The agency nurses and newly hired RNs had not worked at Somerset previously. Like any new hire - regardless of license status or position – they were not familiar with the facility or its policies, procedures, resources, and patients. Accordingly, the Administrator asked the LPNs and others on staff to orient them. (Tr. at 124:5-9, 454). The Administrator did not ask or instruct the LPNs to train RNs. (Tr. at 454).

By August 18, 2011, only two LPNs remained at Somerset – Irene D’Ovidio and Maharanie “Shanny” Mangal. (Tr. at 129, 174-75, 264). D’Ovidio was more trained and skilled than the average LPN. (Tr. at 159-60, 189-90). Somerset had moved D’Ovidio into a Charge Nurse position, but she did not like the assignment and did not want to do the work assigned. (Tr. at 161-64, 188-89). In June 2011, Somerset took D’Ovidio out of the assignment she did not want and moved her into a full-time floor nurse (LPN) position, as she requested, starting in July 2011. (Tr. at 169-72, 188, GC-3, GC-4). However, because this did not fit into Somerset’s plans to move to an RN-only model, then-Administrator Doreen Illis

informed D'Ovidio on August 18, 2011, that Somerset was moving in a different direction and she was not included in the plan, and her employment ended. (Tr. at 151, 175-76).

Mangal was a long-term employee who was hired by Somerset as a CNA and obtained her LPN license while working for Somerset. (Tr. at 111-12). She has always wanted to become an RN (Tr. at 141), which was known at Somerset. (Tr. at 129-30, 442-43). On August 19, 2011, incoming Administrator Kris Grasso told Mangal that she needed to enroll in RN school in the Fall semester and show proof of enrollment as a condition of remaining employed. (Tr. at 141, 265-67, GC-8). Mangal agreed (Tr. at 265), but never enrolled. When Grasso learned that Mangal did not enroll in an RN program in the Fall of 2011 as she had agreed to do, Grasso terminated Mangal's employment on October 17, 2011, based on Mangal's failure to enroll. (Tr. at 111, 134-35, 265, 267, GC-8).

Somerset, therefore, completed its transition to an all-RN model in October 2011. (Tr. at 542). As the result of the change in the nature, scope and direction of Somerset's business, Somerset now markets itself only as a "Dedicated Subacute Care" facility (Tr. at 284-87, R-7) and has an all-RN clinical staff. Somerset no longer markets to the long-term care patient market, has not admitted any new long-term care patients, and is only pursuing short-term subacute patients. (Tr. at 284-85).

**v. The all-RN model has improved patient care**

Every competent witness who testified about this issue agreed that going to an all-RN model was a positive move for patient care at Somerset. (R-20, tab 3 at 129-30). The NLRB's own expert in nursing home administration, Kathleen Martin, testified in federal court that it is in the public interest to have an all-RN staff. (R-21 at 203:22 – 204:9). She added that it is better for patients to have all-RN staff (R-21 at 201:23-25, 202:8 – 203:6, 204:4-6); she prefers RNs over LPNs (R-21, tab 2 at 130:4-7); and if Somerset is having RNs do everything instead of LPNs that is a plus in terms of patient care. (R-21 at 201:12-16). Beth

Bell, a former NJDOH complaint investigator and Supervisor of Investigations, also recently testified in federal court that going to an all-RN model “demonstrates an awareness of current trends and long-term planning for the future” and “there’s a decrease in hospital re-admissions the higher qualified staff that you have.” (R-20 at 171). Bell added that an all-RN staff is likely to provide a higher level of patient care than a staff of LPNs, because RNs have more education, particularly in the area of assessment. (R-20, tab 3 at 125). Indeed, research shows that when a nurse has more education, it results in better patient outcomes. (R-20, tab 3 at 127). RNs are more skilled at assessing residents who have multiple conditions and many different illnesses and are more skilled to quickly identify when a resident is getting sicker and needs intervention. (R-20, tab 3 at 127). Since going to an all-RN model, Somerset’s readmission rate has been trending downward and in April 2012 was the lowest it had been in over one year. (Tr. at 390).

Contrary to the ALJ’s findings (ALJD 6:9-16, 11:48 – 12:2, 12:17-19), RNs are not simply doing the “same work” previously performed by LPNs. Instead, because of the inherent differences between LPNs and RNs, as acknowledged by the ALJ, the RNs are providing a higher level of patient care than LPNs previously performed. As the ALJ found, RNs, not LPNs, are able to develop a plan of care using an “interpretive as opposed to observational assessment” and “are permitted to perform more sophisticated evaluations of patient status and a wider range of procedures than LPNs.” (ALJD 5:46-47, 5:38 – 6:7, 13:27-29, 17:29-31).

Becoming an all-subacute, all-RN facility also enabled Somerset to make other staff upgrades to improve patient care. The all-subacute, all-RN structure of the facility attracted an extremely qualified Administrator, Kris Grasso, from another health care system. Grasso is a licensed RN and has substantial medical and nursing management experience. (Tr. at 260, 263-64, 273). As Grasso testified, an all-RN model is “a great way to deliver care” and

will help meet a “lot of the challenges that healthcare reform [is] going to present to the subacute care setting.” (Tr. at 263-64). In November 2011, Somerset added a long sought-after physician, Dr. Anthony Frisoli, as its Associate Medical Director only because of its all-RN model. (Tr. at 561-63, 572). Dr. Frisoli is on the cutting edge of developing protocols at Somerset for the subacute care of CHF patients and diabetics. These efforts are quite significant, as such protocols previously did not exist at any subacute skilled nursing center. (Tr. at 573-75, 584). Somerset also now participates in a new program with area hospitals for the care of CHF patients that it did not (and could not) participate in prior to adopting an all-RN model. (Tr. at 276). Finally, the results of NJDOH’s State Survey in January 2012 (the most recent survey prior to the hearing) showed dramatic improvement over the previous annual survey in December 2010. While there are still areas to improve upon, the number of deficiencies found in January 2012 (six) was substantially less than in December 2010 (21). (Tr. at 382, GC-18).

**vi. Somerset’s all-RN model is consistent with the growing trend in medical care**

Somerset’s move to an all-RN clinical model is consistent with the growing trend in medical care. (Tr. at 562, 581). Indeed, the trend within the American and New Jersey Nurses’ Associations is to place LPNs in more technical, rather than assessment, roles. (R-20, tab 3 at 126). Local acute care hospitals eliminated all their LPNs, including some very experienced LPNs, in favor of RNs beginning in 2005. (Tr. at 564-65). The NLRB’s own expert recently confirmed that hospitals went to all-RN staffs years ago and terminated their LPNs “for **obvious** reasons.” (R-21 at 198) (emphasis added). As subacute facilities take on more of the characteristics and patient populations of acute care settings, going to an all-RN model is a natural and necessary progression. (See R-20 at 171: going to an all-RN model “demonstrates an awareness of current trends and long-term planning for the future”). The

undisputed proof demonstrates that this is already happening. CareOne at Wall is a skilled nursing facility in the area with separate units for long-term care residents and subacute patients. Wall employs only RNs on its subacute unit and employs LPNs only on its long-term care unit. (Tr. at 530-31). Two years ago, Bridgeway Care Center, another skilled nursing facility in the area, fired all the LPNs in its subacute center, including LPNs with considerable years of experience, in favor of RNs. Bridgeway's subacute center is a separate entity from its long-term care unit. Bridgeway no longer employs LPNs in its subacute center and employs LPNs only in its long-term care unit. (Tr. at 565, 569-70).

**2. The ALJ Erred in Finding that Respondent Violated Sections 8(a)(1) and (5) by Transferring LPN Work to RNs and Eliminating the LPN Classification**

The ALJ's findings that Respondent violated Sections 8(a)(1) and (5) of the Act by transferring LPN work to RNs and eliminating the LPN classification are not supported by a preponderance of all of the relevant evidence in the record and are contrary to established Board law. As an initial matter, Somerset is challenging the certification of the Union as the collective bargaining representative in the U.S. Court of Appeals. That case remains pending. Should the Court of Appeals declare that the Union was improperly certified, Somerset will not have had any duty under Section 8(a)(5) to bargain with the Union over any issue.

Even if the Union were properly certified, Somerset still had no duty to bargain with it over Somerset's decision to move to an RN-only clinical staffing model. In determining whether an employer has a duty to bargain over a decision that results in the transfer of bargaining unit work, the Board applies the following standard:

Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this

junction, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

*Dubuque Packing Co.*, 303 NLRB 386, 391, 137 LRRM 1185 (1991). *Dubuque Packing Co.*'s flexible burden-shifting framework has been applied not merely to plant relocation decisions but also to decisions resulting in a transfer of bargaining unit work within the same facility. See, e.g., *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1248 (3d Cir. 1994) (no duty to bargain over subcontracting decision that neither involved labor costs nor concerned some other difficulty that could be overcome through collective bargaining). While Respondent did not simply transfer LPN work to RNs for RNs to act as LPNs, the framework of *Dubuque Packing Co.* is also applicable under these circumstances.

The ALJ erred in refusing to apply *Dubuque Packing Co.* and by applying *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964) and the Board's line of cases beginning with *Torrington Industries, Inc.*, 307 NLRB 809 (1992), instead. (ALJD 11:46-51). The ALJ based this decision on an erroneous finding that under the all-RN model, Respondent simply substituted RNs for LPNs and the RNs now perform the same "floor nurse work formerly performed by the LPNs in the same location and manner." (ALJD 11:48 – 12:2). The RNs are not performing the same work previously performed by LPNs. Instead, RNs are providing a higher level of patient care than LPNs previously performed by virtue of the inherent differences between LPNs and RNs. As acknowledged by the ALJ, RNs, not LPNs, are able to develop a plan of care using an "interpretive as opposed to observational assessment" and "are permitted to perform more sophisticated evaluations of patient status and a wider range

of procedures than LPNs.” (ALJD 5:46-47, 5:38 – 6:7, 13:27-29, 17:29-31). Additionally, RNs also perform work with a new program with area hospitals for the care of CHF patients with which LPNs never worked. (Tr. at 276).

Additionally, this matter is distinguishable from *Fibreboard* because here Respondent did not subcontract the work of the LPNs and there was no “replacement of employees in the existing bargaining unit with those of an independent contractor.” *Mercy Health Partners*, 358 NLRB No. 69, 2012 NLRB LEXIS 380, at \*33-34 (June 26, 2012) (distinguishing case from facts in *Fibreboard*). For the same reasons, the cases cited by the ALJ applying the *Fibreboard/Torrington* standard (ALJD 12:6-26) are distinguishable. See *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 458, 467-69 (2004), *enfd*, 414 F.3d 158 (1st Cir. 2005) (finding unilateral subcontracting of bargaining unit work to independent contractors violated Act); *St. George Warehouse, Inc.*, 341 NLRB 904, 906, 922-23 (2004), *enfd*, 420 F.3d 294 (3d Cir. 2005) (finding unilateral transfer of unit work to temporary agency employees who performed the same type of work as unit employees violated Act). Again, contrary to the ALJ’s findings (ALJD 12:17-19), RNs did not and do not perform the same work as LPNs. Therefore, the ALJ should have applied the *Dubuque Packing Co.* analysis.

Further, where, as here, the alleged failure to bargain occurs “during the period that objections to an election are pending and the final determination has not yet been made,” the employer is not liable for making unilateral changes if it can demonstrate “compelling economic considerations” for doing so. *Mike O’Connor Chevrolet*, 209 NLRB 701, 703, 85 LRRM 1419 (1974), *enforcement denied on other grounds*, *NLRB v. Mike O’Connor Chevrolet*, 512 F.2d 684 (8th Cir. 1975).

In this case, as shown further below, Somerset had no duty to bargain with the Union over Somerset’s decision to move to an RN-only model because: (1) the decision involved a change in the nature, scope and direction of Somerset’s business; (2) labor costs were not a

factor in the decision; and (3) the decision occurred during the period between the union vote and the Board's certification decision and was motivated by "compelling economic circumstances," *i.e.*, Somerset's need to improve patient care and position itself in the marketplace as an all-subacute facility.

**a. Somerset made a fundamental change in the nature, scope and direction of its business**

An employer has no duty to bargain if the challenged action constitutes a fundamental change in the nature, scope, and direction of the employer's business or a significant facet of its business. *Van Dorn Plastic Machinery Co.*, 286 NLRB 1233, 1242, 128 LRRM 1265 (1987), *enfd*, 881 F.2d 302 (6th Cir. 1989); *Otis Elevator, Co.*, 269 NLRB 891, 892, 115 LRRM 1281 (1984). The initial burden is on the General Counsel to prove that the employer's decision involved "a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation." *Dubuque Packing Co.*, 303 NLRB at 391. "The critical factor to a determination of whether the decision is subject to mandatory bargaining is the essence of the decision itself, *i.e.*, whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; not its effect on employees nor a union's ability to offer alternatives." *Van Dorn*, 286 NLRB at 1242 (quoting *Otis Elevator*, 269 NLRB at 892). Here, there is no question that Somerset's decision to move to an RN-only clinical staffing model was part of a fundamental change in the nature, scope and direction of its business. Somerset transitioned to an all-RN model to address the patient care and nursing issues that existed and to reposition the facility in the marketplace as an all-subacute facility. (Tr. at 435-37, 540-42). Somerset no longer admits long-term care residents who need only custodial and limited nursing care. Somerset cannot fully re-tool its operations merely by flipping a switch, especially when fragile and dependent human lives are involved. Only a few long-term care residents still live at Somerset. Even though Somerset does not intend to

ask them to leave their “home” (Tr. at 285, 545), it no longer markets itself to the long-term care patient market (Tr. at 419-21, 439-41, R-13) and no longer admits new long-term care residents. (Tr. at 285). When the few current long-term care residents leave the facility, Somerset will no longer have any long-term care residents. The limited skills that LPNs possess are no longer needed at the facility and, in any event, LPNs are ill-equipped to treat Somerset’s subacute patient population. Somerset also brought in an Administrator who is a licensed RN and has a substantial background in the medical industry as well as a long sought-after Assistant Medical Director who is on the cutting edge of developing protocols for patients with the highest acuity levels. Finally, Somerset now participates in new patient care programs involving patients with the highest acuity levels.

The ALJ was incorrect in finding that there is no evidence that Respondent “has abandoned a line of business or otherwise made a change in its overall scope of its operations.” (ALJD 12:40-43). The ALJ cited to *O.G.S. Technologies, Inc.*, 356 NLRB No. 92 (Feb. 11, 2011) in support of this finding. In that decision, the Board found there was no change in the scope and direction of the business, distinguishing that case from *First National Maintenance v. NLRB*, 452 U.S. 666 (1981) as follows:

In contrast to *First National Maintenance*, OGS made certain operational changes, but they did not amount to a “partial closing” or other “change in the scope and direction of the enterprise,” which remained devoted to the manufacture and sale of brass buttons to the same range of customers. *Id.* at 677, 681. Before and after the decision to subcontract die cutting, OGS produced and supplied brass buttons to customers. Before and after the decision, OGS, either directly or through its subcontractors, used a mix of technologies to cut the dies needed to produce the buttons. Before and after the decision, OGS utilized subcontractors to perform the vast majority of the die cutting (85 percent before and 100 percent after). The decision at issue simply resulted in a marginal increase in the percentage of cutting work the Respondent subcontracted and a modest change in the functions performed in-house, but not the abandonment of a line of business or even the contraction of the existing business. Given this essential continuity in its operations, OGS’s action in marginally expanding its subcontracting in order to avail itself of more advanced technologies for cutting dies does not rise to the level of a change in the scope of the enterprise or its direction. Specifically, we reject the dissent’s

characterization of a subcontracting decision of such limited scope as a “fundamental realignment of the Respondent's production processes.”

*O.G.S. Technologies, Inc.*, 356 NLRB No. 92, 2011 NLRB LEXIS 75, at \*18-19. However, here, Respondent changed its business from devoting itself to long-term care, short-term care and wound care, to solely devoting itself to short-term care of the highest acuity subacute patients, implementing new patient care programs focused on that population of patients. Before its decision to devote itself to subacute care, health care was delivered using primarily LPNs, with RNs generally functioning as supervisors. After the decision, Respondent changed to an all-RN model. Respondent did not continue the same business. Therefore, *O.G.S. Techs* is distinguishable from this case.

The ALJ also erred in finding that a brochure distributed during Doreen Illis’s tenure as Administrator which advertised long-term care services establishes that Respondent continues to operate the same facility providing the same health care services to a substantially similar patient population in terms of overall acuity level. (ALJD 12:47 – 13:4, 17:44-48). Illis learned of a change in the health care delivery model, accompanied by a corresponding transition to an all subacute facility, in May 2011, after which time she notified marketing about the change and that it was coming “towards the middle or the end of the year.” (Tr. 435-37, 540-42). Illis testified the brochure advertising long-term care was used during her tenure at Somerset, which ended in August 2011. (Tr. 418, 439-41, R-13). When Kristina Grasso became Administrator in August 2011, the current brochure, which does not advertise long-term care services, was being used. (Tr. 256-57, 285-88, R-7). Grasso’s uncontroverted testimony was that Somerset currently markets itself as a subacute center and has not marketed itself as a long-term care facility since Grasso became Administrator. (Tr. 284-85). Accordingly, the brochure used during Illis’s tenure has no relevance to Respondent’s current business.

Similarly, contrary to the ALJ's findings, the fact that Respondent's web page, as of May 9, 2012, stated that it offered long-term care does not establish that Respondent continues to operate the same facility providing the same health care services. (ALJD 12:45 – 13:4, 17:44-49). The uncontroverted evidence is that Somerset does not market itself as a long-term care facility. (Tr. 284-85). Grasso testified that Somerset has a page on the website for CareOne HealthBridge. (Tr. 312). However, Grasso did not testify about the contents of the page and she was not asked to explain who provided the content for the website or how long the content had been on the website. (Tr. 312). Therefore, the web page has limited relevance.

Further, the ALJ's finding that Somerset has not made a fundamental change in the nature and scope of its business (ALJD 12:21-24, 12:27 – 13:21) overlooks that with its changes, Somerset is positioning itself as one of a limited number of facilities capable of meeting the needs of the Medicare-reimbursed referring hospitals that are the life blood of Somerset's operations. Somerset is now able to market and position itself in the current health care environment as a dedicated subacute facility, and it now seeks referrals only for short-term care of the highest acuity subacute patients. While Somerset's transition to an all-subacute facility remains an ongoing process, its move to an RN-only model was clearly part of this fundamental change. For this reason alone, the 8(a)(5) allegations should have been dismissed. The ALJ erred in finding that the elimination of the LPN classification and change to an all-RN model "was a mandatory subject of bargaining." (ALJD 12:24-26, 14:6-12).

**b. Somerset's decision did not turn on labor costs**

Even if the ALJ was correct in finding that Somerset's decision to move to an RN-only model was not accompanied by a fundamental change in the nature, scope, and direction of its business, Somerset still had no duty to bargain with the Union because labor costs were undisputedly not a factor in Somerset's decision. See *Dubuque Packing Co.*, 303 NLRB at

391; see also *Dorsey Trailers v NLRB*, 134 F.3d 125, 133 (3d Cir. 1998) (no duty to bargain over subcontracting decision, even though the subcontract “was not a change in the ‘scope and direction’ of the company,” where decision did not turn on desire to reduce labor costs). Instead, Somerset’s decision to move to an RN-only model was motivated by its desire to improve the quality of nursing care being provided to its patients. After two seriously deficient State Surveys and additional unsuccessful efforts to improve the quality of nursing care, Somerset ultimately came to the conclusion that the acuity level of Somerset’s patients was simply too high for LPNs. (Tr. at 422-23, 476-77). Somerset thus decided to transition its facility to an all-RN model to address the serious patient care and nursing issues that existed and reposition the facility in the marketplace as an all-subacute facility. (Tr. at 435-37, 540-42). It is undisputed that labor costs had nothing to do with this decision. Indeed, RNs are generally paid more than LPNs. (GC-7; see also R-21, tab 2 at 130:12-13). Thus, Somerset had no duty to bargain over this decision. *Dubuque Packing Co.*, 303 NLRB at 391.

The ALJ erred in ignoring the actual reasons motivating Somerset’s decision. In *Furniture Rentors*, the U.S. Court of Appeals for the Third Circuit considered whether the employer had a duty to bargain over its decision to subcontract furniture delivery work and lay off bargaining unit employees. There, the Court found that the Board had improperly applied its holding in *Torrington Industries, Inc.*, 307 NLRB 809, 148 LRRM 1295 (1992), to the subcontracting decision at issue in that case. *Furniture Rentors*, 36 F.3d at 1248. In *Torrington*, the Board abandoned the flexible approach of *Dubuque* for a more rigid standard in subcontracting cases. However, the Third Circuit noted that inflexibly applied, the Board’s holding in *Torrington* was at odds with the Supreme Court’s precedent in *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). *Furniture Rentors*, 36 F.3d at 1247. The Court found that “the *Torrington* manner of examining [a] decision to subcontract only to see whether it is

analogous to *Fibreboard's* general factual framework” was “simplistic and ... potentially hamhanded.” *Id.* at 1248. Instead, the Court stated, in deciding whether bargaining was required over the decision, it was “necessary to look behind the subcontracting decision itself to the reasons motivating the decision.” *Furniture Rentors*, 36 F.3d at 1248. Thus, it was “imperative to ‘evaluate the factors which actually motivated the employer’s’ decision.” *Id.* (quoting *Dubuque Packing*, 303 NLRB at 392 n.14).

The *Furniture Rentors* Court noted that the ALJ had found in that case, and the record supported, that the factors that principally motivated the employer’s decision to subcontract the work were its “continuing problems with delivery workers’ carelessness, misconduct, untrustworthiness and thievery.” *Furniture Rentors*, 36 F.3d at 1250. The Third Circuit remanded the case to the Board to weigh the benefits, if any, of collective bargaining in this situation “against the employer’s considerable interest in taking prompt action.” *Id.* On remand from the Third Circuit, **the Board concluded that the subcontracting decision at issue was not a mandatory subject of bargaining** “because it was not ‘driven by labor costs or some other difficulty that can be overcome through collective bargaining.’” *Furniture Rentors of America, Inc.*, 318 NLRB 602, 604 (1995) (quoting *Furniture Rentors*, 36 F.3d at 1248); accord *Dorsey Trailers*, 134 F.3d at 133 (no duty to bargain over subcontracting decision because “this Court remains unconvinced that [the employer’s] sole motivation was a desire to eliminate overtime at the . . . plant; rather, we believe that [the employer’s] motivation lies in a need to fill orders and maintain a healthy, viable business”)).

Here, as in *Furniture Rentors* and *Dorsey Trailers*, Somerset’s decision to move to an RN-only model was not driven by labor costs or another difficulty that could be overcome through collective bargaining. As noted above, it was motivated by Somerset’s need to upgrade the quality of its nursing staff to care for the higher acuity level of Somerset’s patients and to reposition itself as an all-subacute facility. Indeed, the interests at stake in

this decision are far more compelling than those at issue in *Furniture Rentors* and *Dorsey Trailers*. This is not a situation where Somerset was seeking merely to prevent the loss or damage to furniture (*Furniture Rentors*) or unfilled orders (*Dorsey Trailers*). The consequences of Somerset's ongoing inability to provide proper nursing care to its subacute patients included poor State Surveys, substantially higher hospital readmission rates, and actual harm to its patients. It was only a matter of time before the repeated nursing mistakes at the facility would have led to further serious harm or even death to one or more of Somerset's patients. Somerset's considerable interest in taking prompt action to improve the care being provided to its patients far outweighed any benefits of collective bargaining. *Cf. Furniture Rentors*, 36 F.3d at 1250. For this additional reason, Somerset had no duty to bargain with the Union over its move to an RN-only model. The ALJ erred in finding that the Third Circuit's decisions in *Dorsey Trailers* and *Furniture Rentors* "are inapposite here." (ALJD 13:39-48 (n. 15)). The ALJ stated that in those cases, the Third Circuit "considered whether the employers were motivated by labor cost issues amenable to collective bargaining, or other, entrepreneurial, factors." (ALJD 13:41-45). While the ALJ asserted that the Board has declined to apply the Third Circuit's analysis, the case cited by the ALJ, *Overnite Transportation Co.*, 330 NLRB 1275 (2000), does not stand for that proposition. In *Overnite*, the Board stated,

[I]ike our *Torrington* predecessors, we agree . . . that, in some cases, nonlabor cost reasons for subcontracting may provide a basis for concluding that a decision to subcontract is not a mandatory subject of bargaining[;] . . . however, we would *follow Torrington* by reserving such inquiries to cases where the nonlabor cost reasons relate to a change in the scope and direction of a business and are therefore matters of core entrepreneurial concern outside the scope of bargaining.

*Id.* at 1276 (emphasis original); see *Torrington Indus., Inc.*, 307 NLRB at 810 ("there may be cases in which the nonlabor-cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining").

Therefore, *Overnite* did not reject the Third Circuit's analysis, but is consistent with the Third Circuit's analysis. Moreover, the Third Circuit reversed the Board's finding in *Overnite* that the employer unlawfully subcontracted bargaining-unit work. *Overnite Transportation Co. v. NLRB*, 170 LRRM 2589 (3d Cir. 2000).<sup>6</sup> Additionally, the Board has cited to *Furniture Rentors* without criticism, see, e.g., *Sunoco, Inc.*, 349 NLRB 240, n. 1 (2007), and to *Dorsey Trailers* without criticism, see, e.g., *Wackenhut Corp.*, 345 NLRB 850, 853 (2005).

Additionally, the cases to which the ALJ cited for the proposition that the Board has found subcontracting decisions to be mandatory subjects of bargaining where the decisions were not motivated by labor costs (ALJD 13:15-21) are distinguishable. *O.G.S. Techs* was a subcontracting case where the decision to subcontract was based on a desire to increase production speed. 356 NLRB No. 92, 2011 NLRB LEXIS 74, at \*20. Here, Respondent did not subcontract work and did not base its decision to change to an all-RN model on increasing the speed or efficiency of the work done at Somerset. *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.* was a subcontracting case where the decision to subcontract was based on the employer's inability to recruit and hire staff X-ray technicians and respiratory therapists needed to meet staffing requirements. 342 NLRB at 468-69. Again, Respondent did not subcontract work and did not base its decision on its inability to recruit and hire needed LPNs. *Torrington* involved the layoff of two employees and replacement with a nonunit employee and independent contractors where the decision to lay off the employees was based on the seasonal nature of the business and a mechanical breakdown. 307 NLRB at 810-11 ("whether or not the Respondent's decision to replace [laid off employees] with nonunit personnel was motivated by labor costs in the strictest sense of

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<sup>6</sup> It appears from the Third Circuit's docket that the Court submitted its decision under LAR 34.1(a) on October 8, 2000; entered Judgment on November 8, 2000; vacated its November 8 decision pursuant to FRAP 19 by Order entered November 22, 2000; and finally entered Judgment on January 2, 2001.

that term, the fact remains that the decision clearly involved unit employees' terms of employment and it did not 'lie at the core of entrepreneurial control"). Here, Respondent did not lay off employees and did not base its decision on seasonal fluctuations in business or the breakdown of equipment. Accordingly, the instant case is not analogous to those cited by the ALJ and Respondent's decision to change to an all-RN model was not a mandatory subject of bargaining.

The ALJ erroneously rejected Respondent's assertion that part of the reason for transitioning to an all-RN model was because of its concern with reducing readmission rates. (ALJD 13:9-12, 13:23 – 14:6). While the ALJ found that Respondent did not offer evidence to demonstrate how the new protocols being developed to reduce readmission rates would affect the day-to-day work at Somerset and require the services of RNs (ALJD 13.23-25), Respondent offered substantial evidence that the model at Somerset was changed to an all-RN model because of the higher level of care RNs can provide and that the protocols are being developed with that higher level of care in mind. (R-20 at 171, tab 3 at 125, 127, 129-30; R-21 at 201:12-16, 201:23-25, 202:8 – 203:6, 203:22 – 204:9, tab 2 at 130:4-7; Tr. at 121, 276, 390, 540-42, 573-75, 585). Accordingly, the ALJ erred in finding that this decision was a mandatory subject of bargaining. (ALJD 14:6-8).

**c. "Compelling economic circumstances" motivated Somerset's decision to move to an RN-only model before the Union was certified**

Somerset had no duty to bargain with the Union for the further reason that its decision to move to an RN-only model was made in May 2011, while Somerset's election objections were pending before the Board, but before the Board certified the results of the election on August 26, 2011. Under *Mike O'Connor Chevrolet*, "compelling economic considerations" would excuse Somerset from bargaining with the Union during that time period. Such considerations were present here. In *Van Dorn Plastic Machinery Co.*, 286 NLRB 1233

(1987), the ALJ, with Board approval, stated that “compelling economic circumstances” within the meaning of the *Mike O’Connor Chevrolet* test require that the action taken “must rest on some business circumstances that are discernibly more demanding than calling for mere exercise of sound business judgment,” but “something less than an imminent business collapse, or requiring a demonstrable jeopardy of same.” *Van Dorn*, 286 NLRB at 1245. Determining whether this standard is met depends upon “whether there is some real and unavoidable economic driving force behind the advanced business details that should excuse an employer’s unilateral act.” *Van Dorn*, 286 NLRB at 1245. Here, there is no question that “compelling economic circumstances” motivated Somerset’s decision to move to an RN-only model. This decision followed two deficient State Surveys and numerous additional unsuccessful efforts to improve the quality of nursing care as the facility transitioned to a dedicated subacute facility. (Tr. at 422-23, 435-37, 476-77, 540-42). Had Somerset remained unable to handle the level of care the patients needed in the increasingly all-subacute environment, it risked more deficient State Surveys, unacceptably high hospital readmission rates, and loss of referrals from hospitals. (See Tr. at 261, 288-89). Even more important, it risked further serious harm or even death to its patients. As the Supreme Court has recognized, “[p]atient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer’s customers,” is the business of a nursing home. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 577 (1994). Preventing harm or death to Somerset’s patients must be viewed as a “compelling economic circumstance” that excused Somerset’s failure to bargain over its decision to move to an RN-only model while its objections to the election were pending.

The ALJ erred in finding that Respondent did not show that its decision to change to an all-RN model was motivated by compelling economic circumstances. (ALJD 14:32 – 15:6). This case is distinguishable from the case relied upon by the ALJ in reaching her

erroneous finding. In *Jason Lopez' Planet Earth Landscape*, 358 NLRB No. 46, 2012 NLRB LEXIS 294 (May 22, 2012),<sup>7</sup> the ALJ found:

The record contains only the Respondent's self-serving and conclusory statements that because there was no work the changes [of laying off two employees] were necessitated by compelling economic considerations. No evidence was submitted, however, showing extraordinary, unforeseen events occurring that had a major economic effect on the Respondent. As stated above, this evidence is contradicted by other evidence and no evidence was presented showing that the Respondent made its decision to fire Olguin and Mota before the union election. Thus, I find that: (1) the Respondent's shifting reasons for laying off employee Olguin; (2) the Respondent's hiring new employees soon after the layoffs and its not offering employees Olguin and Mota theirs [sic] jobs back before hiring new workers; (3) Olguin's and Mota's credible testimony that at the time of their layoffs their amount of work and work hours remained unchanged; and (4) the Respondent's incorrect application of current Board law repudiates its unsupported argument that there were compelling economic reasons for their employees' layoffs. In so doing, the Respondent assumed the risk. Because the final determination in the representation proceeding resulted in the certification of the Union, the Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral actions referred to above.

*Id.* at \*48-49. Here, the results of the December 2010 survey and soon-to-be effective federal health care reform which will result in skilled nursing centers that are unable to provide the level of care required to keep higher acuity patients from being readmitted to the hospital not getting referrals (Tr. at 261, 288-89) were extraordinary and unforeseen and would potentially have had a major economic impact. Additionally, there is no evidence contradicting Respondent's reasons for making the change to an all-RN model and there is no evidence of shifting reasons for the change. Therefore, contrary to the ALJ's finding (ALJD 15:3-6), the elimination of the LPN classification was not a mandatory subject of bargaining.

For all of these reasons, Somerset had no duty to bargain with the Union under Section 8(a)(5) over its decision to move to an RN-only model. Therefore, the ALJ's Decision

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<sup>7</sup> The Board lacked a quorum when this decision was issued and its order, therefore, is void. See *Noel Canning v. NLRB*, 2013 U.S. App. LEXIS 1659 (D.C. Cir. Jan. 25, 2013).

and Order regarding the Complaint's 8(a)(5) allegations and directing Somerset to rescind its elimination of the LPN classification should be reversed.

**3. The ALJ Erred in Finding that Respondent Violated Sections 8(a)(1) and (3) by Eliminating the LPN Classification and Transferring LPN Work to RNs Allegedly in Retaliation for Employees' Union Activities**

Alleged violations of Section 8(a)(3) involving questions of employer motivation must be analyzed under the burden-shifting doctrine articulated in *Wright Line, Inc.*, 251 NLRB 1083, 1087, 105 LRRM 1169 (1980), *enfd*, 662 F.2d 899 (1st Cir. 1981). Under *Wright Line*, the General Counsel bears the initial burden of proving by a preponderance of the evidence that: (1) the employees as to whom the alleged violation was committed engaged in conduct protected by Section 7 of the Act; (2) the employer knew of the protected conduct; (3) the employer took an adverse employment action against the employees; and (4) the protected conduct was a motivating factor in the decision to take the adverse action. *Id.* at 1087. As to the fourth element, absent direct evidence of discrimination, the General Counsel must establish a causal link between the protected activity and the adverse employment action by circumstantial evidence – *i.e.*, such as by showing that the employer's decision was inconsistent with its other actions, its treatment of similarly-situated employees, and its past practices, and by establishing some temporal proximity between the employment action and the protected activity. *See DTG Operations, Inc.*, 357 NLRB No. 6, 2011 NLRB LEXIS 357 at \*19, 191 LRRM 1231 (July 20, 2011). If the AGC's proof is insufficient to establish each of the foregoing elements, the inquiry is over. *Wright Line, Inc.*, 251 NLRB at 1087. However, if the AGC makes this threshold showing, the employer still may avoid liability by proving by a preponderance of the evidence that it would have taken the same action regardless of the protected conduct. *Id.* Notwithstanding these shifting burdens, the ultimate burden of

proving unlawful discrimination remains with the General Counsel at all times. *Id.* at 1088 n.11.

**a. There was insufficient proof of a causal link to establish a violation of Section 8(a)(3)**

The ALJ erred in finding a causal link between Somerset's patient-care decision to move to an all-RN clinical staffing model and union activity. "Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer's customers," is the business of a nursing home. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 577 (1994). Nursing homes "are not factories or mines or assembly plants," instead they are facilities "where human ailments are treated, where patients and relatives alike are often under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activities, and where the patient and his family – irrespective of whether that patient and that family are labor or management oriented – need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed." *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 783 n.12 (1979). *See also Beth Israel Hospital v. NLRB*, 437 U.S. 483, 498, 505 (1978) (health care facilities "give rise to unique considerations" and involve "the well-being of patients"). As shown above, Somerset adopted an all-RN health care delivery model to address increasing patient care issues and proactively respond to the changing landscape in the health care industry. There is no evidence that Somerset moved to an all-RN model to retaliate for any union activity at the facility or to chill further union activity at the facility. Indeed, the overwhelming, un-contradicted, and un-impeached hearing testimony was to the contrary.

The AGC presented no evidence at the hearing to establish any union animus or any causal link. Rather, the AGC relied solely upon the findings in a different case. Specifically,

at the hearing, the AGC asked the ALJ to take judicial notice of ALJ Steven Davis's decision and recommended order in *1621 Route 22 West Operating Co., LLC*, 22-CA-29599. Subsequent to the hearing and briefing in this matter, the Board affirmed ALJ Davis's decision, in large part, in *1621 Route 22 West Operating Co., LLC*, 358 NLRB No. 146 (Sept. 26, 2012). The ALJ erred in finding that the "Board's findings in the previous case evince Respondent's animus toward the union activities of its employees, and the union activities of the LPNs in particular." (ALJD 16:12-13). The ALJ's finding in this regard is erroneous for several reasons. First, the Board's decision affirming ALJ Davis's finding of union animus in connection with the discharges of three LPNs and a scheduling coordinator currently is before the Third Circuit Court of Appeals for review. Respondent incorporates by reference its proof and arguments in its Exceptions to ALJ Davis's decision in *1621 Route 22 West Operating Co., LLC*, 22-CA-29599, and its Brief in Support of those Exceptions, showing no animus in that matter, as if fully set forth herein. Should the Third Circuit refuse to enforce the Board's order and its finding of animus in that case, there would be no basis for the ALJ's finding of animus in this matter. Second, the issues in Judge Davis's case involved the individual discharges of three LPNs (in the fall of 2010 and the winter of 2011) and a scheduling coordinator (in the fall of 2010). Those events took place months before Somerset's unrelated decision to adopt an all-RN model. Moreover, the AGC and Union did not present the entire picture concerning those proceedings. Based upon its allegations in that case, the AGC sought injunctive relief against Somerset in U.S. District Court under Section 10(j) of the Act. In an extensive opinion, the District Court denied most of the relief sought by the AGC and made a number of specific factual findings that vindicated Somerset's patient care motivated decisions for the four employee discharges.

Specifically, in *Lightner v. 1621 Route 22 West Operating Co., LLC*, Civil Action No. 3:11-cv-02007, 2012 U.S. Dist. LEXIS 52896 (D.N.J. Apr. 16, 2012), the District Court found

that the NLRB lacked reasonable cause to believe that Somerset's discharge of Jillian Jacques, a former LPN and union supporter, violated Section 8(a)(3). The Court also found that Somerset would have disciplined and discharged Jacques in any event because of unprotected conduct. (R-19 at 114-18). The Court further found that reinstatement of Jacques would not be in the public interest. (R-19 at 126). In rather pointed findings, the District Court held, "the potential impact on Somerset Valley of reinstating Jacques's employment weighs heavily in the Court's calculus" and "reinstating Jacques's employment would be 'absolutely contrary to the public interest,' *i.e.*, to the interest served by Somerset Valley's continuous provision of adequate patient care, because to use a colloquialism, 'she just doesn't get it.'" (R-19 at 126). The District Court continued, "[b]oth before and after the union election, Jacques created the risk for patient harm by, *inter alia*, failing to document incident reports and failing to properly transcribe (or, simply, to transcribe) a doctor's order for patient medication. ... Furthermore, in at least one instance, Jacques's actions led to actual and very severe patient harm." (R-19 at 127). The District Court thus concluded that "[i]n light of the many errors that Jacques committed while employed at Somerset Valley [and] the ongoing risk of patient harm that she created, she would continue to create risk of such harm." (R-19 at 127). The District Court also found that reinstatement of former Scheduling Coordinator Valerie Wells would not be in the public interest. Specifically, the District Court found that "Somerset Valley's ability to provide adequate patient care[] would be negatively impacted by Wells's reinstatement" because she "repeatedly caused confusion amongst the Somerset Valley staff and administration about staff schedules and assignments, thus creating the risks of absenteeism, inadequate care, and patient harm." The Court added that "the potential harms created by such reinstatement are great." (R-19 at 124-25). Finally, the District Court expressly found that former LPNs and union supporters Shannon Napolitano and Sheena Claudio had a "record of 'sloppy nursing care,' including documentation errors

and medication administration errors.” (R-19 at 122). The District Court added that “Claudio may pose a risk to Somerset Valley’s residents” and that she “repeatedly demonstrated contempt and disregard for authority, both within Somerset Valley’s walls and in the course of litigation.” (R-19 at 122).<sup>8</sup>

In short, not only do ALJ Davis’s decision and the Board’s affirmance of that decision not establish a causal link between the union campaign and Somerset’s patient-motivated decision to move to an RN-only model, they do not provide the full story of the patient care problems that plagued Somerset’s facility before Somerset decided to move to an RN-only model and do not show that Respondent did not legitimately discipline LPNs for patient care issues. As the District Court’s opinion makes clear, Somerset had compelling patient-motivated reasons for each of the employment terminations alleged to be unlawful in Case No. 22-CA-29599. These same patient care concerns augmented by subsequent events – not any union activity – caused Somerset to move to an all-RN clinical staffing model. Therefore, the ALJ improperly relied upon ALJ Davis’s opinion and the Board’s decision affirming that opinion in finding a causal link.

ALJ Esposito also improperly focused on the date of the administrative hearing before Judge Davis (April 27, 2011) and the date of the filing of the Regional Director’s petition for injunctive relief pursuant to Section 10(j) around that time in determining that their temporal proximity to the May 2011 decision to change to an all-RN model supported a finding of unlawful motivation. The cases cited by the ALJ in support of the premise that timing can be evidence of unlawful motivation focused on the length of time between an employer learning of protected activities and discipline (two months) and the length of time between a

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<sup>8</sup> Respondent excepts to the ALJ’s finding and/or reliance upon the District Court’s finding in *Lightner v. Somerset Valley Rehabilitation and Nursing Center*, 2012 U.S. Dist. LEXIS 52896 (D.N.J. Apr. 16, 2012), that former employees Shannon Napolitano and Sheena Claudio should be reinstated. (ALJD 5:11-12). Their reinstatement was stayed by the Third Circuit.

representation election and the same discipline (two weeks), as well as the length of time between the filing of an election petition and subcontracting (three weeks). (ALJD 16:45-53). However, Respondent in this case was aware of protected activity at the very least as of July 22, 2010, when the election petition was filed. (ALJD 15:48 – 16:2). Unlike the cases cited by the ALJ, then, this ten-month time period is not close enough in time to create an inference of unlawful motivation. Moreover, in *Relco Locomotives, Inc.*, timing was only part of the evidence in support of animus, not the sole basis for the finding of animus. 358 NLRB No. 37, 2012 NLRB LEXIS 242, at \*65 (Apr. 30, 2012) (citing shifting reasons for discipline and timing as evidence of animus). Additionally, in *St. Vincent Medical Center*, the ALJ found that the three-week temporal proximity was not enough to establish animus on its own. 338 NLRB 888, 893-95 (2003).

**b. Somerset would have adopted an all-RN model regardless of any union activity**

Finally, even if there were a causal link between any union activity and Somerset's decision, the 8(a)(3) claim still fails under *Wright Line* – Somerset would have adopted an all-RN model for reasons unconnected with any union activity at the facility. In evaluating the proof in this regard, the Board may not second guess an employer's business decisions. *Ryder Distribution Resources, Inc.*, 311 NLRB 814, 816, 143 LRRM 1225 (1993) ("the Board does not substitute its own business judgment for that of the employer"). Thus, the question is not whether the Board would have made the same decision under similar circumstances. *Id.* Instead, the appropriate inquiry is whether the employer's proffered non-discriminatory reasons, more likely than not, would have compelled the employer's decision even absent protected conduct. *Id.* at 816-17; *DTG Operations, Inc.*, 357 NLRB No. 6, 2011 NLRB LEXIS 357 at \*19. The employer's defense does not fail simply because it is not supported by all the evidence, or even because it is refuted by some of the evidence. *DTG Operations, Inc.*, 357

NLRB No. 6, 2011 NLRB LEXIS 357 at \*20. The employer needs only prove its defense by a preponderance of the evidence. *Id.* Somerset did so in this case.

There is no question that Somerset would have implemented an RN-only clinical staffing model regardless of any union activity. As shown above, Somerset has a statutory responsibility as a skilled nursing facility to provide safe and competent patient care. See, e.g., 42 U.S.C. § 1395i-3(b)(1)(A); 42 U.S.C. § 1395i-3(b)(2); 42 C.F.R. Part 483. Despite continuing efforts to improve the quality of nursing care, Somerset's performance did not significantly improve for the 2010 State Survey. (R-10). Somerset made additional efforts to improve the quality of nursing care, but it ultimately concluded that the acuity level of Somerset's patients was too high for LPNs. (Tr. at 422-23, 476-77). Thus, Somerset decided to transition its facility to an all-RN model to address the patient care and nursing issues that existed and reposition the facility in the marketplace as an all-subacute facility. (Tr. at 435-37, 540-42). Moreover, there can be no serious dispute that this move has had a positive impact upon patient care at Somerset. (R-20, tab 3 at 129-30; R-21 at 203:22 – 204:9). Indeed, the results of NJDOH's State Survey in January 2012 (the most recent survey prior to the hearing) showed dramatic improvement over the previous annual survey in December 2010, when Somerset relied on LPNs. (Tr. at 382, GC-18).

The ALJ erred in finding that the evidence does not support Respondent's assertion that it would have transferred bargaining unit work in the absence of the employees' union activity. (ALJD 17:15-36, 22:31-34). The ALJ relied upon many findings that supported her erroneous finding that Respondent did not change the nature and scope of its business in reaching this conclusion. Respondent addressed those errors above and will not restate them here. The ALJ also erroneously questioned Manzi's testimony that the 2010 survey was part of the reason to move to an all-RN model because, according to the ALJ, the testimony was "elicited after a specific suggestion by Respondent's counsel." (ALJD 18:27-

31; Tr. at 541). However, prior to Respondent's counsel asking the follow up question, "Did the survey results that are R-10 impact that decision as well," Manzi already had testified that based on her review of the survey results, she was "very concerned about the residents and Somerset" because the survey citations "indicated that there was a potential for harm of those residents." (Tr. at 540-41). Indeed, the ALJ also elicited the testimony at issue:

Judge Esposito: The reason that you testified, is that the only reason that you decided to move to an RN-based modeled care at Somerset?"

The Witness: There was -- from the basis of this survey, there was [sic] also some concerns from the survey.

(Tr. at 541:12-16). Manzi further explained the importance of having all RNs under the new model and that the results of the survey with regard to medication administration, for example, showed that certain systems could not be sustained under the LPN/RN model. (Tr. at 541-42).

The ALJ also erroneously cited Jason Hutchens' testimony in a prior case that "it was 'common' for a facility to be cited for deficiencies in a survey" as contradicting Respondent's reliance on the December 2010 survey in changing its model. (ALJD 18:31-34; *1621 Route 22 West Operating Co., LLC*, 358 NLRB No. 146, 2012 NLRB LEXIS 657, at \*31 (2012)). However, the ALJ took Hutchens' testimony out of context. According to ALJ Davis, Hutchens, in the context of his testimony about the December **2009** survey, testified generally that it was common for a facility to be cited for deficiencies in a survey, but did not say anything about whether it was common to have any particular number of deficiencies or any particular level of severity of deficiencies. *1621 Route 22 West Operating Co., LLC*, 2012 NLRB LEXIS 657, at \*31. Moreover, Hutchens did not offer any testimony about the types or numbers of deficiencies received in the December **2010** survey, and it was the nature and

severity of the deficiencies in the December 2010 survey, not the fact that there were deficiencies in general, that caused Respondent to make changes.

The ALJ further erred in finding that the seven-month period between Illis concluding LPNs were incapable of providing adequate care and the May 2011 decision to change the health care delivery model, and/or the five-month period between the December 2010 survey and the May 2011 decision, “militate[] against a finding that [Respondent’s] asserted reason for replacing [LPNs] with RNs was legitimate.” (ALJD 18:35 – 19:20). It is uncontroverted that both Illis and Manzi were concerned by the results of the surveys, that attempts to correct the issues identified in the surveys were unsuccessful, and that the decision to change models was made in May 2011. (Tr. at 435-37, 540-42). A five- or seven-month period of time cannot reasonably be considered a significant delay, particularly when the survey results were only one facet of the decision to change models. Therefore, contrary to the ALJ’s findings, it is unconverted that Respondent “legitimately concluded in May 2011 that LPNs were incapable of competently providing care to the acuity level of its patient population.” (ALJD 18:23-26).

Additionally, the ALJ erred in finding that Respondent did not discipline LPNs immediately after the December 2009 survey or in response to the citations the NJDHSS issued or for quality of care issues, but in response to the representation election in September 2010, and that Respondent did not discipline LPNs as a result of the patient care deficiencies Illis discussed with them between the time that the December 2010 survey was issued and May 2011, when Manzi made the decision to eliminate the classification. (ALJD 9:45-47, 19:21-25, 19:30 – 20:4). Relying entirely on the Board’s decision in *1621 Route 22 West Operating Co., LLC*, 358 NLRB No. 146 (2012), the ALJ found that a “significant amount of the disciplinary action taken by Respondent against the LPNs during the period August 2010 through May 2011 was imposed for unlawful, retaliatory reasons.” (ALJD 20:1-

4). However, to the extent that the ALJ inferred from the Board's prior decision that **all** of the discipline issued during this time period was retaliatory, that inference is wholly unsupported and is contrary to the uncontroverted evidence. See *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332, 1335 (11th Cir. 2012) ("The Board cannot ignore relevant evidence that detracts from its findings. When it misconstrues or fails to consider important evidence, its conclusions are less likely to rest upon substantial evidence."). In fact, the Board in the prior decision noted Jacques received discipline in December 2009, which was not alleged to be unlawful. *1621 Route 22 West Operating Co., LLC*, 358 NLRB No. 146, 2012 NLRB LEXIS 657, at n. 7, \*11 (2012). The Board also found Claudio's written warning on September 20, 2010 for a medication administration error was not unlawful because another employee was warned during the same time period for a similar error. *Id.* at n. 3, \*3. Additionally, the Board's decision that disciplinary action had been taken for retaliatory reasons primarily focused on discipline for attendance infractions of three employees, not discipline for quality of care issues and noted that 17 other LPNs had been disciplined for performance related issues during the same time period as Jacques. *Id.* at \*5-\*12.

ALJ Esposito also ignored the following discipline cited by ALJ Davis: LPN Michelle Moore received a written notice on March 4, 2010 for failure to report changes in a patient's status and a patient's fall; LPN Patty Beck received a written warning on September 10, 2010 for documentation issues; LPN Doreen Dande received a written warning on September 17, 2010 for improper administration of medication;<sup>9</sup> RN Sandy Mootosamy received a first written warning on September 27, 2010 for failure to document a status postfall, to do a post-admission documentation and to document vital signs; LPN Beck received a verbal notice on September 28, 2010 for failing to complete an admission chart; LPN Beck received discipline

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<sup>9</sup> While the ALJ stated it is not clear whether Dande was an LPN or an RN (ALJD 20:35-38), the record evidence in this case established that Dande was an LPN. (GC-7).

on October 21, 2010 for errors in incident reports; LPN Dande received a written warning on November 8, 2010 for failure to notify the physician or family of a wound and not completing the necessary documentation for the wound; LPN Dande received a first written warning on November 23, 2010 for failure to timely change a colostomy appliance; LPN Dande received a second written notice on November 26, 2010 for failure to administer medication; LPN Conteh Salaimatu received a documented verbal notice on November 29, 2010 for failure to transcribe an order; and LPN Moore received a written notice on December 23, 2010 for multiple failures. *Id.* at \*76-77, 85-86, 90-92. (See also GC-7).

Additionally, the uncontroverted testimony of Illis established that she warned the nursing the staff that they would be disciplined for the issues identified by the December 2010 survey. (Tr. at 425-28, 432-34, R-11 and R-12). As noted by the ALJ, the record in the instant case “establishes that D’Ovidio received a verbal warning in the early spring of 2011 for failing to timely provide a daily summary of treatments administered to would patients” and “the General Counsel does not allege that this warning was issued for retaliatory reasons.” (ALJD 20:38-41; Tr. at 176). Further, ALJ Davis noted the following discipline in 2011: LPN Moore received a final warning on February 9, 2011, for failing to document treatment for a dressing and failing to date the dressing; LPN Dande was disciplined on February 12 and 13, 2011 for stating in records that she administered treatments which she had not administered; and LPN Beck received a final warning on February 15, 2011 for failing to properly change a dressing although she documented that the dressing was changed according to the order. *1621 Route 22 West Operating Co., LLC*, 358 NLRB No. 146, 2012 NLRB LEXIS 657, at \*91-92 (2012). (See also GC-7). Therefore, there is no basis for the ALJ’s finding that LPNs were not disciplined as a result of patient care deficiencies starting with the December 2009 survey.

The ALJ further erred in finding that Respondent should have considered turnover in the nursing department management as a contributor to the issues raised in the 2009 and 2010 surveys. It is undisputed that this “turnover” resulted from Respondent’s attempts to address issues with nursing department management in an attempt improve the quality of care. (Tr. at 423; see, e.g., Tr. at 503-06). The ALJ further incorrectly found that Respondent only focused on the LPNs and not the RNs as the source of the patient care issues. (ALJD 20:23-24). When RNs have made errors, they have been disciplined and sometimes discharged. (CP-2; GC-7 at 2). The fact that RNs have been disciplined and discharged when warranted underscores Somerset’s commitment to patient care.

While the ALJ found that the evidence did not establish that using an all-RN model has improved patient care (ALJD 21:2-30), the ALJ erroneously relied upon testimony from three individuals (Mangal, D’Ovidio and Buch) who have no knowledge of what has happened at the facility since it became an all-RN facility in October 2011. (Tr. at 542). Mangal and D’Ovidio were LPNs and did not observe the building operating as an all-RN facility. (Tr. at 111-12, 151-52). Dr. Buch has not been in the building since September 2011 and has no knowledge of the care being provided since then or since the facility completed its transition to an all-RN model. (Tr. at 598). Dr. Buch admitted that previously he visited Somerset only once a week and limited his attention to wound care (Tr. at 590) – a program that has been discontinued. Dr. Buch further admitted that prior to September 2011, Somerset provided many subacute services other than wound care, that he did not see every patient, and that he had little knowledge of the other subacute services provided by Somerset. (Tr. at 598). The ALJ also relied on the results of the January 2012 survey,<sup>10</sup> comparing the results of that

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<sup>10</sup> There is no December 2011 survey in the record and there was no survey done at that time. The survey for 2011 was conducted on January 25, 2012, and the results were set forth in a letter dated February 8, 2012. (GC-18). Respondent assumes that the ALJ intended to reference the January 2012 survey when she referred to a December 2011 survey.

survey with the December 2009 survey and erroneously finding they were substantially the same. (ALJD 21:20-27). However, the ALJ failed to note a significant difference – that the January 2012 survey did not include any G-level deficiencies, while the December 2009 survey included two G-level deficiencies. (Tr. at 422, R-9, GC-18). Accordingly, the ALJ’s finding that the evidence did not establish that using an all-RN model has improved patient care is completely unfounded and contrary to the uncontroverted evidence. See *Lakeland Health Care Associates, LLC*, 696 F.3d at 1338-40 and n. 4 (criticizing Board for resting its decision on “speculative inferences from what the evidence could or might have shown” and for “meticulously exclud[ing] or disregard[ing] [uncontradicted] record evidence, which . . . compel[led] a different result”).

The ALJ further erroneously found that Somerset’s 30-day hospital readmission rates have not improved since the change to an all-RN model. (ALJD 21:32 – 22:4). Initially, and importantly, the fact that the desired results from a course of action do not happen instantaneously or as quickly as one would hope does not mean that the desired result did not motivate the decision to take the action. Secondly, the ALJ refused to credit the testimony of Administrator Grasso that since going to an all-RN model, Somerset’s readmission rate has been trending downward and in April 2012 was the lowest it had been in over one year. (Tr. at 390). The ALJ found the testimony was not supported by documentary evidence and that Grasso testified the most recent decline was due to training, not the change to all-RNs. (ALJD 21:34 – 22:4). However, Grasso did not testify that the general decline was due to training. Instead, she testified that while there has been a general decline in the readmission rate, there was a “spike” in the readmission rate in December, but after re-training in the acute transfer alternative program, the rate declined again and that April 2012 showed the best acute discharge rate in over a year. (Tr. at 390). Additionally, while there was no single document Grasso could point to as showing the readmission rate,

there were two exhibits in the record – the Acute Discharges Monthly Report (GC-14) and the Monthly Census Information (GC-15) – from which readmission rates could be calculated. The Acute Discharges Monthly Report shows the number of unplanned discharges from Somerset to an acute care hospital by month. (Tr. 316-17, GC-14). The Monthly Census Information shows the number of patients at Somerset on average for each month. (Tr. at 336-39). As Grasso testified, the readmission rate can be calculated by dividing the number of acute discharges by the average census and expressing that number as a percentage. (Tr. at 383-84). The exhibit that Respondent withdrew, R-8, purported to show the final percentage (Tr. at 384-85), but the fact that it was withdrawn does not mean that the percentage could not be derived from GC-14 and GC-15. Moreover, Grasso did not testify that she relied on R-8 in reaching the conclusion that readmission rates generally have been declining, but that her conclusion was based on her “experience.” (Tr. at 390). While the data on readmission rates was not restricted to 30-day readmission rates, it is still informative of the 30-day readmission rates, and readmissions/acute discharges in general, whether or not within a 30-day period, are negative and sought to be avoided. (Tr. at 292-93, 444, 485-86, 530, 575; R-20 at 172; R-20, tab 3 at 128-30). Finally, contrary to the ALJ’s finding, Somerset being made into a subacute, all-RN facility, is entirely consistent with the subacute unit at Wall employing only RNs and is not a “discrepancy” that constitutes evidence of pretext. (ALJD 22:6-29; Tr. at 530-31).

Accordingly, the ALJ erred in finding that “Respondent has not rebutted General Counsel’s prima facie case, and that Respondent eliminated the LPN classification and transferred work to RNs in retaliation for the LPNs’ union support and activities, in violation of Sections 8(a)(1) and (3) of the Act.” (ALJD 22:31-37). Therefore, the ALJ’s Decision and Order regarding the Complaint’s 8(a)(3) allegations should be reversed.

**4. The ALJ erred in finding that Respondent violated Sections 8(a)(1), (3) and (5) by discharging D'Ovidio and Mangal**

For the reasons stated above, the ALJ erred in finding Respondent violated the Act by discharging D'Ovidio and Mangal. (ALJD 22:37 – 23:16).<sup>11</sup>

**C. The ALJ Erred in Finding that Respondent Violated Sections 8(a)(1) and (5) when it Denied Access to its Facility**

The ALJ improperly found that Respondent violated Sections 8(a)(1) and (5) of the Act by denying the Union's January 30, 2012 request for access to the facility.<sup>12</sup> (ALJD 24:37-38). Further, the ALJ's finding that the evidence does not establish that "the Union had alternate means at its disposal to obtain the information it sought by visiting Respondent's premises" is contrary to the undisputed testimony of the Union's Vice President, Ricky Elliott. (ALJD 24:25-35; Tr. at 99:13-15, 102-104).

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<sup>11</sup> At the close of the Acting General Counsel's proof, Somerset made a motion to dismiss under Section 10(b) with respect to the Section 8(a)(3) allegation as to Ms. D'Ovidio, individually. (Tr. at 249-52). Any claim that Somerset terminated Irene D'Ovidio, individually, in violation of Section 8(a)(3) for any reason unrelated to the elimination of the LPN position is time-barred by the six-month statute of limitations of Section 10(b). Somerset terminated D'Ovidio on August 18, 2010. A charging alleging that D'Ovidio's discharge violated Section 8(a)(3) was not filed until April 3, 2011. (See Tr. at 151:20-21, 249-52, GC-1). In response, counsel for the Acting General Counsel conceded that "the allegations regarding Ms. D'Ovidio's termination, as well as Ms. Mangal's, are not individual 8(a)(3) allegations. They are allegations that their terminations were the result of – the elimination of the LPN position." (Tr. at 251:9-13). The ALJ deferred a ruling. In its post-hearing brief, Somerset renewed its motion, but advised that based upon the representations of counsel for the AGC, its motion as to D'Ovidio, individually, would appear to be moot. Nevertheless, the ALJ addressed Somerset's motion and the timeliness of "D'Ovidio's" charge. (ALJD 23, n.24). The ALJ appears to have misunderstood Somerset's argument. Again, based upon counsel for the AGC's statements as to what claim the Amended Complaint actually asserted, there was no claim before the ALJ that Somerset targeted D'Ovidio, individually, or terminated D'Ovidio in violation of Section 8(a)(3) on any basis or for any reason other than as a result of the allegedly unlawful elimination of the LPN position. Indeed, the ALJ found no basis for D'Ovidio and Mangal's terminations other than "Respondent's unlawful termination of the LPN position." (ALJD 23:9-12).

<sup>12</sup> As a threshold matter, Somerset's duty to bargain with the Union and/or provide access to its private property depends in the first instance upon the Union's status as the properly certified collective bargaining representative – a status Somerset disputes. A decision by the Third Circuit Court of Appeals to overturn the election will render this claim moot in its entirety. Notwithstanding Somerset's position on certification of the Union, this claim should be dismissed on the merits.

## 1. Facts

The Union sent a letter to Somerset on January 30, 2012, requesting “access to the work areas in the facility where bargaining unit employees work in order to observe work processes and working conditions, including safety and health conditions.” (Tr. at 96-97 and GC-2). Somerset did not allow the requested access. At the hearing, the Union articulated the following reasons for needing access: to observe the employees, make sure that the employees had adequate supplies, make sure that the employees had safe equipment, get an overview of the workday and what it took to get the work done, see if supplies are available at the nurses’ station or locked in a closet, and see if lifts are available for employee use. (Tr. at 97-98). The only “complaint” identified was that the LPNs thought the facility was short-staffed and they could not get their work done in time. (Tr. at 98). Finally, Ricky Elliott (“Elliott”), the Union’s Vice-President, testified that “it is a lot better to go inside and actually observe and see so as to put forth proposals at the bargaining table.” (Tr. at 99-100). Essentially, the Union’s rationale for needing entry into the facility and onto Somerset’s private property, therefore, is that it would be helpful to its efforts.

## 2. Law and Argument

### a. Entry on private property is granted only when a union’s duty can be met only by access

As the Administrative Law Judge recognized in *Bashas’, Inc.*, 2009 NLRB LEXIS 288 at \*39 (Sept. 24, 2009), there is not a general Section 7 right for employees to be contacted and observed by their union representatives on their employer’s property. Furthermore, a request for access to an employer’s private property is not tantamount to a request for information. *Holyoke Water Power Co.*, 273 NLRB 1369, 1370, 118 LRRM 1179 (1985), *enfd*, 778 F.2d 49 (1st Cir. 1985). Applicable Board precedent on this matter is clear: a right of access to an employer’s private property is not absolute, but determined on a case-by-

case basis, carefully balancing the employer's property rights and the employees' rights to be effectively represented by their collective bargaining representative. See *American National Can Co.*, 293 NLRB 901, 131 LRRM 1153 (1989), *enfd*, 924 F.2d 518 (4th Cir. 1991); *Holyoke Water Power Co.*, 273 NLRB at 1370; see also *New Surfside Nursing Home*, 322 NLRB 531, 534, 153 LRRM 1266 (1996). Importantly, the Board has recognized that "Respondent's property rights are entitled to great weight inasmuch as it is a nursing home, caring for elderly, fragile patients." *New Surfside Nursing Home*, 322 NLRB at 535. Moreover, "a union is not automatically entitled to access to an employer's premises to obtain information simply because the information has been shown to be relevant to the union's proper performance of its representational duties." *American National Can Co.*, 293 NLRB at 901; *Holyoke Water Power Co.*, 273 NLRB at 1370. Even when the presence of a union representative on the employer's premises may be of assistance to the union in the performance of its representational duties, that fact alone does not obligate an employer to "open its doors" and permit access to its private property or facilities. *Holyoke Water Power Co.*, 273 NLRB at 1370; see also *Central Soya Co.*, 288 NLRB 1402, 1406, 130 LRRM 1351 (1988). Rather, as the Board's precedents explain, the employer's property rights yield "[w]here it is found that responsible representation of employees can be achieved **only** by the union's having access to the employer's premises." *Holyoke Water Power Co.*, 273 NLRB at 1370 (emphasis added); see also *Lehigh Portland Cement Co.*, 287 NLRB 978, 984, 130 LRRM 1123 (1988) (access permitted when "Union's responsible representation of employees could be achieved only by the Union having access to Respondent's facility"). "[W]here it is found that a union can effectively represent employees through some alternate means other than by entering upon the employer's premises, the employer's property rights will predominate and the union may properly be denied access." *American National Can Co.*, 293 NLRB at 905; *Holyoke Water Power Co.*, 273 NLRB at 1370.

**b. Access is not required for the Union's professed needs**

In the present case, Somerset properly denied the Union's request for access to Somerset's facility and private property because the Union has effective, alternate means to represent the bargaining unit. The test is not whether the Union has alternate means to gather or obtain the information it seeks through access, but whether it can represent the bargaining unit without access. There is no dispute that the Union can do this. The Union's Vice-President, Ricky Elliott, admitted that the information the Union sought through entry upon the Respondent's private property could be provided by other means. Specifically, Elliott admitted that the Union could get all the information it sought from employees who worked in the facility without being granted access. (Tr. at 99:13-15). There is no contrary evidence in the record. Elliott further admitted that employees who work in the facility could tell the Union if there was a smell in the facility, how many patients/residents they serve each day, how many "difficult" patients they have each day, what duties they perform each day, if the supply door was locked, if the nurses had enough supplies, and if a fire exit was blocked. (Tr. at 102-04). Therefore, the facts do not show that the Union can get the information it seeks **only** by being granted access to the facility in derogation of Somerset's private property rights. When alternate means to obtain the information sought exist, the Board has affirmed decisions finding that the employer properly denied a union entry into its facility and access to its private property. See, e.g., *Lehigh Portland Cement Co.*, 287 NLRB at 984, (union could interview employees before and after work); *Central Soya Co.*, 288 NLRB at 1406. Accordingly, Somerset's private property rights outweigh the Union's representational needs and Somerset properly denied the Union's request for access.

**c. The present case is distinguishable from Board precedent granting access**

While the Board has granted a union access to an employer's private property to investigate safety issues and complaints in some prior cases, the facts and specific needs at issue in those cases are distinguishable from the present request. For example, in *Holyoke Water Power Co.*, the fan room in the plant was a "high noise area" and the plant supervisor admitted that there was a "noise problem" in the fan room. 273 NLRB at 1369. The Board found that the union's industrial hygienist needed access to the fan room to conduct noise level studies. *Id.* at 1370. In the present case, no such specific issue exists that the Union is attempting to investigate or address by a specific test or study.

*American National Can Co.* is also instructive. In that case, employees worked under conditions of extreme heat and noise. The collective bargaining agreement ("CBA") expressly granted the union access to the plant for "matters pertaining to complaints and/or grievances ... concerning the application or interpretation of" the CBA. 293 NLRB at 901. The CBA also contained provisions requiring the employer to use its best efforts to adjust heat and ventilation, to provide relief to employees when heat conditions warrant, and to design systems to control hazards on the job. *Id.* Several employees suffered heat exhaustion at work, grievances were filed, and a labor-management meeting convened to discuss excessive heat conditions and application of the heat-relief provisions of the CBA. *Id.* at 901-02. The Board permitted the union's representative access to monitor temperatures in the plant for the purpose of determining compliance with the CBA. *Id.* at 905. In granting access for this specific purpose, the Board noted that nothing in the record indicated that the union could acquire this information independently, and relied heavily on the fact that the union already had a contractual right of access to investigate grievances and compliance with the CBA. *Id.* at 905-06. In the present case, no specific complaint is sought to be

investigated, no specific testing is sought to be done, and the Union has no existing contractual right of access to Respondent's private property.

Finally, in *New Surfside Nursing Home*, improperly applied by the ALJ (ALJD 24:8-11), employees voiced complaints to union representatives about specific health and safety conditions that existed at the employer's facility – back injuries, infectious diseases, blood borne pathogens, and issues concerning AIDS, HIV, hepatitis, and tuberculosis; confusion about whether protocols were being followed; and inadequate training as to infectious diseases. In response to those specific complaints, the union made a request for access to the employer's facility so that its health and safety expert could conduct an inspection and investigate those alleged hazards. 322 NLRB at 532.<sup>13</sup> Likewise, the cases relied upon in *New Surfside Nursing Home* involved requests for access to investigate specific reports or complaints. In the present case, the Union seeks broad and unlimited entry into the facility and access to the Respondent's private property not to investigate specific complaints or alleged hazards, but merely to obtain generalized information that otherwise can be obtained from employees without the need for Union representatives to be in the Respondent's facility.

In the present case, no specific issue required access for the Union to investigate or for which access was the only means by which the Union could gather desired information. To permit the mere invocation of the words "health and safety" to grant a union generalized access to an employer's private property, especially a nursing home, in the absence of such a specific issue or circumstance would eviscerate employers' private property rights and render the balancing test required by *Holyoke Water Power Co.* illusory and a sham.

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<sup>13</sup> One issue involved in *New Surfside Nursing Home* was whether employees were actually using the lifts that the employer made available to them. In the present case, Elliott identified, as something the Union **might** discover, whether lifts were available at the Center, not whether employees actually used them (Tr. at 98) – information that certainly can be provided by employees who work at the Center without granting the Union access to the facility.

**d. The ALJ's reliance on *CCE, Inc.* is misplaced**

In support of the ALJ's finding of a violation, she improperly relied on the Board's decision in *CCE, Inc.*, 318 NLRB 977, 978 (1995) (ALJD at 24:11-25) – the facts of which are significantly different than those presented here. In that case, the employer was evidenced to have provided access to its facility to “many individuals and groups” including school children, a video production crew, cub scouts, vocational school students, potential customers, dealers and their drivers, and suppliers. *Id.* Thus, the employer's arguments that the union should be denied access because of the potential for disclosure of confidential, proprietary, and trade secret information as well as the unwarranted disruption of its operations were rejected. *Id.* Notably, in that case, no argument was presented that the union had an effective, alternate means to represent the bargaining unit. In the present case, Somerset properly denied the Union's request for access to Somerset's facility and private property because the Union admittedly has effective, alternate means to represent the bargaining unit. Additionally, as a skilled nursing facility caring for a frail and elderly, and increasingly subacute, patient population, patient privacy and lack of disruption to patient care is of utmost concern. Unlike the employer in *CCE, Inc.*, Respondent does not provide opportunities for “many individuals and groups” to parade through its facility, interrupting the treatment of patients. Thus, the ALJ improperly relied on *CCE, Inc.* to support her decision.

**e. Somerset properly denied the Union's request for access**

The Union's request for access to and entry upon Somerset's private property boils down to it being **helpful and of assistance to** the Union. This is not enough. Somerset's private property rights, therefore, predominate. Ignoring clear Board precedent and the evidence in this case, the ALJ erroneously found that the Respondent violated Sections 8(a)(1) and (5) of the Act by denying the Union's request to access the facility.

**D. The ALJ's Remedies Are Not Supported by the Preponderance of Evidence and/or Are Contrary to Public Policy**

The ALJ ordered Somerset to reinstate the LPN classification and to permit the Union access to its property. As set forth above, the ALJ erred in finding violations that support such remedies. Moreover, the order to reinstate the LPN classification contravenes well-defined federal policy. The Act does not require reinstatement of individuals who are not competent to carry out the jobs from which they were discharged. See, e.g., *Family Nursing Home and Rehab Ctr.*, 295 NLRB 923, 923 (1989); *NLRB v. Western Clinical Lab, Inc.*, 571 F.2d 457, 461 (9th Cir. 1978); *NLRB v. Big Three Industrial Gas & Equip. Co.*, 405 F.2d 1140, 1142-43 (5th Cir. 1969). As the court in *Western Clinical* noted, this is particularly true in the health care field:

In our view, promotion of the beneficial policies of the National Labor Relations Act . . . cannot take precedence over the public interest in being free from incompetent workmanship by a hospital employee, whose work, if incompetently done, would jeopardize the health and lives of patients . . . [R]einstatement of incompetent employees in the health care field does not effectuate the policies of the Act.

571 F.2d at 461.

The Supreme Court has stressed that the unique nature of health care facilities requires the Board to take into account patient well-being in enforcing the Act. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 498, 505 (1978). Moreover, the Supreme Court has made clear that, in deciding what remedies are available under the Act, it will not provide the remedy the Board requested where to do so would be inconsistent with other competing federal policies. *Hoffman Plastics v. NLRB*, 535 U.S. 137, 143-44 (2002). As the Supreme Court stated in *Hoffman Plastics*, “the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important congressional objectives.” *Id.* at 143. Thus, the Court has “never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal

statutes and policies unrelated to the NLRA.” *Id.* at 144. Consequently, “where the Board’s chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield.” *Id.* at 147 (internal citations omitted). Here, reinstatement of an LPN classification providing direct care to subacute patients at Somerset contravenes the well-defined federal policy mandating the provision of safe, effective, and competent care at skilled nursing facilities.

## **VII. CONCLUSION**

Based on the foregoing, the ALJ’s findings of fact and conclusions of law are not supported by a preponderance of all of the relevant evidence in the record and/or are contrary to established Board law or policy. Accordingly, the ALJ’s Decision and Order should be reversed, Judgment should be entered in favor of Respondent on all counts, and the Complaint should be dismissed in its entirety.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing pleading were served on

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