UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

1621 ROUTE 22 WEST OPERATING COMPANY, LLC
D/B/A SOMERSET VALLEY REHABILITATION
AND NURSING CENTER

Cases 22-CA-069152
22-CA-074665

and

1199 SEIU UNITED HEALTHCARE WORKERS
EAST, NEW JERSEY REGION

COUNSEL FOR ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. SUMMARY OF THE ARGUMENT

The record fully supports the Administrative Law Judge's ("ALJ") findings that 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center ("Respondent" or "Somerset") violated Section 8(a)(1)(3) and (5) of the Act by eliminating the licensed practical nurse ("LPN") job classification, removing bargaining unit work, discharging Irene D'Ovidio and Maharanie Mangal, and denying the 1199 SEIU United Healthcare Workers East, New Jersey Division ("the Union") access to its facilities. Respondent excepts to all of the ALJ's findings and conclusions of law.

In May 2011, Respondent decided to eliminate the LPN bargaining-unit job classification and replace its LPNs with registered nurses ("RNs"), who are not members of the bargaining unit. Initially, the process of replacing LPNs with RNs was accomplished through attrition, but the last two LPNs, Maharanie Mangal and Irene D'Ovidio, were terminated.

Respondent's elimination of the LPN classification and subsequent discharge of Mangal and D'Ovidio violate Section 8(a)(1) and (5) of the Act because Respondent did not first secure the Union's consent or an order from the Board. Respondent does not dispute that it failed to satisfy either requirement. Additionally, the same conduct also violates Section 8(a)(1) and (5) of the Act because Respondent did not give the Union notice and an opportunity to bargain. Respondent argues that it was not obligated to bargain with the Union regarding its decision to eliminate the LPNs, because the decision was part of a fundamental change in the nature and scope of its business, which was a transition to a facility that serves only sub-acute patients. Respondent's contention is not supported by the record, as the ALJ properly found.

The record also supports the ALJ's finding that Respondent's removal of the LPN job classification and transfer of the LPN work to RNs violates Section 8(a)(1) and (3) of the Act. Respondent's elimination of the LPN job classification represents a continuation of

Respondent's numerous unfair labor practices that began shortly after the commencement of a Union organizing campaign in the summer of 2010. These unfair labor practices included the termination of three LPNs who were Union leaders and were litigated in *1621 Route 22 West Operating Co., Inc. d/b/a Somerset Valley Rehabilitation and Nursing Center ("Somerset I"),* 358 NLRB No. 146 (2012). The evidence shows that Respondent eliminated the LPN job classification to evade an expected order requiring it to reinstate the discharged LPNs.

The record also supports the ALJ's finding that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to allow the Union access to its facility for the purpose of observing work processes and working conditions.

II. FACTS

A. RESPONDENT'S OPERATIONS

Respondent operates a 64-bed nursing home located in Bound Brook, New Jersey, which provides short-term rehabilitation and skilled nursing care. Tr. 419, 420, 339;[1] *Somerset I*, 358 NLRB No. 146, slip op. at 5.

Respondent receives reimbursement for resident care through the Medicare program. Tr. 269, 270, 340, 420. It also accepts patients who can pay for the services themselves or through their medical insurance. Tr. 340. Somerset has never taken Medicaid patients. Tr. 340, 420-421, 453. The facility is subject to regulation by the New Jersey Department of Health and Senior Services ("NJDHSS") and the Centers for Medicare and Medicaid Services ("CMS"). Tr. 288; *Somerset I*, 358 NLRB No. 146, slip op. at 5.

[1] References to "Tr." are to the transcript of the hearing before the Administrative Law Judge. References to "GC Ex, "R Ex," and CP Ex" are to the exhibits of the Acting General Counsel, Respondent, and Charging Party, respectively. The *Somerset I* transcript, excluding exhibits, was admitted into the record of this case through GC Ex 6, and all references to the *Somerset I* transcript are indicated as "GC Ex 6, p.__."

The majority of Somerset's patients receive sub-acute care, which is short-term care for the purpose of rehabilitating individuals immediately after discharge from a hospital. Tr. 259, 420. These patients are often recovering from surgery or living with a degenerative illness. Tr. 259, 420. Somerset also cares for a handful of long-term care patients, who receive help with traditional activities of daily living, such as eating, dressing and bathing. Tr. 259, 420.

1. Corporate Management

Respondent is managed by Healthbridge Management, Inc. ("Healthbridge"), and it is part of the Healthbridge/CareOne Management, Inc. ("CareOne") portfolio of nursing homes. Tr. 312, 349, 495, 496; GC Ex 12, GC Ex 6, p. 1410, 1419; *see also Somerset I*, 358 NLRB No. 146, slip op. at 5. Together, Healthbridge and CareOne manage 29 nursing home facilities in New Jersey. Tr. 537, 546. The two companies share corporate offices in Fort Lee, NJ, their management is interchangeable, and they issue policies and procedures jointly. GC Ex 16, 17; Tr. 376-379, 495, 496, 529, 546, 548. In fact, the companies are so intertwined that Respondent's witnesses were unable to distinguish between them. Tr. 349, 346, 347, 494.

Somerset's administrator is the on-site manager with responsibility for the facility's operations. Elizabeth Heedles was Respondent's administrator from December 2008 through August 2010. *Somerset* I, 358 NLRB No. 146, slip op. at 5. Heedles was replaced by Doreen Illis, who held the position from August 3, 2010 through mid-August 2011. Tr. 507, Illis was then replaced by Christina Grasso, who remains in the position. Illis and Grasso overlapped employment the first two weeks of August 2011. Tr. 419.

Respondent's administrator reports to the regional director of operations, who is either a Healthbridge or CareOne employee, or both. Tr. 348, 349, 419, 475, 476, 494, 512, 538. Jason Hutchens held this position until November 2011, when he was replaced by Orrin Karstetter. Tr. 345, 348, 349, 539. The regional director of operations in turn reports to the executive vice

president of operations. Tr. 536-539. Dannette Manzi held this position from January 2011 through at least May 2012.[2] Tr. 538. Manzi, an employee of both Healthbridge and CareOne, holds the ultimate authority regarding Somerset's operations. Tr. 538.

2. Nursing Department Management

Respondent's nursing department provides direct care to the facility's patients. *Somerset I*, 358 NLRB No. 146, slip op. at 5, Tr. 152. The nursing department is headed by the director of nursing ("DON"). *Somerset I*, 358 NLRB No. 146, slip op. at 5. The assistant director of nursing ("ADON") reports to the DON, and the unit manager reports to the ADON. *Id.*

Management of this department has had significant turnover in the past several years. Between the fall of 2008 and August 2010, four individuals held the DON position. *Somerset I*, 358 NLRB No. 146, slip op. at 5; GC Ex 6, p. 1420-22. Jessica Arroyo, a Care One regional employee, served as acting DON for the month of August 2010, when Illis hired Inez Konjoh. Tr. 503. Illis terminated Konjoh five months later. *Somerset I*, 358 NLRB No. 146, slip op. at 5; Tr. 504. Jackie Engram, former vice president of clinical operations, then served as acting DON from January 2011 through sometime in August 2011. *Somerset I*, 358 NLRB No. 146, slip op. at 5; Tr. 351, 505. A temporary nurse from another state replaced Engram until the end of August, when Ruth Roper Brown was hired. Tr. 353. Roper-Brown lasted until early November 2011, when she was terminated. Tr. 355. Jennifer Lempke then served as interim DON through April 2012. Tr. 356. Ajoke Ogunwolere served as interim DON at the time of the hearing. Tr. 357.

Francine Dominique held the ADON position from about October 2010 through about August 2011. Tr. 356, 505. The position remained vacant until about October 2011. Tr. 356. Jennifer Lempke then held the position for about a month until she was promoted to serve as

[2] The hearing in this case took place from May 11-15, 2012.

interim DON. TR. 356. Ajoke Ogunwolere next served as ADON until April 2012, when she in turn was promoted to interim DON. Tr. 357.

The lowest level of supervision in the nursing department is the unit manager. *Somerset I,* 358 NLRB No. 146, slip op. at 5. This position has suffered from significant turnover as well. Three individuals held this position during Illis' one-year tenure at the facility, and three individuals held the position between August 2011 and May 2012. Tr. 506, 357-58.

3. Nursing Department Operations

Direct care to Somerset's residents is provided by staff nurses[3] and certified nurses' aides ("CNAs"). Tr. 152. Staff nurses and CNAs are assigned to work on one of three daily shifts. Tr. 112. Staff nurses typically care for between 20-22 patients each shift. Tr. 114.

Prior to May 2011, most staff nurses were LPNs. LPNs earn their licenses after completing a program that typically takes about one year. Tr. 112,152. Although LPNs represented the majority of Respondent's staff nurses, it is undisputed that Respondent always employed a certain number of RNs in that position. GC Ex 7, Tr. 136, 144-145, 511, 523. Irene D'Ovidio testified that an RN was always on duty during the day shift. Tr. 152. In addition, the individuals who held the DON, ADON and unit manager positions were all RNs.[4] Tr. 139, 152.

Respondent's staff nurse job description explains that staff nurses are "responsible for the day-to-day coordination and oversight of the nursing process for residents assigned to their care." GC Ex 9, p. 1. Pages two through four of the job description list the staff nurses' numerous daily duties. GC Ex 9. In summary, the nurse is expected to provide daily care to her patients, document that care, communicate their patients' status to doctors and families, participate in the coordination of patients' care with other facility professionals, and follow facility policies. GC Ex 9.

[3] Staff nurses are also referred to as floor nurses.
[4] The MDS Coordinator was also an RN. Tr. 152.

Irene D'Ovidio and Maharanie Mangal, LPNs who each were employed by Respondent for approximately 9 years,[5] testified that staff nurses generally are responsible for administering medications, performing various treatments, checking vital signs and testing blood sugar levels, and charting medications and treatments given to their patients. Tr. 111-123, 151-158. Upon starting the day shift, a staff nurse first receives a report on the status of her patients from the out-going nurse, and together both nurses count the narcotics in the medication cart. Tr. 122, 153. Next, before breakfast is served, the day shift staff nurse visits each of her patients. Tr. 122, 153. At this time, the nurse will test patients' vital signs and the blood sugar levels of diabetic patients. Tr. 115, 122, 153. After breakfast, the staff nurse begins her first round of administering medication to her patients. Tr. 122, 153. Blood sugar levels are tested a second time prior to lunch, and medication is administered around lunchtime as well. Tr. 122, 123, 153. The nurses usually complete their charting towards the end of the shift. Tr. 122, 153.

Staff nurses are responsible for completing daily pain assessments for each patient. Tr. 116, 146, 155-156, 194. The nurses use several techniques to assess a patient's pain level. Tr. 155-156, 194. They will ask the patient if she is experiencing pain, whether she slept well the previous night, and whether she has an appetite. Tr. 155-156, 194. The nurse also will observe the patient for color and breathing patterns. Tr. 155-156, 194. This information is recorded in a nurse's note. Tr. 146, 194. If the nurse determines that the patient has an unacceptable level of pain, and pain medication is prescribed and scheduled to be administered, she will administer it. Tr. 194. The nurse will also contact the doctor if necessary. Tr. 194.

Both Mangal and D'Ovidio testified that staff nurses have certain responsibilities in caring for patients at the time of their admission into the facility. Tr. 115-116, 156. They take

[5] The transcript errantly documents that Mangal said she began working for Respondent on April 29, 2010. Tr. 111. Mangal's true starting date was April 29, 2002, which can be determined through Mangal's remaining testimony regarding her work history for Respondent. Tr. 111-112.

patients' vital signs, complete initial pain assessments, and perform overall body checks, which includes assessing any wounds, any hearing or speech problems and evaluating their mental health. Tr. 115-116, 156, 194. Upon admission, the staff nurse also reviews the patient's health history and all medications the patient is currently taking. Tr. 115-116, 156.

Nurses also administer treatments to their patients as needed throughout their shift. Tr. 118-119, 122, 153-155. Treatments range from the simple application of salve or ointment to performing more involved procedures. Tr. 118-119, 122, 153-155. Wound care is an important part of a nurse's everyday practice. Tr. 118, 154-155. Although such care involves cleansing wounds and changing bandages and dressings, nurses also are commonly required to perform wound vacs, a procedure that uses a machine to suction the wound. Tr. 118, 155. Nurses also perform a similar treatment called the pleur-evac, which suctions liquid from a patient's lungs. Tr. 125-126. Other treatments include administering breathing treatments, such as nebulizers, and setting up and removing BiPAP and CPAP machines, which help patients breathe while sleeping. Tr. 119, 154.

A nurse's daily tasks often depend upon the medical needs of her patients. Tracheotomy care includes special cleansing and monitoring of the patient as well as the equipment. Tr. 118, 119, 157. For patients receiving IV therapy, the nurses are required to perform duties associated with starting the IV line, hanging the IV bag, and flushing the lines. Tr. 119, 157. The nurses also care for patients who receive total parenteral nutrition,[6] by starting the lines providing the nutrition, disconnecting them and flushing them. Tr. 158. Nurses administer peritoneal dialysis to patients at the facility and they monitor access sites for patients who receive hemodialysis at another facility. Tr. 120-121, 158.

[6] Total parenteral nutrition refers to intravenous feeding. Tr. 150.

B. CHRONOLOGY OF EVENTS

1. Summer 2010: The Union Organizing Campaign

In June 2010, employees began an organizing campaign in response to Respondent's plans to change employees' work schedules and hours. *Somerset I*, 358 NLRB No. 146, slip op. at 5-6. During the organizing campaign, the employees discussed their support for the Union with supervisors, and they showed their support by wearing stickers supporting the Union. *Id.* Before the election, the Union distributed a brochure entitled "At Somerset We're Voting Yes for 1199 SEIU." *Id.* at 6. The brochure displayed photographs of 35 employees and contained a statement of Union support next to each picture. *Id.* Hutchens and Illis testified that they saw the brochure and recognized four of the most active Union supporters. *Id.* Three of those individuals were LPNs Shannon Napolitano, Jillian Jacques and Sheena Claudio. *Id.*

On July 22, 2010, the Union filed a petition seeking to represent a unit of Respondent's employees that included, *inter alia*, LPNs and certified nurses' aides. *Somerset I*, 358 NLRB No. 146, slip op. at 6. The Union won the election, held on September 2, 2010. *Id.* At that time, about 24-27 employees of the total unit of approximately 73 were LPNs. *1621 Route 21 Operating Co., LLC, d/b/a Somerset Valley Rehabilitation and Nursing Center*, 357 NLRB No. 71, slip op. at 1 (2011); *Somerset I*, 358 NLRB No. 146, slip op. at 6; Tr. 95, 105. Respondent filed objections to the conduct of the election, and an administrative hearing was held in October and November 2010. *Somerset I*, 358 NLRB No. 146, slip op. at 6. The Hearing Officer overruled Respondent's objections in a Report and Recommendations on Objections, which issued on January 19, 2011. *Id.* Respondent filed timely exceptions to the Hearing Officer's Report with the Board. *Id.*

2. Summer and Fall 2010: Respondent Commits Unfair Labor Practices in Response to the Petition and the Election

a. Respondent unlawfully interrogates employees

In August 2010, just prior to the election, Respondent's managers, including Hutchens and Illis, unlawfully interrogated employees about their Union sympathies and the sympathies of their co-workers and asked them to vote no in the election. *Id.* at 8-10, 25, 26. Administrator Illis asked employee Lynette Tyler how she would vote in the election. *Id.* at 8, 9, 25, 26. Illis also instructed Tyler to find out how her co-workers planned to vote and to convince them to vote no. *Id.* Hutchens also instructed managers to ask employees how they would vote and the reasons for their choices, and then report the information back to him. *Id.*

b. Respondent unlawfully solicits employees' complaints and grievances and promises increased benefits and improved terms and conditions of employment

Following the filing of the petition, Illis directed that the planned schedule changes be withdrawn. *Id.* at 8. At various meetings with employees, Illis and Hutchens promised to "fix" things at the facility. *Id.* Illis also told Tyler that she would try to relieve her of some responsibilities, and only a week later one of Tyler's tasks was removed. *Id.* The Board found that all of these actions were unlawful. *Id.* at 1, 25, 26.

c. Respondent unlawfully disciplines and terminates four Union supporters, accelerates the resignation date of a fifth Union supporter, and reduces the hours of per diem employees

Licensed practical nurses Shannon Napolitano, Jillian Jacques and Sheena Claudio were three leading Union supporters. *Id.* at 1-3, 27. On September 13, 2011, only 11 days after the election, Respondent unlawfully issued discipline to Jacques, Claudio and Napolitano for attendance issues. *Id.* 1, 2, 27, 28. Respondent further unlawfully disciplined and then discharged Napolitano, Claudio and Jacques for performance issues. *Id.* at 2, 28-30. Valerie Wells, the facility's staffing coordinator, received written warnings on September 15, 16 and 20,

2010, and she was discharged on September 21. *Id.* at 30. The Board found each action unlawful. *Id.* at 1, 30. When certified nursing assistant Lynette Tyler gave a two-week notice of her resignation on September 9, 2010, Illis told her to leave immediately. *Id.* at 30. The Board found Illis' accelerated resignation of Tyler to be unlawful. *Id.* at 1, 30.

Prior to the election, Respondent employed at least five per diem workers, who, despite their titles, worked regular schedules. *Id.* at 21-24, 30, 31. After the election, Respondent removed these workers from the schedule and refused to offer them any work. *Id.* The Board found this action unlawful. *Id.* at 3.

3. April 2011: Litigation Begins Regarding Respondent's Pre- and Post-Election Unfair Labor Practices

In the spring of 2011, the Region issued the Consolidated Complaint regarding the unfair labor practices listed above.[7] *Id.* at 4. The administrative hearing took place between April 27 and June 28. *Id.*

In April 2011, before the administrative hearing opened, the Region also filed a Petition in the United States District Court for the District of New Jersey seeking a temporary injunction pursuant to Section 10(j) of the Act. *Lightner v. 1621 Route 22 West Operating Co., LLC, d/b/a Somerset Valley Rehabilitation and Nursing Center*, 2012 WL 1344731 (D.N.J. April 16 2012). The Region sought, *inter alia*, reinstatement of the three discharged LPNs and the staffing coordinator, as well as restoration of hours to the per diem employees. *Id*. Discovery in the federal court action took place over the summer and fall of 2011. *Id.*, slip op. at *4-5. A hearing before United States District Court Judge Mary J. Cooper was held during eight days between November 30, 2011 and February 9, 2012 and oral argument took place on March 13 and 23, 2012. *Id.*, slip op. at *4-5.

[7] An Order Consolidating Cases and Amended Consolidated Complaint was issued on April 6, 2011. *Somerset I*, 358 NLRB No. 146, slip op. at 4.

4. May 2011: Respondent Decides to Eliminate the LPN Job Classification

a. Manzi makes the decision

In May 2011, Dannette Manzi, Executive Vice President of Operations for Healthbridge and Care One, decided to eliminate the LPN job classification and replace the LPNs with RNs. [8] Tr. 540. Manzi testified that she directed the facility to eliminate LPNs by attrition, meaning that as LPNs resigned or were discharged, they were to be replaced with RNs. Tr. 542.

Manzi made this decision after consultation with Hutchens; she did not consult with the administrator at the time, Doreen Illis. Tr. 514, 549. Illis found out about the decision from Hutchens, who did not explain to her the basis for the decision. Tr. 514.

Manzi did not consult the Union prior to making this decision, give the Union any notice of the decision or opportunity to bargain, or receive the Union's consent.[9] Tr. 95-96. Manzi acknowledged that the Union was the collective-bargaining representative of the LPNs at the time she made the decision to eliminate that classification. Tr. 543. At hearing, Respondent stipulated that CareOne has not eliminated LPNs or moved to an all-RN model of providing care for its sub-acute patients at any of its other 28 facilities in New Jersey. Tr. 16-18.

b. Respondent's stated reasons for eliminating the LPN classification

Manzi testified that she decided to remove the LPNs from Somerset for two reasons. First, it was determined that Somerset would provide only sub-acute care and cease providing long-term care, in order to differentiate the facility from its competitors. Tr. 541. Therefore, according to Manzi, RNs were needed to provide care at all times, because RNs have superior assessment skills, which are needed to handle sub-acute patients. Tr. 541-542. Manzi added that

[8] In its Answer, Respondent admits that beginning in May 2011 it began the process of converting the facility to an all-RN model that does not employ LPNs. GC Ex 1(x), ¶¶ 6(a) and 7(a).
[9] In its Answer, Respondent admits that it took this action without giving the Union prior notice, affording the Union an opportunity to engage in collective-bargaining, or obtaining the Union's consent. GC Ex 1(x), ¶¶ 6(c) and 7(c).

a second factor in the decision to eliminate the LPNs was her concern with the "inability to sustain some of the systems," specifically medication administration. Tr. 542. After prompting by Respondent's attorney, she mentioned that the December 2010 survey indicated that the facility could not maintain the daily operations consistently. Tr. 542.

(1) Respondent's patients

Despite Manzi's assertion that Somerset was planning to care for only sub-acute patients, Somerset's patient mix has not changed. Grasso and Manzi both testified that Somerset has cared for between four and six long-term care residents for many years. Tr. 285, 545-546; CP Ex 1. Manzi further admitted that these residents still remain at the facility. Tr. 545-546. Additionally, there is no evidence that the acuity level of Respondent's sub-acute patients increased at any time before the decision to eliminate the LPNs was made, or that it has increased since then. In fact, none of Respondent's witnesses asserted that Somerset was seeking, or planned to seek, sub-acute residents who needed a higher level of care than is currently provided. Grasso testified that at some point after the facility moved to an all-RN model, it began participating in a project to reduce hospital readmissions for patients with congestive heart failure and diabetes.[10] Tr. 276. Respondent has always cared for patients with these diseases, and Respondent's documentation shows that since 2010, Respondent has admitted fewer patients with chronic heart failure.[11] GC Ex 14, Tr. 121.

Grasso testified that since August 2011, Somerset has only marketed itself as a sub-acute center. Tr. 284, 285. Grasso referred to a flyer entitled "Dedicated Sub-Acute Care," which promotes sub-acute care at Somerset. R Ex 7, Tr. 287. Although Grasso testified that the facility currently uses this flyer, she did not know how it was distributed. Tr. 287. She also testified that

[10] Contrary to Respondent's assertion at page 21 of its brief, there is no evidence that Respondent could not participate in such a project when LPNs provided most of the nursing care at its facility.
[11] Using the chart entitled "Diagnoses on Initial Admission to Facility," Respondent had 27 chronic heart failure patients in 2010, 3 in 2011, and 3 thus far in 2012. GC Ex 14.

the flyer was produced before August 2011, when she began working at Somerset. Tr. 287. On cross-examination, Grasso further acknowledged that Somerset uses other marketing brochures, but she did not testify about their content. Tr. 287. And, fully contradicting herself, Grasso additionally admitted that on its website, Somerset currently advertises that its services include long-term care, medical specialization, respite care and sub-acute rehabilitation. GC Ex 12; Tr. 312. In contrast, Illis testified that Somerset used a brochure that advertised both sub-acute services and long-term care services during the year she worked at Somerset. Tr. 440, 441. Since Illis worked at Somerset through August 2011, this brochure was used at least four months after the alleged decision was made to move to an all-subacute facility and eliminate the LPNs. Tr. 440, 441.

(2) The December 2009 and December 2010 surveys and Somerset's reactions to them

The NJDHSS conducts annual surveys of every nursing home to ensure that they comply with state and federal requirements. *Somerset I*, 358 NLRB No. 146, slip op. at 7; Tr. 421-422. An annual recertification survey for Somerset was completed on December 1, 2009. R Ex 9. Somerset was cited for six deficiencies in this survey, and two were G-level deficiencies, which indicate that a patient received actual harm. Tr. 422, GC Ex 9. These deficiencies were due to the facility's failure to provide a comprehensive care plan for a patient with excruciating pain due to rectal cancer. GC Ex 9. A review of the 2009 survey shows that the facility also received three D-level deficiencies and one C-level deficiency. These lower-level deficiencies were due to the facility's failure to care for a resident's catheter; failure to provide condiments on meal trays; failure to properly ensure that the pharmacy provided medication "stat"; failure to properly secure the medication cart; and failure to comment on the use of an antipsychotic medication for a patient who did not have behavioral symptoms. GC Ex 9. Somerset corrected all six deficiencies and submitted a plan of correction. *Somerset I,* 358 NLRB No. 146, slip op. at 7.

NJDHSS conducted a re-survey in January 2010 and found that Respondent was in substantial compliance, although it recommended that Respondent receive a monetary penalty of $200 per day for 27 days. *Id.*

Administrator Heedles was replaced by Illis in August 2010. Tr. 476. Hutchens testified that Heedles was replaced due to his concerns about the results of the December 2009 survey as well as concerns about Heedles' administrative abilities, specifically in the areas of scheduling and staffing. *Somerset I,* 358 NLRB No. 146, slip op. at 7.

Illis testified that she first read the December 2009 survey within the first week or two of her employment at Somerset. Tr. 476. Thereafter, by September or October 2010, Illis came to the conclusion that LPNs were not able to care for Somerset's patients. Tr. 423, 476-477. Illis did not remember discussing this conclusion with anyone. Tr. 477. She testified that she did, however, take steps to address the LPNs' performance, specifically through education and then discipline. Tr. 423, 508. Illis did not explain the type of education she provided to her staff or provide any examples of discipline, but she did admit that this discipline began within a week or two after the Union election on September 2, 2010. Tr. 508. The discipline referenced by Illis is the same discipline that the Board found unlawful in *Somerset I.*

NJDHSS conducted its next annual recertification survey of Somerset in December 2010. R Ex 10. This time, Respondent did not receive any G-level deficiencies, but the overall number of deficiencies was greater than the previous year. R Ex 10; Tr. 424-428. The most severe deficiency, an F-level, indicated widespread findings that constituted no actual harm to patients, but a potential for more than minimal harm that was not in immediate jeopardy. R Ex 10. There is no evidence that additional remedies, such as a fine, were imposed on Respondent as a result of the December 2010 survey, as they had been proposed the previous year.

Illis testified that this survey was unacceptable due to the quantity of the deficiencies, rather than the type of deficiencies. Illis did not explain which deficiencies caused her specific concern, which is significant since a number of these deficiencies were unrelated to nursing care.[12] R Ex 10; Tr. 242, 478-481. Illis testified that she met with the staff in the end of December 2010 to review the survey results and inform the staff of their severity. Tr. 425-426, 428; R Ex 12.

Manzi did not explain the basis of her determination that the survey results indicated that the facility's nurses could not maintain its "systems," nor did she explain why medication errors were a specific concern. Even though Manzi was concerned about medication errors at Somerset, she did not know whether or not any RNs had been disciplined for committing them. Tr. 549. She did not even inquire into whether or not RNs were performing better than LPNs at Somerset. Tr. 549. Athough Illis initially testified that she believed the LPNs were incapable of providing sufficient care for the facility's patients, on cross-examination she admitted that RNs as well as LPNs made documentation and nursing errors. Tr. 476, 511. She added that in her opinion the entire nursing staff, both RNs and LPNs, had been performing inadequately. Tr. 511.

Even though Manzi testified that she decided to eliminate Somerset's LPNs after they had tried teaching, mentoring and training, there is no evidence of any such efforts after the December 2010 survey.[13] Tr. 542. Illis' December 2010 meetings regarding the results of the December 2010 survey represent the sole efforts of Respondent to increase the quality of care at that time.

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[12] As the ALJ noted, in the *Somerset I* unfair labor practice hearing, Hutchens testified that it was common for facilities to receive deficiencies in the annual survey. ALJD 18:26-28; *Somerset I*, 358 NLRB No. 146, slip op. at 7; GC Ex 6, p. 1628.

[13] Respondent did not except to the ALJ's finding that the only training and education given to the LPNs after the December 2010 Survey was a series of meetings with the staff during which she told them about the Survey results.

Grasso and Manzi testified that, in general, they believe RNs are able to provide better care than LPNs. Tr. 273-292, 383, 586. Grasso opined that RNs, due to their education, think conceptually, while LPNs are task-oriented. Tr. 292. Grasso thought that RNs were able to provide more complex care to Somerset's sub-acute patients than LPNs, due to licensing restrictions. Tr. 382. The record reflects five tasks that LPNs at Respondent's facility could not perform: calling the time of death, mixing total parenteral nutrition, creating a care plan, completing an assessment, and administering an IV push.[14] Tr. 138, 139, 145, 150, 190. Manzi explained that RNs were needed because they have superior assessment skills, but she did not explain the nature of those skills or how Somerset's patients would benefit from them. Tr. 541-542. In fact, neither Grasso nor Manzi explained how Somerset's patients would benefit from having RNs, rather than LPNs, provide their nursing care.[15]

Dr. Anthony Frisoli, a family practitioner and an Associate Director at Somerset, testified that Somerset's "all-RN model" was one of the reasons he became affiliated with Somerset. Tr. 562. On direct examination, Dr. Frisoli testified that there is a trend in the industry to move to an all-RN staff, citing Somerset Medical Center and Bridgeway Nursing Home. On cross-examination, he acknowledged that this trend is limited to acute-care hospitals and does not

[14] Grasso also testified that LPNs are not licensed to complete certain types of assessments, which she differentiated from the assessments described by D'Ovidio and Mangal. Tr. 274. The assessment discussed by Grasso seems to be analogous to a care plan, which is a comprehensive plan of the care a patient will receive during his/her stay at the facility. Tr. 200-201, 274. Care plans are created shortly after a patient is admitted. Care plans are not created by a single individual, but by interdisciplinary teams, made up of representatives of several disciplines within the facility. Tr. 200-201.

[15] Respondent refers to the testimony of Beth Bell, its expert in the *Somerset I* injunction proceeding and to the testimony of Kathleen Martin, the Board's expert in that proceeding, as supporting its argument that RNs are better capable of providing care for Somerset's sub-acute patients. Neither witness's testimony supports this conclusion. Bell testified that in general, RNs would provide better care than LPNs, because they have more education. R Ex 20. Bell referred to a trend of using RNs instead of LPNs in acute care, but she did not testify that RNs are better suited to care for Respondent's patients or sub-acute patients in general. R Ex 20, p. 170; R Ex 20, tab 3, p. 125-127. Similarly, Martin also testified that RNs generally provide better care. R Ex 21, p. 120. Martin did not testify that it was in the public interest for nursing homes to have an all-RN staff, nor did she testify that it was in the public interest for Somerset to have an all-RN staff. R Ex 21, p. 201-204.

extend to long-term care facilities.[16] Tr. 581. Dr. Frisoli also admitted that his direct knowledge regarding the hiring of LPNs and RNs at nursing homes is limited to two facilities, Somerset and Bridgeway. Tr. 583. Dr. Frisoli further acknowledged that Bridgeway still employs LPNs to care for its long-term care patients.[17] Tr. 570. Dr. Frisoli testified that he had plans to set in place new protocols at Somerset for chronic heart disease and diabetes patients, which other nursing homes also did not have. Tr. 573-574. Dr. Frisoli said that these protocols were an attempt by the industry to standardized care. Tr. 574-575.

Dr. Buch is a vascular surgeon who is Board-certified in four areas: general surgery, vascular surgery, vascular technology and wound care. Tr. 589. Dr. Buch, who refers sub-acute patients to Bridgeway, was both unaware and unconcerned that Bridgeway used only RNs to care for its sub-acute patients. Tr. 596. Dr. Buch testified, in contrast to Dr. Frisoli, that the quality of care at a facility does not depend on whether a nurse has an RN or LPN degree. Tr. 596-597. He said that a degree does not translate into experience, and that "experience wins out over degree every time." Tr. 597.

The record evidence shows that Respondent continued to employ RN Ensendemir Gulhan (aka "Rose") in the spring and summer of 2011, even after she committed several medication errors. CP Ex 2; Tr. 361- 365, 182-187. Gulhan was hired in March 2011. GC Ex 7. On May 4, 2011, Gulhan received a documented verbal warning, for failing to complete admission papers. CP Ex 2; Tr. 361-365. Merely two weeks later, Gulhan received a written warning, for eight separate medication errors.[18] CP Ex 2; Tr. 361-365. D'Ovidio testified that she witnessed Gulhan administer a dose of morphine to a patient that was ten times larger than the dose prescribed. Tr.

[16] Somerset Medical Center is a hospital. Tr. 570.
[17] Bridgeway separates its long-term care residents from its sub-acute patients. Out of a total of 130 beds at Brideway, only 23 are reserved for sub-acute patients. Tr. 570.
[18] On January 19, 2012, Gulhan was suspended pending investigation for failing to follow policy. CP Ex 2. The record contains no explanation of the reason for her suspension. However, according to Respondent's records, Gulhan remains employed at Somerset. GC Ex 7.

182-187. D'Ovidio explained that this medication error was made because Gulhan gave her patient medicine that was borrowed from another patient, without realizing that the medications were not identical. Tr. 182-187. D'Ovidio said that she immediately reported this mistake to Gulhan herself, who was the acting charge nurse, and to Grasso. Tr. 185, 186, 187. Grasso denied receiving this report from D'Ovidio. Tr. 282.

Grasso testified that continuity of care is very important in maintaining quality care at the facility, and that consequently, turnover in nursing staff is not desirable. Tr. 507. Likewise, Illis and Dr. Frisoli agreed that significant changeover in nursing management will adversely affect the consistency and quality of care provided. Tr. 374, 375, 578.

5. May–October 2011: Respondent Replaces Bargaining Unit LPNs with Non-Bargaining Unit RNs

During the first two months after Manzi decided to replace Somerset's LPNs with RNs, Respondent used an extraordinary number of temporary RNs from staffing agencies. Tr. 123, 439, 527. Illis testified that the facility had only one requirement for these agency nurses: that they hold an RN degree. Tr. 527. They were not required to have any experience with sub-acute patients. Tr. 527. The facility management did not interview the agency workers or review their resumes. Tr. 527. Mangal testified that the agency nurses did not have experience with certain treatments, such as IV therapy, caring for patients on dialysis and performing wound vacs. Tr. 124-125. D'Ovidio felt that the agency nurses were not responsible or committed to the care of Somerset's patients. Tr. 165.

By the summer of 2011, Respondent had hired permanent RNs to fill the staff nurse positions that the LPNs had vacated. Tr. 124, 165. It is undisputed that the staff nurse RNs performed the same duties and had the same responsibilities as the staff nurse LPNs before them. Tr. 114, 137-139, 166. In fact, the job description given to the newly-hired RNs is virtually identical to the job description that had been given to the LPNs. GC Ex 9 and 10.

Mangal and D'Ovidio testified that very few of the newly-hired RNs had nursing experience prior to their employment at Somerset. Tr. 125-128, 167. Respondent did not require that the newly-hired RNs hold bachelor degrees, and in fact most hold only associates degrees. Tr. 125-128, 454. Mangal and D'Ovidio, the two remaining LPNs at Somerset in the summer of 2011, testified that they played a large role in training the newly-hired RNs. Tr. 125-128, 167. Mangal trained Rose, Irena, Amy, Rebecca, Puja, Danielle. Tr. 125-126. She taught Amy how to distribute medication, change dressings, start an IV line, perform wound vacs, perform pleur-evac, and perform dialysis. Tr. 125-126. Mangal taught Irena how to distribute medication, disconnect a patient from dialysis, start an IV line, and perform a wound vac. Tr. 126. She taught Puja and Danielle how to distribute medication, start an IV line and perform treatments, such as wound vacs. Tr. 126-127. She taught Rebecca how to distribute medication and start an IV line. Tr. 127. She taught Rose how to distribute medication, insert an IV line, perform pleur-evac, perform dialysis, and suction a trach patient. Tr. 127-128. D'Ovidio trained Irena for six weeks during June and July 2011. Tr. 167. This training was extensive, and it included various duties such as counting narcotics on the medication cart, performing admissions, giving injections, inserting g-tubes, and caring for patients with tracheotomies. Tr. 167. D'Ovidio also taught Amy Bergfeld how to handle IVs. Tr. 168. Illis, in contrast, denied that LPNs trained RNs; she testified that the LPNs merely "oriented" the RNs to the unit, by showing them where things were kept. Tr. 454.

DON Engram completed a form entitled "2011 objectives" in June 2011, and she revised this form on July 19, 2011. R Ex 14. Illis testified that she was required to have the form completed for the "care rewards process," which is her bonus program. Tr. 450-451. Illis directed Engram to fill out the form for her, and as a result, Illis' knowledge of the information on the form was limited. Tr. 443-452, 481-500. The form lists two operational measures that needed

improvement: acute discharges and "level one basic requirements, center level certification." R Ex 14. Illis testified that she did not know what Engram meant by the latter. Tr. 498, 499. The form also lists the actions that Engram planned to take to attack the root causes of the problems, and how her progress was being evaluated. R Ex 14.

In the acute discharges row of the form, Engram identified a starting readmission rate of 32% and she noted that by July 19, the rate had declined to 12%. R Ex 14. Illis testified that she did not know how Engram came up with those rates or what time period the rates represented. Tr. 484. On the form, Engram identified five issues that lead to a high readmission rate: delay in implementation of Interact II, "lack of RNs all shifts to do comprehensive assessments", ADON/FE, unit manager, census and advance care planning. R Ex 14. Interact II was a program geared at monitoring patients' conditions and teaching nurses to communicate effectively with physicians. Tr. 486. Somerset was directed to implement this program by Healthbridge in the spring of 2011, but Somerset's implementation was delayed. Tr. 487, 488. Illis initially testified that "lack of RNs all shifts to do comprehensive assessments" meant that the facility did not have RNs assigned to all shifts, but after further questioning she stated that she did not understand the meaning of the statement. Tr. 488-489. Illis testified that ADON/FE was listed as a cause of the problems with acute discharges because both the ADON and the FE, the facility educator, were weak managers. Tr. 490. Similarly, the unit manager was listed as a cause because that position had been vacant. Tr. 490. Illis further testified that "advanced care planning," another root cause of the high readmissions rate, meant that the facility needed to improve patients' care plans. Tr. 491. Illis testified that Engram's plan was to educate the nurses, who at this time were mostly RNs, regarding care plans so that they could become more familiar and comfortable with them. Tr. 497. Illis also said that the facility had not been consistently holding 72-hour care plan

meetings, which ensure that the initial care plans for newly-admitted patients are created within 72 hours. Tr. 496-497.

6. August 2011: Respondent Informs Mangal That She Needs to Enroll in RN School

By August 2011, Respondent employed only two remaining full-time LPNs: D'Ovidio and Mangal. Tr. 129, 174-175, 264. The first week of August 2011, Mangal told Ruth Roper-Brown, the DON at the time, that she had a friend who was interested in working at Somerset. Tr. 128-129. Roper-Brown told Mangal that Somerset was no longer hiring LPNs; it would only hire RNs with bachelor degrees. Tr. 129.

It is undisputed that during the second week of August 2011, administrator Grasso summoned Mangal to her office and told her that she needed to enroll in an RN program. Tr. 129-130, 265. Grasso testified that she said, "You're the only LPN left … as a requirement for you to stay, you need to enroll in an RN program in the fall semester." Tr. 265. According to Mangal, Grasso said that she needed to enroll as soon as possible; Grasso did not require that she start the fall semester. Tr. 129-130.

The evening after this conversation, Mangal called the Raritan Valley Community College and was informed that it was too late for her to enroll for the fall semester, but she could enroll for the spring semester, which would begin in January 2012. Tr. 129-130. Mangal also learned that she needed to take four prerequisite classes prior to beginning the RN program. Tr. 130-131. The school representative also explained the lengthy process for applying and enrolling, which involved registering on-line, completing a registration package that would be mailed to her and taking entrance examinations.[19] Tr. 130-131.

[19] D'Ovidio explained that the process for applying to enroll into an RN program takes about four weeks. Tr. 178, 179.

Mangal provided unrebutted testimony that at the end of August 2011, DON Roper-Brown asked if she had enrolled in school. Tr. 131-132. Mangal explained that it had been too late to enroll in the fall semester, but she would enroll in the spring semester, when she would start her prerequisite courses. Tr. 131-132. Roper-Brown did not respond. Tr. 131-132.

7. August 18, 2011: Respondent Terminates Irene D'Ovidio

Irene D'Ovidio began working for Respondent in August 2002, as a staff nurse.[20] Tr. 151. In September 2006, D'Ovidio took on two positions, wound care nurse and minimum data set ("MDS") assistant, spending half of her time in each. Tr. 159. As MDS assistant, D'Ovidio helped develop the care plans for patients when they were admitted. Tr. 161. In February 2009, D'Ovidio received a national certification to provide wound care. Tr. 160. To receive this certification, D'Ovidio had to complete two years of hands-on experience, attend a wound care course and pass a certification exam. Tr. 160. In the wound care nurse position, D'Ovidio took over treating the more complicated wounds in the facility. Tr. 160. She visited each of her patients daily and she also saw all newly-admitted patients to evaluate their existing wounds and their potential for developing wounds. Tr. 160-161.

After D'Ovidio became certified in wound care, the facility created a brochure to market its wound care program. GC Ex 5; Tr. 173-174, 190-191. The brochure features pictures and descriptions of the three professionals administering the program, including D'Ovidio and Dr. Edward Buch. GC Ex 5. This brochure was distributed to local hospitals, and it was posted at Somerset Medical Center as recently as January 2012. Tr. 173-174, 190-191.

Under the wound care program, Dr. Buch made weekly rounds at Somerset with D'Ovidio, to treat all patients who had wounds and occasionally patients with surgical problems. Tr. 590, 592, 593. Dr. Buch testified that during the time he and D'Ovidio treated the wound

[20] D'Ovidio provided unrebutted testimony regarding her employment and termination.

patients, they received excellent outcomes. Tr. 593. As a result, Somerset's reputation for providing quality care increased. Tr. 593.

In January 2011, D'Ovidio was asked to take over the charge nurse position on her shift. Tr. 162. As charge nurse, D'Ovidio managed the nurse's desk, oversaw the staff nurses, and worked as a liaison between the facility and its laboratories and doctors.[21] Tr. 163. To accommodate this new role, D'Ovidio's MDS assistant duties were taken away. Tr. 162. She retained her wound care nurse duties, but the amount of time spent on wound care was reduced to about one to two hours each morning. Tr. 162-163.

In the spring of 2011, Engram gave D'Ovidio a written verbal warning for failing to hand in wound care documentation in a timely manner. Tr. 176. D'Ovidio contested the discipline, asserting that due to her numerous and changing job duties, she did not have time to complete all of her work. Tr. 177. D'Ovidio, having noticed that most of her LPN co-workers were no longer employed, told Engram that she thought she was being set up. Tr. 177, 193. In response, Engram told D'Ovidio to protect herself. Tr. 177.

On May 31, 2011, Acting DON Jackie Engram told D'Ovidio that the position of wound care nurse was being eliminated, because the facility no longer needed a full-time wound care nurse. Tr. 168. Engram ignored the fact that D'Ovidio did not work as a full-time wound care nurse, nor had she ever worked in that capacity. Tr. 168-169. Engram offered D'Ovidio a choice of working as a full-time staff nurse or as a part-time wound care nurse, with a schedule of only 16 hours per week. GC Ex 3; Tr. 168. D'Ovidio chose the full-time staff nurse position, which she began on July 11, 2011. GC Ex 4, Tr. 171-172.

[21] Jillian Jacques also worked as a charge nurse until her termination on February 11, 2011. *Somerset I*, 358 NLRB No. 46, slip op. at 2. *In Somerset I*, the Board, citing the testimony of Respondent's witnesses, found that being selected as charge nurse was "an acknowledgement of [Jacques'] experience and expertise," based on the testimony of Respondent's witnesses that only high performing and dependable nurses were selected for the position. *Id.*

After D'Ovidio was removed from wound care nurse duty, a succession of different nurses replaced her, none of whom were certified to provide wound care. Tr. 172, 189. One of the temporary replacements was Michelle Conrad, an RN who initially had been hired as a unit manager. Tr. 172-173. Dr. Buch testified that beginning in the winter of 2011, after Somerset reduced the number of hours D'Ovidio was allowed to perform wound care, he worked with nurses who did not have the same knowledge or expertise as D'Ovidio. Tr. 591. As a result, the quality of care declined. Tr. 591. He added that after D'Ovidio was completely removed from wound care duty, the nurses with whom he worked had no experience in major wounds, resulting in an even further decline in the quality of wound care at the facility. Tr. 591.

On August 18, 2011, D'Ovidio was terminated. GC Ex 18; Tr. 175-176. D'Ovidio attended a five-minute meeting with Grasso and Illis, during which Illis told D'Ovidio that the facility was moving in a different direction, and D'Ovidio was not part of the plan. Tr. 175-176.

8. August and September 2011: The Union is Certified and Respondent Refuses to Bargain with the Union

On August 26, 2011, the Board certified the Union as the exclusive collective-bargaining representative of the following unit of Respondent's employees:

> All full-time and regular part-time and per diem non-professional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by the Employer at its Bound Brook, New Jersey location, but excluding all office clerical employees, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefits coordinators, all other professional employees, guards and supervisors as defined in the Act.

1621 Route 21 Operating Co., LLC, d/b/a Somerset Valley Rehabilitation and Nursing Center, 357 NLRB No. 71 (2011).

Shortly thereafter, the Union requested to bargain, but Respondent refused. *1621 Route 21 Operating Co., LLC, d/b/a Somerset Valley Rehabilitation and Nursing Center*, 357 NLRB

No. 153 (2011). On September 13, 2011, the Union filed a charge alleging that Respondent violated Section 8(a)(5) of the Act by failing and refusing to bargain, and a Complaint issued on October 18, 2011. *Id.* at 1. On November 10, 2011 the Region filed a motion for summary judgment. *Id.* On December 30, 2011, the Board issued a Decision granting the Region's motion for summary judgment. *Id.* Respondent filed a petition to review the Board's Decision, challenging the Union's certification with the Third Circuit Court of Appeals.

9. October 16, 2011: Respondent Terminates Maharanie Mangal

Mangal testified that in the beginning of October 2011, Roper-Brown told her to call the College Network to find out about their RN program. Tr. 133. That evening, Mangal spoke to a College Network representative, who explained that the program provided only on-line instruction. Tr. 134. Mangal decided that the College Network's program was inappropriate for her, because she needed in-person instruction and its cost was excessive. Tr. 134.

Mangal testified that a couple of days later, Jason Hutchens asked her if she had enrolled in RN school. Tr. 133-134. As with Roper-Brown, Mangal replied since that it had been too late for her to enroll in the fall semester, she would have to start school in January. Tr. 133. She added that she needed to complete prerequisite courses prior to enrolling in an RN program. Tr. 133, Hutchens responded, "okay." Tr. 133. Grasso testified that in October, she also asked Mangal if she had enrolled in an RN program, but Grasso did not testify about Mangal's response to this question. Tr. 267. Mangal did not testify that such a conversation took place. Tr. 129-135.

At the end of Mangal's shift on October 17, 2011, Grasso informed Mangal that she was terminated because she had not enrolled in an RN program. Tr. 135, 267. Mangal tried to explain to Grasso that she had been unable to enroll in the fall semester but would start in January, but Grasso would not listen. Tr. 135. In contrast, Grasso testified that Mangal had never explained to

her the difficulties she encountered enrolling in school. Tr. 265. Grasso completed a Terminal Personal Action Form for Mangal, and on it she wrote: "Employee advised on 8/19/11 that job requirement was for her to enroll in an RN program in September. As of this date, she has failed to do so." Tr. 266-267, GC Ex 8.

10. November 2011: Respondent Notifies the Union that it Eliminated the LPN Position

In November 2011, days before the evidentiary hearing began in the *Somerset I* injunction proceeding, Respondent filed a declaration with the district court stating that it had eliminated the LPN position. *Lightner v. 1621 Route 22 West Operating Co., LLC, d/b/a Somerset Valley Rehabilitation and Nursing Center*, 2012 WL 1344731, slip op. at *3, fn 7. Respondent provided no prior notice of this fact to the Union. Tr. 96. The eight-day hearing regarding the injunction proceeding took place shortly thereafter, from November 30, 2011 through February 9, 2012. *Lightner v. 1621 Route 22 West Operating Co., LLC, d/b/a Somerset Valley Rehabilitation and Nursing Center*, 2012 WL 1344731, slip op. at *5, 75.[22]

11. November 2011 to the Present: Respondent's Quality of Care Since the Elimination of the LPN Job Classification Has Not Improved

There is no evidence that the quality of care at Somerset has increased since the facility's LPNs have been replaced with RNs. Indeed, none of Respondents' witnesses testified that the RNs at Somerset were providing a better quality of care than the LPNs had provided. In contrast, Dr. Buch found that the quality of care at Somerset had decreased so significantly that in September 2011, he severed his affiliation with the facility. As stated above, he noticed the quality of care begin to decline when Somerset removed its certified wound care nurse, D'Ovidio, from wound care duties and replaced her with nurses who had no previous experience

[22] On November 21, 2011, ALJ Davis issued the decision in *Somerset I*, finding that Respondent had violated the Act as alleged. On September 26, 2012, the Board issued its decision affirming all of the ALJ's findings, with some modifications that did not alter the ALJ's conclusions that Respondent had violated the Act as alleged. *Somerset I*, 358 NLRB No. 146.

in wound care. Tr. 591-592. Dr. Buch testified that in September 2011, he encountered the last straw, when the nurse who was assigned to do rounds with him could not even identify which patients had wounds. Tr. 593. Dr. Buch testified that the care at this time was so poor that he could no longer associate himself with the facility. Tr. 593. Dr. Buch reported his dissatisfaction with the quality of care to both Illis and Grasso. Tr. 592. Grasso acknowledged that Dr. Buch chose to disaffiliate with the facility due to concerns about some of the changes that had taken place. Tr. 340-341.

As a result of his concern with Respondent's quality of care, Dr. Buch has stopped referring patients to Somerset, ending his former practice of referring between 20-40 patients per year. Tr. 594-595. Dr. Buch further testified that the reputation of the facility has deteriorated over the past year as well. Tr. 594-595. He said that between September and November 2011, other physicians approached him and commented that they had seen a decline in the quality of care at Somerset, specifically in wound care. Tr. 594-595.

Grasso and Dr. Frisoli testified that they are concerned about the facility's readmission rates, due to regulations that will take effect in the fall of 2012. Tr. 270-272. Under the new healthcare regulations, if a patient is admitted to a hospital for one of three diagnoses (congestive heart failure, pneumonia, or myocardial infarction), then discharged and readmitted to the hospital within thirty days of that discharge, the hospital will incur a financial penalty. Tr. 271. Grasso testified that hospitals are seeking to partner with nursing homes that have low readmissions rates. Tr. 171-172.

A reduction in readmissions rates, however, is not only Somerset's concern, but the concern of all nursing homes in New Jersey. CareOne introduced and distributed to its facilities the Acute Transfer Alternative Program ("ATAP"), a company-wide policy aimed at reducing readmissions to hospitals. GC Ex 16 and 17; Tr. 341-342, 528-529. This policy was initially

implemented in July 2011, and it is still in effect. Tr. 341-342. Illis testified that she and Engram participated in weekly conference calls about acute discharges with Jeff Slocum, whom she thought worked in quality assurance for Healthbridge. Tr. 494-495. Illis said that Slocum held a single conference call each week, and different CareOne or Healthbridge nursing homes would join and leave the call in succession. Tr. 495-496.

Grasso testified that readmissions rates "went up a little bit in December" 2011. Tr. 390. She also testified that readmissions rates declined after January 2012 with the lowest rate in a year reported in April 2012. Tr. 389-390. Grasso then stated that this decline was due to the facility's re-implementation of the ATAP program. Tr. 389-390. Grasso's general assertion that readmissions rates declined after January 2011 is not supported by any reliable documentary evidence. Respondent initially offered into evidence and then withdrew R-8, which Grasso identified as representing the facility's readmissions rate. Tr. 383-390, 414. In its brief, Respondent asserts that the facility's readmissions rates can be calculated by dividing the number of acute discharges as shown on GC 14 by the average census as shown on GC 15. Although Grasso did testify that such a calculation can be made in a general sense, she did not testify that GC 14 and GC 15 should be used in making such a calculation. Tr. 316-339. Moreover, GC 14 does not include data for April 2012 and Grasso was unable to confirm that the data for that month on GC 15 was complete. Tr. 337. Grasso also testified that Respondent tracks all hospital admissions, not just those that occurred within 30 days of the patient's admission to Somerset. Tr. 386-387. Readmissions rates, therefore, are not helpful in tracking compliance with the new healthcare regulations.

Kathleen Martin, the Board's expert witness in the *Somerset I* injunction proceeding, testified that there are several variables that affect a facility's readmission rate. R. Ex 21, p. 196. These variables include the patient's medical status, age and condition. *Id.* at 196. Martin added

that physicians are the biggest barrier to lowering readmissions rates, because they are not personally penalized for sending a patient to a hospital. *Id.* In fact, physicians get paid a higher rate when their patients are in the hospital, so their "incentive is – has always been to send the patient to the hospital." *Id.* Martin further testified that she did not know of any research that suggested that an all-RN model will result in lower readmissions rates. *Id.* at 197.

Likewise, Respondent's census numbers have not increased since Somerset ceased using LPNs. GC Ex 15. A comparison of census rates shows that they are extremely variable and can be subject to numerous interpretations. GC Ex 15. In fact, a comparison of the months between January and April in 2010 and the same months in 2012 shows that census rates were consistently higher in 2010.[23] GC Ex 15.

Finally, in December 2011, Somerset received another annual recertification survey, which again found that the facility was not in compliance with federal requirements. GC Ex 18. NJDHSS found that the most severe deficiency included isolated findings that constitute no actual harm with potential for more than minimal harm that is not immediate jeopardy. GC Ex 18. In this survey, Respondent was found to be deficient in failing to thoroughly assess and complete care plans.[24] GC Ex 18. Respondent also received a deficiency for failing to meet professional standards of care during a medication pass. GC Ex. 18. These deficiencies are in areas that Respondent specifically asserted would be improved as a result of RN care, and they therefore show that the type of degree held by nurses providing care at the facility is not the determinative factor in the quality of care provided.

[23] The 2010 rates for January through March, respectively, are: 59.0, 53.6, 58.5 and 58.8. The 2012 rates for January through March, respectively, are 51.7, 59.0, 54.1 and 50.5. GC Ex 15.

[24] As a result of this failure, a resident eloped from the facility and was found at the far end of the parking lot. GC Ex 18.

12. Winter 2012: Respondent Refuses to Grant the Union Access

Via letter dated January 30, 2012, Union executive vice president Milly Silva sent Grasso a letter requesting "access to the work areas in the facility where bargaining unit members work in order to observe work processes and working conditions, including health and safety conditions." GC Ex 2. Respondent did not respond to this request.[25] Tr. 97.

Union vice president Rickey Elliott leads the Union's organizing department for New Jersey and upstate New York. Tr. 91. His responsibilities extend beyond elections and include preparations for bargaining first contracts and attending negotiation sessions. Tr. 91-92. To prepare for bargaining, the Union first distributes a bargaining survey to members of the bargaining unit. Tr. 92. This survey seeks general information from the workers, such as their length of employment, job classification, pay rate, and their opinions of the working conditions in their place of employment. Tr. 92. Elliott testified that Union officials also visit the facilities in preparation for bargaining a first contract. Tr. 92. To this end, the Union requests access from the employer, as it did through Silva's January 30 letter. Tr. 92.

Elliott testified that the Union sought access to Respondent's facility in order to "observe the workers at work to make sure there [were] no health and safety issues, make sure workers had adequate supplies, make sure that they had safe equipment and really just get an overview of … their work day, what it took to get their work done…" Tr. 97.

Nursing home workers typically report to Elliott that they have insufficient supplies, and through visiting the worksite the Union can determine the causes of this problem. Tr. 97. Elliott testified that a lack of adequate supplies can create a health and safety risk. Tr. 97. For example, the Union officials will look for a sufficient number of hoyer lifts, which help move patients from one place to another. Tr. 98. An insufficient number of hoyer lifts poses a health risk,

[25] In its Answer, Respondent admits that it did not respond to this request. GC EX 1(x).

because if they are not available, workers are forced to lift patients on their own, risking back, neck or shoulder injuries. Tr. 98.

Somerset's workers had complained to the Union that the facility was short-staffed. Tr. 98. Elliott therefore intended to investigate this issue, if access had been granted. Tr. 98. Through observing bargaining unit members at work, Elliot would be able to evaluate these complaints. Tr. 98. He would seek to determine what type of patients resided at the facility, their acuity level, how patients are grouped within the facility, if at all, the manner in which patients are housed in the facility, and how and where the patients interacted with each other and the staff. Tr. 98-99. Elliott added that simply walking into a facility provides helpful information, because a strong smell of urine will indicate a staffing problem. Tr. 101. All of this information would aid the Union in fashioning its contract proposals. Tr. 99.

Elliott testified that although it is possible to get some information through bargaining surveys and through speaking with the residents, seeing the staff at work provides context that brings a higher level of understanding. Tr. 99, 103. For example, a worker's report that he cares for ten patients at once, without seeing what type of care the worker is required to give to each patient, is meaningless. Tr. 99.

Access also can allow the Union to observe health and safety problems that bargaining unit members had not been aware of or did not think to report to the Union. Tr. 103. Elliott testified that during a recent visit to a nursing home, he observed old equipment stacked in a hallway in the basement, blocking a fire exit. Tr. 100. The employees had not reported this problem to the Union prior to the visit. Tr. 106. Elliott also observed an employee performing dietary work after having completed some housekeeping, which posed a health and safety risk because the employee had not changed uniforms. Tr. 100-101. It also showed that bargaining unit members were working multiple jobs. Tr. 100.

III. ARGUMENT

A. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT VIOLATED SECTION 8(A)(1) AND (5) OF THE ACT BY ELIMINATING THE LPN JOB CLASSIFICATION AND REMOVING BARGAINING UNIT WORK

Exceptions 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 31, 32, 33, 35, 36, 40

1. Respondent Eliminated the LPN Job Classification Without the Union's Consent

The ALJ found merit to the allegation that Respondent violated Section 8(a)(5) of the Act by unilaterally eliminating the LPN job classification. The Acting General Counsel ("General Counsel") respectfully excepts to the ALJ's legal analysis regarding this determination, and the reasons therefore are set forth in Counsel for the Acting General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge, dated March 5, 2013.

2. Respondent Unilaterally Transferred Bargaining Unit Work Outside the Unit

The General Counsel alternatively alleged that Respondent violated Section 8(a)(5) of the Act by unilaterally transferring bargaining unit work outside of the bargaining unit.[26] The removal of the bargaining unit employees and assignment of their work to employees outside the bargaining unit, without notification to the Union and an opportunity to bargain, is also a violation of Section 8(a)(5). *St. George Warehouse, Inc.*, 341 NLRB 904 (2004), enfd 430 F.3d

[26] If merit is found to the allegation that Respondent unlawfully eliminated the LPN job classification, it is not necessary to address this alternative theory. In its brief, Respondent does not distinguish between the two allegations, but cites only case law regarding the alternate theory that the bargaining unit work was unlawfully removed from the unit. However, the two allegations are separate and distinct. The elimination of a job classification from a bargaining unit is a permissive subject of bargaining, which requires the employer to secure either the Union's consent or a Board order. *United Technologies Corp.*, 292 NLRB 248, 249, n 2, 3 (1989), enfd 884 F.2d 1569 (2d Cir. 1989). In contrast, the removal of bargaining unit work from bargaining unit employees and assignment of that work to non-unit employees is a mandatory subject of bargaining, which requires the employer to give the Union notice and an opportunity to bargain. *Wackenhut Corp.*, 345 NLRB 850, 868-870 (2005); The Board has noted the distinction between these two allegations in several cases. *Wackenhut Corp.*, 345 NLRB at 868-870; *Mt. Sinai Hospital*, 331 NLRB 895, n 2, 907-908 (2000), enfd 8 Fed.Appx. 111 (2d Cir. 2001); *see also Antelope Valley Press*, 311 NLRB 459, 460 (1993).

294 (3d Cir. 2005); *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458 (2004), enfd 414 F.3d 158 (1st Cir. 2005); *Mt. Sinai Hospital*, 331 NLRB 895, n 2, 907 (2000), enfd 8 Fed.Appx. 111 (2d Cir. 2001); *Hampton House*, 317 NLRB 1005, 1005 (1995).

a. Applicable principles

Section 8(a)(5) of the Act and Section 8(d) of the Act require bargaining about "wages, hours, and other terms and conditions of employment." Section 8(d) defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment." In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1994), the Supreme Court found that where there is a mere substitution of one group of workers for another, who perform the same work under the control of the same employer, and there was no alteration of the company's basic operation, there is a statutory obligation to bargain under the Act. *Fibreboard Corp. v. NLRB*, 379 U.S. 203; *see also Mid-State Ready Mix, a Division of Torrington Industries, Inc.*, 307 NLRB 809, 809-810 (1992); *Gaetano & Assoc.*, 344 NLRB 531, 533 (2005), enfd 183 Fed.Appx. 17 (2d Cir. 2006). The Supreme Court noted that requiring an employer to bargain about the substitution of other workers for its own "would not significantly abridge [its] freedom to manage its business." *Fibreboard*, 379 U.S. at 213.

In *First National Maintenance*, 452 U.S. 666 (1981), the Supreme Court further defined the requirements for mandatory bargaining. There, the employer unilaterally closed part of its business, terminating the employees who had worked there, a move that the Court characterized as "a significant change in [the employer's] operation, a change not unlike opening a new line of business or going out of business entirely." 452 U.S. at 688. The Court described three types of managerial decisions. The first type, those decisions that have only an indirect and attenuated

impact on the employment relationship, are not mandatory subjects of bargaining. *Id.* at 677. The second, those decisions that are "almost exclusively 'an aspect of the relationship' between employer and employee, such as layoffs, recalls, and work rules," are mandatory subjects of bargaining. *Id.* The third type of managerial decision, which has a "direct impact on employment," but is focused only on the economic profitability of the enterprise, requires bargaining "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the business." *Id.* at 677, 679.

The Court found that the employer's decision to close part of its business was the third type of managerial decision. *Id.* at 686. In applying the balancing test, the Court found that the employer had no obligation to bargain over this decision. *Id.* The Court noted that the employer's decision amounted to a change in the scope and direction of its enterprise, as it concerned whether or not to keep part of its business, and the employer's only purpose was to reduce economic loss. *Id.* at 677, 687. In limiting the holding, the Court also noted that the employer "had no intention to replace the discharged employees or to move that operation elsewhere." *Id.* at 687. Furthermore, since the union had no control over the specific costs associated with the part of the business that closed, bargaining would have been futile. *Id.* 687-688. The Supreme Court also noted that its decision did not depart from its prior decision in *Fibreboard*, where the Court "implicitly engaged in this analysis," and "where bargaining would have been effective." *Id.* at 679, 688.

Since *First National Maintenance*, the Board has continued to take the position that an employer is relieved from the duty to bargain only when such decisions are focused on the economic profitability of the company, and they constitute a change in the scope and direction of the enterprise that is "akin to the decision whether to be in business at all." *First National Maintenance Corp.*, 452 U.S. at 667; *see Kroger Co.*, 273 NLRB 462 (1984) (finding employer's

decision to stop processing eggs and close a "nest-run" egg processing facility was a significant change in the scope of its business); *see also O.G.S. Technologies, Inc.*, 356 NLRB No. 92, slip op. at *4-8 (2011); *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 258 (2006); *Torrington Industries, Inc.*, 307 NLRB 809 (1992).

In contrast, the Board, following *Fibreboard*, has continued to find that where there is a mere substitution of one group of workers for another, who perform the same work under the control of the same employer, there is a statutory obligation to bargain under the Act. *Torrington Industries, Inc.* 307 NLRB 809; *St. George Warehouse, Inc.*, 341 NLRB 904; *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458; *Mt. Sinai Hospital*, 331 NLRB at 895, n 2, 907; *Hampton House*, 317 NLRB 1005, 1005 (1995). In these situations, "there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain." *Torrington*, 307 NLRB at 810; *see also Gaetano & Assoc.*, 344 NLRB at 531, 533. This is because such decisions do not involve a change in the nature and scope of the employer's business, and therefore they are not core entrepreneurial decisions that are not subject to bargaining. *Torrington*, 307 NLRB at 810.

In *Torrington Industries*, the Board found that an employer was obligated to bargain its decision to lay off two truck drivers and replace them with non-bargaining unit independent contractors. 307 NLRB at 810-11. The Board emphasized that the employer had not made a substantial input of capital or a change in the type of its business, the work the employees had performed had not been eliminated, and the employer did not show that bargaining over the subcontracting of the work would have been futile. *Torrington Industries, Inc.*, 307 NLRB at 810-811. The Board acknowledged that labor costs were not a factor in the employer's decision but found that fact insignificant, because the employer's reasons for its decision were not related to a change in the scope and direction of the employer's business. *Id.* at 810. "[W]hether or not

the [employer's] decision to replace [the employees] with nonunit personnel was motivated by labor costs in the strictest sense of 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.'" *Id.* at 811 citing *Fibreboard,* 379 U.S. at 223 (Stewart J., concurring) .

The Board also applies the *Fibreboard/Torrington* analysis in cases where bargaining-unit work has been transferred to other non-unit employees. *St. George Warehouse Inc.*, 341 NLRB 904; *Mt. Sinai Hospital*, 331 NLRB 895 (by reclassifying employees in the sous chef bargaining unit position to non-unit culinary manager position, the employer unlawfully transferred the work of the employees outside the bargaining unit).

b. The ALJ was correct in applying the *Fibreboard/Torrington* standard

This case falls clearly under the *Fibreboard and Torrington* line of cases. Without notifying the Union, Respondent merely substituted non-bargaining unit RNs for LPNs, who continued the same work in the same location and under the same supervisory staff.

The ALJ correctly found that the RNs are performing the same work that the LPNs previously performed. Respondent excepts to this finding and argues that *Fibreboard*/*Torrington* should not apply here, because the RNs are providing a higher level of care, due to their ability to perform five additional tasks that LPNs are unable to perform. This argument is unpersuasive for several reasons. First, the additional duties that the RNs can perform are not bargaining unit work, and they never have been. The fact that RNs are able to perform additional tasks is irrelevant, because the unrebutted evidence does show, and Respondent does not contest, that RNs currently are performing all of the tasks that the LPNs formerly performed. *See Regal Cinemas, Inc.*, 334 NLRB 304, 312 (2001), enfd 317 F.3d 300 (D.C. Cir. 2003)(finding that decision to assign bargaining unit work to managers who also had additional duties was a mandatory subject of bargaining); *Hampton House*, 317 NLRB 1005 (finding that the employer's

transfer of five LPNs to supervisory positions with additional supervisory duties was a mandatory subject of bargaining because "the critical fact is the LPNs continued to perform unit work"). Second, there is no evidence to support the contention that the RNs are providing a higher level of care. Kathleen Martin and Beth Bell provided general testimony that was not specific to Respondent's facility, and neither testified about any change in the quality of patient care after the LPNs were replaced with RNs. Further, Respondent was unable to provide any credible evidence that its readmissions rates have improved. Finally, the Board has applied the *Fibreboard/Torrington* analysis where employers have replaced employees with those who have superior knowledge of new technology that was contemporaneously introduced, finding that "bargaining was required, despite the employer's argument that its subcontracting decision turned on inadequate equipment and the incapacity of its employees," because such a change was on one "by degree, not kind." *O.G.S. Technologies, Inc.*, 356 NLRB No. 92, slip op. at *2-6 citing *Torrington Industries*, 307 NLRB at 811.

The facts in *St. George Warehouse*, where the Board applied the *Fibreboard* doctrine, are very similar to the instant case. *St. George Warehouse*, 341 NLRB at 924. There, sometime after the union election, the employer stopped hiring permanent workers and began assigning their work to temporary agency workers. *Id.* at 904, 922-923. The change was done by attrition, with the employer replacing the unit employees as they quit or were terminated for cause. *Id.* at 922. The Board affirmed the ALJ's finding that the case was analogous to the subcontracting described in *Fibreboard* because both cases involved the removal of unit work that involved the replacement of unit employees. *Id.* at 924. In *St. George Warehouse*, the ALJ noted that substituting non-bargaining unit employees for unit employees as they leave employment can dilute the strength of the bargaining unit and eventually eliminate it, an outcome that can only be avoided by notifying the Union and affording it an opportunity to bargain. *Id.* at 924-925. There,

the bargaining unit diminished from 42 employees to 8 at the time of the hearing. *Id.* at 924. Likewise, here the bargaining unit dwindled from about 73 to 35, thereby diminishing the size of the bargaining unit by nearly half.

c. The ALJ was correct in finding that Respondent did not make a fundamental change in nature, scope or direction of its business

Respondent asserts that *Fibreboard* also does not apply here because the replacement of the LPNs with RNs was part of a fundamental change in the nature, scope and direction of its business, specifically the decision to devote itself to providing short-term care to the highest acuity patients and to implement new patient care programs. However, as the ALJ found, Respondent's business did not undergo such a change, because Respondent continues to provide nursing care to a population of mostly sub-acute patients whose acuity level has not increased.

Respondent's argument that it will, at some unnamed date, no longer care for the few long-term care patients that it has always cared for does not constitute a change in the scope of Respondent's enterprise. Respondent's population always has consisted of 4-5 long-term care patients, with the remaining patients receiving sub-acute care. There is also no evidence that the acuity level of Respondent's sub-acute patients has increased in any way.

Similarly, Respondent's transfer of wound care duties from Irene D'Ovidio and Dr. Buch to the RNs does not constitute a fundamental change in its business. Respondent continues to provide wound care services to its patients, and the evidence does not show that Respondent's patients have fewer wounds than they did in the past. Moreover, Respondent's formal wound care program ended with the resignation of Dr. Bush, which occurred nearly six months after Respondent decided to replace its LPNs with RNs.

The evidence also does not support Respondent's claim that it has repositioned itself in the market. Grasso's assertion that Respondent only advertises sub-acute care is belied by the facility's website, which, as of May 9, 2012, continued to offer services for long-term care and

respite patients. Respondent's claim that it has repositioned itself is also contradicted by Illis, who testified that a brochure advertising long-term care services was distributed during her tenure, which included the four months directly after Respondent's alleged decision to dedicate itself to sub-acute care.

Likewise, Respondent's assertion that its implementation of new patient care programs constitutes a fundamental change in its operations is not supported by the evidence. First, there is no evidence that Respondent implemented any new patient care programs before the decision to eliminate the LPNs was made. The two protocols mentioned by Dr. Frisoli were not begun until the fall of 2011, several months after the decision to eliminate the LPNs was made. As the ALJ found, those protocols had not been completed at the time of the hearing. The ATAP program is merely a method of monitoring patients' progress in order to reduce readmissions rates. That program certainly did not require RNs, since it also was implemented by numerous other CareOne and Healthbridge facilities that employ LPNs to care for their sub-acute patients. Finally, Respondent did not produce any evidence to show that the protocols or the ATAP program have caused a significant change in Respondent's daily operations.

Even removal of Respondent's handful of long-term care patients and replacement of them with sub-acute patients would not create a change in the scope of Respondent's business. Respondent's long-term care patients represent a small portion of its total census, and Respondent would offer the new sub-acute patients the same services it is offering those it currently serves.

d. The ALJ properly found that *Dubuque Packing Company* does not apply here

Here, Respondent urges the Board to expand the application of a burden-shifting standard that is set forth in *Dubuque Packing Company*, 303 NLRB 386 (1991). In that case, the Board created a separate balancing test for determining whether an employer's decision to remove

bargaining unit work due to a relocation of its business or a portion of its business is a mandatory subject of bargaining**.** The Board found that the General Counsel must set forth a prima facie case 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., Inc.*, 303 NLRB at 391. The employer can rebut the prima facie case by establishing that: 1) labor costs were not a factor in the decision; or 2) even if labor costs were a factor, the Union could not have offered concessions that could have changed the decision to relocate. *Id.*

The ALJ properly refused to apply the *Dubuque* standard here, because this case does not concern a relocation of Respondent's business. The Board in *Dubuque* emphasized that the standard it applied in that case "addresses only decisions to relocate unit work." *Id.* at 390, n 8. Since then, the Board has continued to limit the application of the *Dubuque* burden-shifting test to situations involving relocation of unit work. *Torrington Industries, Inc.*, 307 NLRB 809 (the *Dubuque* test "was devised for determining the nature of relocation decision, and we did not purport to extend it to other types of management decisions that affect employees"); *see also Comar, Inc.*, 349 NLRB 342, 359 (2007); *Finch, Pruyn and Co., Inc.*, 349 NLRB 270, 274, n 19 (2007), enfd 296 Fed.Appx 83 (D.C.Cir. 2008); *Geiger Ready Mix Co. of Kansas City*, 315 NLRB 1021, 1022-1023 (1994), enfd in part 87 F.3d 1363 (D.C. Cir. 1996).

e. The ALJ was correct in refusing to adopt the standards of *Furniture Rentors and Dorsey Trailers*

Respondent cites the Third Circuit's decision in *Furniture Rentors of America, Inc. v. N.L.R.B.*, 36 F.3d 1240 (3d Cir. 1994) as support for the proposition that *Dubuque* should apply in this case. Yet in *Furniture Rentors*, the Third Circuit did not apply the *Dubuque* burden-shifting standard. The Third Circuit criticized the Board's *Torrington* standard as inflexible and simplistic, because it did not consider the reasons behind the employer's decision to remove the unit work. The court stated that it was necessary to consider "whether, as in *Fibreboard*, the

employer's decision was driven by labor costs *or some other difficulty that can be overcome through collective bargaining*." *Furniture Rentors v. N.L.R.B.*, 36 F.3d at 1248. (emphasis added) The court then remanded the case to the Board "to make a judgment about the likelihood and degree of benefit, if any, to be derived from collective bargaining … and to weigh that benefit against the employer's considerable interest in taking prompt action." *Id.* at 1249.

The ALJ was correct in finding that *Furniture Rentors of America Inc. v. N.L.R.B.*, 36 F.3d 1240 (3d Cir. 1994) and *Dorsey Trailers, Inc. v. N.L.R.B.*, 134 F.3d 125 (3d Cir. 1998) are inapplicable here. In *Dorsey Trailers*, the employer, a manufacturer of platform and dump trailers, subcontracted a portion of its trailer assembly business in response to increased customer demand that had created a backlog in orders. *Dorsey Trailers, Inc. v. N.L.R.B.*, 134 F.3d at 128. The Third Circuit, applying the standard of the third prong of *Furniture Rentors*, found that the employer had not been obligated to bargain this subcontracting decision, because the decision was purely economic, based on the employer's need to maintain a viable business. *Id.* at 133. In contrast, here Respondent does not even assert that the decision to eliminate the LPNs was made for economic reasons.

Furniture Rentors was a distinctive situation where an employer subcontracted its delivery services in response to a serious problem with persistent employee "carelessness, misconduct, untrustworthiness and thievery." *Furniture Rentors v. N.L.R.B.*, F.3d at 1250. On remand, the Board, applying the standard set forth by the Third Circuit, found that since these distinct issues faced by the employer were not amenable to collective bargaining, the employer's decision to subcontract its delivery work was not a mandatory subject of bargaining. *Furniture Rentors of America, Inc.*, 318 NLRB 602, 604 (1995). The D.C. Circuit has noted the limited application of this holding. *Regal Cinemas, Inc.*, 317 F.3d 300, 311 n 7 (D.C.Cir. 2002) ("The unusual contracting decision in *Furniture Rentors* – where the employer hired a subcontractor

because of employee theft – is thus the exception, not the rule, where transfer of work decisions are concerned."). Moreover, contrary to Respondent's assertions, the Board's few citations to *Furniture Rentors* and *Dorsey Trailers* were not affirmations of their holdings.[27]

f. Respondent's decision to eliminate the LPNs was amenable to collective bargaining

Assuming, *arguendo*, that Respondent eliminated the LPN classification due to a genuine concern about the quality of care provided by its LPNs, such a concern is amenable to collective bargaining.[28] The parties could have negotiated methods for training and educating the LPNs regarding the issues that specifically concerned Respondent. Respondent has not shown that it needed to eliminate the LPNs immediately and that such a need outweighed the benefit of bargaining over training to increase the LPNs' performance.

Contrary to Respondent's claim, following the December 2010 survey, Respondent did not make any attempts to train the LPNs, and it has failed to show that training would have been unsuccessful. The Board has stated that where an employer asserts that there is no feasible alternative to subcontracting, the "Board is authorized to insist that such an 'argument' be presented first to the union in the bargaining context." *O.G.S. Technologies, Inc.*, 356 NLRB,

[27] In *Overnite Transportation Co.*, 330 NLRB 1275 (2000), affd in part 248 F.3d 1131 (3d Cir. 2000), the dissenting member relied on the balancing test set forth in *Furniture Rentors* and *Dorsey Trailers* and considered the fact that the employer's subcontracting decision was not based on a concern for labor costs. 330 NLRB at 1278. The majority explicitly rejected that analysis, relying instead on *Torrington* because there had not been a change in the scope and direction of the employer's business. *Overnite Transportation Co.*, 330 NLRB at 1276. The Board cited to *Furniture Rentors* in *Sunoco, Inc.*, 349 NLRB 240 (2007), but merely by acknowledging Member Schaumber's note that the employer in that case did not argue that the balancing test of *Furniture Rentors* should apply. *Sunoco, Inc.*, 349 NLRB at 240, n 1. In *Wackenhut Corp.*, 345 NLRB 850, the Board cited *Dorsey Trailers* for the proposition that "employers are not required to bargain over certain 'core entrepreneurial decisions.'" 345 NLRB at 853.

[28] As discussed below, the ALJ correctly found that Respondent eliminated the LPN classification and assigned the LPN's job duties to non-bargaining unit RNs in retaliation for their selection of the Union as their collective-bargaining representative, in violation of Section 8(a)(1) and (3) of the Act. Respondent's lack of genuine concern for the quality of care afforded to its patients and the insincerity of its assertion that LPNs provided subpar care to its patients is discussed below in Section III.B.3.

slip op. at *7, citing *Rock-Tenn Co. v. N.L.R.B.*, 101 F.3d 1441, 1446 (D.C. Cir. 1996); *see St. George's Warehouse, Inc.*, 341 NLRB at 925.

Respondent argues that the possibility that LPNs could cause actual harm to its patients outweighed the benefits of collective bargaining and warranted the immediate replacement of the LPNs with the RNs. Yet Respondent's immediacy argument is contradicted by its decision to replace the LPNs through attrition. Respondent also grossly exaggerates the possibility that patients would be harmed if LPNs continued to provide their care. In fact, the only evidence of actual harm to a patient was documented in the December 2009 survey, which was issued 17 months prior to the decision to eliminate the LPNs. Finally, there is ample evidence in the record that RNs also committed nursing errors, and Illis admitted that the nursing problems at the facility were caused by both RNs and LPNs.

The fact that Respondent's decision to eliminate the LPNs was not motivated by a concern for labor costs does not alter a finding that the decision was a mandatory subject of bargaining. The Board has repeatedly held that where, as here, the employer has not made a fundamental change in the nature and scope of its enterprise, the employer's decision to subcontract was a mandatory subject of bargaining even though labor costs did not factor into the decision.[29] *O.G.S. Technologies, Inc.*, 356 NLRB No. 92, slip op.at * 6; *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R.*, 342 NLRB at 468-469; *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000); *Torrington Industries*, 307 NLRB at 810-811("We agree that 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. We do not

[29] On page 25 of its brief, Respondent cites a standard set forth in *Van Dorn Plastic Machinery Co.*, 286 NLRB 1233, 1242 (1989) and *Otis Elevator*, 269 NLRB 891 (1984), which the Board overruled in *Dubuque Packing Co.*, 303 NLRB at 390. *See Rock Tenn Co.*, 319 NLRB 1139, n 2 (1995).

reach that issue here, however, because the Respondent's reasons had nothing to do with a change in the 'scope and direction' of its business.") .

g. The ALJ was correct in finding that Respondent's decision to replace the LPNs with RNs was not motivated by compelling economic circumstances

The fact that the Board certified the unit on August 26, 2011, after the decision to eliminate the classification was made, does not alter the Respondent's requirement to seek the Union's consent. It is well settled that an employer's obligation to bargain with a union concerning changes in terms and conditions of employment commences on the date of the election, rather than the date of certification. *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB No. 46, slip op. at * 17 (2012); *Alta Vista Regional Hospital*, 357 NLRB No. 36, slip op. at *2 (2011); *Mike O'Connor Chevrolet-Buick GMC Co.*, 209 NLRB 701, 703 (1974), enf denied on other grounds 512 F.2d 684 (8th Cir. 1975). An employer is relieved of the duty to bargain only where it can show that "compelling economic circumstances" required the unilateral change. *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB No. 46, slip op. at *17 citing *Mike O'Connor Chevrolet-Buick GMC Co.*, 209 NLRB at 703. The Board has found that the standard is met when an employer can show that extraordinary, unforeseen events will take place that will have major economic effect on the Respondent. *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB No. 46, slip op. at * 18.

Respondent asserts that the results of the December 2009 and 2010 Surveys and the health care reform expected in the fall of 2012 were compelling economic circumstances. Respondent argues that the poor patient care provided by the LPNs would cause higher readmission rates, which would therefore result in a loss of referrals from hospitals, especially after the health care reform was initiated.

The ALJ correctly found that Respondent's "hypothetical speculation" is insufficient to establish a compelling economic circumstance that would excuse the obligation to bargain. *See Jason Lopez's Planet Earth Landscape, Inc.*, 358 NLRB No. 46, slip op. at *18. Initially, Respondent's argument is contradicted by Manzi, who did not testify that the healthcare reform was a reason for eliminating the LPNs. Respondent also did not introduce any evidence to support its conclusion that the surveys or the expected changes due to healthcare reform would result in fewer referrals. Further, any reduction in referrals from the two surveys would have been noticeable long before the decision to eliminate the LPNs was made. Finally, the healthcare reform, which did not come into effect until 18 months after the decision to eliminate the LPNs, is clearly not an unforeseen event that would render any economic circumstance compelling.

For the above reasons, the Board should adopt the ALJ's conclusions that Respondent's assignment of the LPN bargaining-unit work to RNs was a mandatory subject of bargaining and that Respondent violated Section 8(a)(1) and (5) of the Act by doing so without first giving the Union notice and an opportunity to bargain.

B. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT VIOLATED SECTION 8(A)(1) AND (3) OF THE ACT BY ELIMINATING THE LPN JOB CLASSIFICATION AND TRANSFERRING THE WORK OUTSIDE THE BARGAINING UNIT

Exceptions 6, 7, 8, 18, 19, 20, 21, 22, 23, 24, 25, 26, 37, 40

There is ample evidence to support the ALJ's finding that Respondent's decision to transfer the LPN work outside the bargaining unit was made in retaliation for employees' support for the Union, in violation of Section 8(a)(1) and (3) of the Act.

1. Legal Standard: *Wright Line*

The issue of whether an employer's transfer of bargaining unit work outside the bargaining unit violates Section 8(a)(3) of the Act is analyzed under the standard set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S.

989 (1982). *Gaetano & Assoc. Inc.*, 344 NLRB 531; *St. Vincent Medical Center*, 338 NLRB 888 (2003),), enf denied and remanded, 463 F.3d 909 (9th Cir. 2006). Under *Wright Line*, General Counsel must demonstrate that the employees were engaged in protected activity, that the employer had knowledge of such activity, that the employer exhibited animus or hostility toward that activity, and that the employees' protected activity was a motivating factor in the employer's decision to take adverse action against the employee. *Wright Line*, 251 NLRB at 1089; *see also Allstate Power Vac*, 354 NLRB No. 111, slip op. at *4 (2009); *Kathleen's Bakeshop, LLC*, 337 NLRB 1081, 1088-1089 (2002), enfd 2003 WL 22221353 (2d Cir. 2003) citing *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd 755 F.2d 941 (D.C. Cir. 1985), cert denied 474 U.S. 971 (1985), decision on remand 281 NLRB 882 (1986), affd 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988). Animus need not be established through direct evidence, but can be inferred through the totality of the circumstances. *St. Vincent Medical Center*, 338 NLRB at 892; *Ronin Shipbuilding*, 330 NLRB 464 (2000). The factors considered by the Board include the timing and surrounding circumstances of the employer's adverse action. *See American Cyanamid Co.*, 301 NLRB 253, 253 (1991); *Abbey's Transportation Services*, 284 NLRB 698, 700-701 (1987), enfd 837 F.2d 575 (2d Cir. 1988).

Once it is established that protected activity was the motivating factor of an employer's action, the burden shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *Allstate Power Vac*, 354 NLRB No. 111, slip op. at *4 (2009); *Kathleen's Bakeshop, LLC*, 337 NLRB at 1088-1089 (2002) citing *Meyers Industries (Meyers I)*, 268 NLRB 493.

2. Respondent Eliminated the LPN Position and Transferred Unit Work to Non-Bargaining Unit RNs in Retaliation for Employees' Union Activity and to Avoid its Obligations Under the Act

As the ALJ correctly noted, General Counsel established a strong *prima facie* case that Respondent eliminated the LPN job classification and transferred bargaining unit work to non-bargaining unit employees in retaliation for employees' Union activity. Employees' support for the Union has been sustained and apparent, beginning with the Union campaign and continuing through the representation election, the Union's certification, and the significant and prolonged unfair labor practice litigation.[30] *Somerset I*, 358 NLRB No. 146; *1621 Route 21 Operating Co., LLC, d/b/a Somerset Valley Rehabilitation and Nursing Center*, 357 NLRB No. 71; *1621 Route 21 Operating Co., LLC, d/b/a Somerset Valley Rehabilitation and Nursing Center*, 357 NLRB No. 153.

Respondent's anti-Union animus is shown through its abundant and continued unfair labor practices, as set forth by the Board and the ALJ in *Somerset I*. There, the Board explicitly affirmed the ALJ's finding that "Respondent's animus toward the Union is beyond question." *Somerset I*, 358 NLRB No. 146, slip op. at 1. The Board also found that "Respondent manifested its antiunion animus in various ways, including through its repeated unlawful interrogations of employees, unlawful solicitations of grievances, disparate and inconsistent treatment of known union supporters, and a number of its managers' additional statements and actions." *Id*.

The ALJ also properly found that Respondent's animus was directly attributed to Hutchens, who counseled Manzi in her decision to eliminate the LPNs, and Illis, who was the

[30] It is well-settled that a judge may rely upon the factual findings in a previous case involving the same respondent. *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394-395 (1998), enfd mem 215 F.3d 1327 (6th Cir. 2000); *Southern Maryland Hospital*, 293 NLRB 1209, n 1 (1989), enfd in part 916 F.2d 932 (4th Cir. 1990). The Board has found that determinations of animus in previous litigation to be especially useful. *Grand Rapids Press of Booth Newspapers*, 327 NLRB at 395.

administrator at the time the decision was made. ALJD 16: 8-23. The ALJ's findings that Hutchens and Illis committed numerous unfair labor practices before and after the Union election duplicate the findings already made by the Board and the ALJ in *Somerset I*. Similarly, the ALJ's finding that Respondent's animus was directed toward the LPNs is supported by the Board's finding in *Somerset I* that Claudio, Jacques and Napolitano, all LPNs, were leading Union advocates demonstrated and that LPNs in particular were behind the Union. *Id.* at 34.

Respondent's animus toward the Union and employees' Union activities was also acknowledged by District Judge Mary J. Cooper in her decision granting a temporary injunction.[31] Judge Cooper found that the Regional Director made a prima facie showing that Respondent violated Section 8(a)(3) of the Act by discharging Napolitano, Wells, Claudio and Jacques, because Respondent was motivated by animus toward the Union. *Lightner v. 1621 Route 22 West Operating Co., Inc. d/b/a Somerset Valley Rehabilitation and Nursing Center*, 2012 WL 1344731, slip op. at *48, 49. Judge Cooper also found that Respondent stopped scheduling its per diem employees after the Union election "in order to dilute the Somerset Valley workforce's support for the Union." *Id.*, slip op. at *51.

Respondent's numerous challenges to the employees' selection of their collective-bargaining representative over the course of 2011 and 2012, through their test of certification and their refusal to bargain, confirm that its opposition to Union representation of its employees has

[31] Respondent asserts that the ALJ erred in relying on the findings by the Board in *Somerset I* in finding that Respondent harbored union animus and that such animus motivated Respondent's decision to eliminate the LPN classification. Respondent asks the Board to instead rely upon the findings of District Judge Cooper in her decision granting the Board injunctive relief. Respondent, however, does not assert that it was denied an opportunity to present evidence before the ALJ in *Somerset I*, and there is no indication that Respondent was denied such an opportunity. Additionally, as noted by the Board in *Somerset I*, "[i]t is well established that 10(j) rulings are not binding on the Board because the issues litigated in an injunction proceeding are different from the issues litigated before the Board." *Somerset I*, 358 NLRB No. 146, slip op. at 4, n 12. Specifically, the district court must make a determination as to whether an injunction would be "just and proper," which is an analysis that is not relevant to the Board's determination of a proper remedy. *Id.*, slip op. at 4, n 12.

not waned. *Somerset I*, 358 NLRB No. 146; *1621 Route 21 Operating Co., LLC, d/b/a Somerset Valley Rehabilitation and Nursing Center*, 357 NLRB No. 71; *1621 Route 21 Operating Co., LLC, d/b/a Somerset Valley Rehabilitation and Nursing Center*, 357 NLRB No. 153. Respondent's elimination of the LPN position and removal of the work is simply a continuation of its unlawful activity, rather than an isolated event.

The ALJ accurately found that the timing of Respondent's decision to eliminate the LPN position and transfer the work outside the unit demonstrates Respondent's unlawful motivation. More specifically, the timing shows that Respondent aimed to avoid an obligation to reinstate the Union leaders that it had terminated. The administrative hearing in *Somerset I* and the accompanying injunction proceeding began in April 2011, less than one month before Respondent decided to eliminate the LPN classification and transfer the LPN's work outside the bargaining unit. It was at this time, when litigation began, that the probability of being required to reinstate the terminated LPNs became more tangible. Although litigation of both cases continued through the summer of 2011, Respondent did not notify the Union of the monumental change in the scope and size of the bargaining unit until the eve of the 10(j) injunction hearing, through a notification to the court, an apparent attempt to avoid being ordered to reinstate the three discharged LPNs into positions that no longer existed.

3. Respondent Would Not Have Eliminated the LPN Classification in the Absence of Union Activity

Respondent's contention that the LPNs were eliminated as part of a transition to providing only sub-acute care, and because LPNs could not provide the level of care necessary for Respondent's existing patients, is not supported by the evidence. The ALJ therefore correctly found that Respondent was unable to rebut the General Counsel's *prima facie* case.

Manzi made the decision to eliminate the LPN job classification after consultation with Hutchens, who was significantly involved in Respondent's anti-union campaign and who made

unlawful promises of benefits to employees before the election. *Somerset I*, 358 NLRB No. 146, slip op. at 26. Illis, the Administrator at the time, was not told the reasons for Manzi's decision. It is not believable that the individual in charge of the daily operations of the facility would be excluded from a decision that so dramatically affected her workforce and would then implement that decision without being told the reasons for doing so.

First, the ALJ properly found that the evidence does not substantiate Respondent's claim that it became an all-sub-acute facility. Rather, as stated above in Section III.2.c, Respondent continues to serve the same patient population, consisting of mostly sub-acute patients and a handful of long-term care patients. Respondent's marketing brochures, which continue to advertise long-term care, also contradict Respondent's contention that it no longer will accept long-term care patients.

Second, the ALJ correctly found that Respondent did not eliminate the LPN classification to keep up with a trend in the healthcare industry. Manzi did not cite such a trend as the basis for her decision. The evidence also shows that any trend in using RNs as opposed to LPNs is limited to acute care, as Respondent presented evidence that only two facilities in New Jersey use only RNs to care for sub-acute patients.

The credible evidence also refutes Respondent's assertion that it eliminated the LPN job classification due to a genuine concern for quality of care. To begin with, Manzi's testimony was extremely vague, and she was unable to cite any specific issues that caused her to take such drastic measures. Further, any reliance by Respondent on the December 2010 survey as a basis for eliminating the LPN classification is deceptive. As the ALJ noted, Manzi did not testify that the December 2010 survey caused her to be concerned about the care provided by the LPNs until she was prompted by Respondent's attorney. In fact, Respondent asserts that it first became aware of its quality of care problems upon receipt of the December 2009 survey, yet Hutchens

did not replace Heedles as administrator until 8 months later. Illis testified that upon reading this survey in August 2009, she first determined that the LPNs were incapable of providing adequate care. As the ALJ noted, Respondent did not explain why the decision to eliminate the LPN classification was not made until 9 months later. Additionally, the December 2010 survey was an improvement over the 2009 survey, because it did not contain any "G" level citations, and therefore no indication of actual harm to patients. Even if Respondent had been concerned about the December 2010 survey results, Respondent did not provide any explanation for the five-month delay between receipt of that survey and the decision to eliminate the LPNs.

Moreover, as the ALJ appropriately found, Respondent did not make efforts to improve the quality of care provided by its nursing staff prior to making the drastic decision to eliminate the entire LPN job classification. As stated above, after receipt of the December 2010 survey, Respondent did not provide any training to its nursing staff to address the issues identified in that survey or for any other reason.

Respondent asserts that 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." Respondent then argues that the ALJ erred in inferring from the *Somerset I* decision that all of the discipline issued during this time period was retaliatory. Contrary to Respondent's assertion, the ALJ did not find that all of the discipline issued to LPNs following the December 2009 survey was retaliatory. Rather, the ALJ specifically noted that "the Board found in the previous case that Respondent *increased its scrutiny* of the employees' work performance only in response to the representation election in September 2010, and not immediately after the December 2009 survey or in response to the citations the NJDHSS issued." ALJD 19: 27-31 (emphasis added). This finding mirrors the ALJ's finding in *Somerset I* that "[i]t appears that

those records were not scrutinized as carefully before the election as they were after the election, and that any errors in those records found prior to the election were rarely the subject of discipline." *Somerset I*, 358 NLRB No. 146, slip op. at 28.

Respondent also asserts that the ALJ erred in finding 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 19:31-3, citing *Somerset I*, 358 NLRB No. 146, slip op. at 1-4, and 1, n 3. Respondent argues that the ALJ failed to consider eleven warnings issued by Respondent to LPNs and RNs between March 2010 and December 2010,[32] and four warnings issued to LPNs between February 9 and 15, 2011.[33] Again, the ALJ did not assert that all discipline issued during this time period was retaliatory. Since the discipline referenced by the Respondent was part of the *Somerset I* record, the Board did take this discipline into account when making its findings. Finally, the ALJ's failure to cite specific discipline does not mean that it was ignored.

Respondent's overall staffing choices do not indicate that quality of care had been its chief concern. Although Respondent asserted that its nurses needed superior skills to handle its sub-acute patients, it hired RNs with no previous experience in nursing, who needed extensive training in their daily assignments.[34] Moreover, during the period prior to hiring the permanent RNs, Respondent used agency employees who, due to the temporary nature of their employment, were not invested in the care of Respondent's patients. Agency nurses are therefore similar to per

[32] The dates of the discipline referenced by Respondent are: March 4, 2010, September 10, 2010, September 17, 2010, September 28, 2010, October 21, 2010, November 8, 2010, November 23, 2010, November 26, 2010, November 29, 2010 and December 23, 2010.

[33] Respondent also erroneously asserts that the ALJ failed to consider the verbal warning issued to D'Ovidio in the early spring of 2011, to Doreen Dande on September 17, 2010 and to Sheena Claudio in September 2010. To the contrary, the ALJ specifically referenced those three disciplines. ALJD 7: 40-44 (n 8) and 19:45-48, 20:36-41 (n 20).

[34] The ALJ properly credited Mangal and D'Ovidio's detailed explanation of the training they gave the newly-hired RNs over Grasso's succinct denial that LPNs played a role in RN training.

diem workers, whom Respondent argued in *Somerset I* could not provide adequate consistency and continuity of care. *Somerset I*, 358 NLRB No. 146, slip op. at 21, 22. Respondent's willingness to use agency workers in May 2011, after it wanted to drastically reduce the use of per diem workers less than a year earlier, belies any assertion that quality of care is its concern.

Similarly, Respondent's decision to replace a certified wound care nurse, D'Ovidio, with numerous nurses who did not have the same certification and who had no experience caring for wounds, shows a glaring lack of concern for patient care. The ALJ properly credited Dr. Buch's unrebutted testimony regarding the worsening of wound care as D'Ovidio was gradually removed from that duty. Respondent's continued employment of RN Gulhan, despite her numerous errors, further counters Respondent's assertion that quality of care was of utmost importance.

As the ALJ correctly found, the record does not support Respondent's contention that LPNs were the cause of any quality of care problems. Illis admitted that the entire nursing staff, including RNs, contributed to the quality of care problems. Manzi admitted that she made the decision to eliminate the LPNs without inquiring as to whether the LPNs' performance was inferior to the RNs' performance. As Dr. Frisoli and Illis admitted, Respondent's overwhelming managerial turnover during the preceding years had a considerable effect on the quality of care. Illis further admitted that during the same time period, Respondent was not enforcing existing policies that were created to improve quality of care, such as Interact II and 72-hour care plan meetings.

As the ALJ properly found, the evidence also does not show that the LPNs were incapable of caring for Respondents' patients. Respondent's witnesses testified in general terms about their preference for RNs due to their education, but they did not testify about any specific problems with the LPNs' care. The temporary and permanent RNs hired by Respondent lacked

critical skills, and Respondent entrusted Mangal and D'Ovidio, both LPNs, to train them. Respondent offered to retain Mangal on its staff while she pursued an RN degree, which demonstrates that Respondent did not question the quality of care that she provided. Respondent also placed LPNs in the trusted charge nurse position, with D'Ovidio remaining in that position one month beyond the decision to eliminate LPNs altogether. Finally, Dr. Buch, who cares for sub-acute patients on a daily basis, credibly testified that it is not the type of degree held by a nurse that matters, but the nurse's experience.[35]

Indeed, the evidence supports the ALJ's finding that the standard of care did not improve after Respondent moved to an all-RN model. The ALJ properly credited Dr. Buch, a disinterested witness with straightforward testimony, who testified that after RNs began providing nursing care, the quality of the care decreased to such an extent that he was forced to discontinue his affiliation with Somerset. In this respect, Dr. Buch was corroborated by Grasso, who acknowledged that Dr. Buch had concerns about the changes at the facility. Finally, the results of Respondent's December 2011 survey, with significant deficiencies in nursing care, provide documentary evidence that Respondent's quality of care problems have continued under an all-RN nursing staff.

The ALJ correctly found that there was no evidence to support Respondent's assertion that its 30-day readmission rates improved after the change to an all-RN model. As noted above, Grasso's testimony is not supported by documentary evidence. In fact, Respondent's withdrawal of R-8, which supposedly documents readmission rates, implies that the documentary evidence contradicts Grasso's testimony. Most importantly, Grasso herself admitted that any reduction in readmission rates was due to the re-implementation of ATAP, rather than the replacement of LPNs with RNs.

[35] The record also supports the ALJ's finding that the 2011 objections form, discussed above in Section II.B.5, does not have probative value.

The ALJ properly found evidence of pretext in the fact that Care One and Healthbridge have not implemented a model of using only RNs to care for sub-acute patients at any of its other facilities. The impending healthcare regulations cited by Respondent would impact all facilities in the same manner they were expected to impact Somerset. CareOne and Healthbridge created the ATAP and Interact II programs to reduce readmissions statistics, and these programs were implemented in all of its facilities. As the ALJ noted, Respondent's witnesses did not explain why Somerset was singled out as the one facility that needed an all-RN model of nursing care. The ALJ's finding is also buttressed by the lack of plans to expand an all-RN model of nursing care to other CareOne or Healthbridge facilities in the future.

All of the foregoing reasons support the ALJ's conclusion that Respondent failed to rebut General Counsel's *prima facie* showing by providing evidence to demonstrate that it assigned the LPN work to non-bargaining unit RNs for legitimate, non-discriminatory reasons. The evidence therefore establishes that Respondent eliminated the LPN classification and removed bargaining unit work for discriminatory reasons, in violation of Section 8(a)(3) of the Act.

C. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S FINDINGS THAT RESPONDENT DISCHARGED IRENE D'OVIDIO AND MAHARANIE MANGAL IN FURTHERANCE OF ITS UNLAWFUL ELIMINATION OF THE LPN JOB CLASSIFICATION AND REMOVAL OF BARGAINING UNIT WORK, IN VIOLATION OF SECTION 8(A)(1)(3) AND (5) OF THE ACT

Exceptions 28, 38, 40, 41

The record supports the ALJ's finding that Mangal and D'Ovidio were terminated in furtherance of Respondent's unilateral and discriminatory elimination of the LPN classification and transition of the LPN work outside the unit. The facts are undisputed. Both Mangal and D'Ovidio worked as full-time LPNs whose positions were eliminated. Although Respondent asserts that the LPNs were eliminated through attrition, there is no evidence to show that Mangal and D'Ovidio quit or were terminated for cause.

When D'Ovidio was notified of her termination, the only explanation given to her was that the facility was moving in a different direction, and she was not part of that plan. As the ALJ found, given the totality of the circumstances, this statement can only mean that D'Ovidio was terminated because she was not an RN. Respondent did not provide any evidence to rebut this presumption. D'Ovidio's verbal warning in the spring of 2011 clearly did not factor into her termination, as Illis did not mention it at the termination interview, and it was not noted on her termination sheet. D'Ovidio's recent position changes were not related to poor performance. Rather, D'Ovidio's ascension to charge nurse in January 2011 was an acknowledgement of D'Ovidio's superior nursing skill. Also, as credibly noted by Dr. Buch, D'Ovidio provided outstanding wound care, and her patients suffered when she was removed from those duties.[36]

Likewise, the unrebutted evidence clearly supports the ALJ's finding that Mangal was terminated because she was an LPN. In August 2011, Grasso told Mangal that in order to retain her employment, Mangal needed to enroll in RN school. On October 18, 2011, Grasso admitted that she terminated Mangal because she had not enrolled in RN school, and the termination sheet documents the same reason.

All of the above reasons support the ALJ's conclusion that D'Ovidio and Mangal were terminated as a result of Respondent's unlawful elimination of the LPN job classification and removal of the bargaining unit work, in violation of Section 8(a)(1) and (3) of the Act.

[36] In exception 41, Respondent asserts that any claim that Respondent terminated D'Ovidio 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) . ALJ found, however, that D'Ovidio's termination was unlawful because it was "engendered by Respondent's unlawful elimination of the LPN position, and transfer of bargaining unit floor nurse work to non-bargaining unit RNs." ALJD at 23. This finding corresponds with the allegation in the Complaint, and Respondent does not assert that this claim is barred by Section 10(b). Nonetheless, the ALJ was correct in finding that the allegation regarding D'Ovidio's discharge was not time-barred, because it is closely related to the allegation that Respondent violated Section 8(a)(3) by eliminating the LPN classification and transferring bargaining unit work in retaliation for the LPNs' Union activity, which was alleged in the second amended charge filed on January 25, 2012.

D. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S FINDINGS THAT RESPONDENT VIOLATED SECTION 8(A)(1) AND (5) OF THE ACT BY FAILING AND REFUSING TO PROVIDE THE UNION ACCESS

Exceptions 29, 30, 34, 39, 40

The ALJ properly found that Respondent violated Section 8(a)(1) and (5) of the Act by denying the Union access to its facility in order to observe work processes and working conditions, including health and safety conditions. The Union has a statutory right of reasonable access to an employer's facility to observe how work is performed in preparation for collective bargaining. *New Surfside Nursing Home*, 330 NLRB 1146 (2000); *see also C.C.E., Inc.*, 318 NLRB 977 (1995). The Union also has a statutory right of reasonable access to inspect health and safety concerns. *New Surfside Nursing Home*, 322 NLRB 531 (1996). In *New Surfside Nursing Home,* 330 NLRB 1146, using the balancing test set forth in *Holyoke Water Power Co.,* 273 NLRB 1369, 1370 (1985), enfd 778 F.2d 49 (1st Cir. 1985), the Bound found that a union's need to obtain information about employee work processes for the purposes of bargaining surpassed the employer's property rights. 330 NLRB at 1150. Where a union is requesting access for this reason, the Board has held that "only where it is found that a union can effectively represent employees by some alternative means would the employer's property rights dominate." *Id.* .

The Board has found that there is no alternative to union access when a union seeks to directly observe employee operations and working conditions, and to evaluate job classifications, safety concerns, work rules and other issues necessary to develop a negotiating strategy. *C.C.E., Inc.*, 318 NLRB 997, 978 (1995). Furthermore, access for these reasons is especially significant when the parties are negotiating a first contract. *Id.* The Board stressed that where the parties do not have an existing collective-bargaining agreement, there is no other means for collecting the information necessary to prepare for bargaining, such as a grievance procedure. *Id.*

Here, the Union indisputably requested access to Respondent's facility to observe its members at work and to look for safety hazards, so that it could prepare for bargaining its first contract. As the ALJ found, Elliott credibly testified that observing unit members in action provides information that far surpasses that which the Union can glean through bargaining surveys or conversations with workers. A Union representative, with knowledge of the work processes of other facilities, can notice problems that workers might not. Elliott's recent experiences of finding a blocked exit door and noting that workers were performing two jobs highlighted the need for the Union to observe its members at work.

Contrary to Respondent's assertion, the union's right to access is not limited to investigations of specific complaints. In *New Surfside Nursing Home*, 330 NLRB 1146 (2000), the union requested access solely in order to prepare for negotiations and to "observe the work processes of people performing bargaining unit work." 330 NLRB at 1148. Even so, here the Union did receive specific complaints that the facility was understaffed, an issue Elliott intended to investigate if he had received access.

It is Respondent's burden to establish that its claim of property rights should prevail over the Union's right of reasonable access. *New Surfside Nursing Home*, 322 NLRB 531, citing *Hercules, Inc.*, 281 NLRB 961 (1996); *New Surfside Nursing Home*, 330 NLRB at 1150. Respondent did not present any evidence to support a finding that its property rights trump the Union's need for access. Respondent's general claim that union access could disrupt patient care and violate patients' privacy is not supported by any evidence. The above reasons support the ALJ's conclusion that Respondent violated Section 8(a)(5) of the Act by denying the Union access to its facility.

IV. CONCLUSION AND REMEDY

For the foregoing reasons, the preponderance of the evidence shows that Respondent violated Section 8(a)(1), (3) and (5) of the Act. Counsel for the Acting General Counsel requests the Board to reject Respondent's exceptions and order Respondent to restore the LPN classification and all LPN positions that existed prior to May 2011, restore to the unit the work formerly performed by its LPNs, reinstate D'Ovidio and Mangal to their previous positions of employment and make them whole, post a notice, and comply with any other remedy deemed appropriate.[37]

Dated at Newark, New Jersey
this 16th day of April, 2013

Respectfully submitted,

Nancy Slahetka
Counsel for the Acting General Counsel

[37] In Exceptions 42 and 43, Respondent asserts that the ALJ erred in ordering Respondent to reinstate the LPN classification and to permit the Union access to its property, because the LPNs were incompetent. The cases cited by Respondent are inapposite. In *N.L.R.B. v. Western Clinical Laboratory*, 571 F.2d 457, 461 (9th Cir. 1978), the Ninth Circuit remanded the case to the Board to decide credibility conflicts in the testimony relating to competency. In *Family Nursing Home and Rehabilitation Center, Inc.*, 295 NLRB 923, 923 (1989), the Board affirmed the ALJ's finding that reinstatement was inappropriate given the discriminatee's violent behavior after she was notified of her termination. In *N.L.R.B. v Big Tree Industrial Gas & Equip. Co.*, 405 F.2d 1140, 1142-43 (5th Cir. 1969), the Fifth Circuit denied the Board's enforcement application regarding reinstatement because the discriminatee, a truck driver, had a previous record of driving misconduct and was classified as a habitual traffic offender under state law. Here, there is no record evidence that the LPNs are incompetent, have exhibited violent behavior, or have previous records of misconduct or malfeasance. Finally, there is no evidence that reinstatement here contravenes any competing federal law, making Respondent's reliance on *Hoffman Plastics v. N.L.R.B.*, 535 U.S. 137, 143-144 (2002) invalid. For these reasons, Respondent's exceptions regarding the ALJ's recommended remedy should be rejected.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of Counsel for Acting General Counsel's Opposition to Respondent's Motion to Stay Proceedings were served on April 3, 2013, in the manner set forth below:

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