

CERTIFICATE OF SERVICE

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

HEARTLAND-PLYMOUTH COURT MI, LLC
d/b/a HEARTLAND HEALTH CARE CENTER—
PLYMOUTH COURT

Respondent

and

Case 07-CA-070626

SEIU HEALTHCARE MICHIGAN,
Charging Union

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

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Charging Union

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

Counsel for the Acting General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision.¹

INTRODUCTION

Respondent filed twenty-three individual exceptions to the ALJD in the instant matter. In its accompanying brief, Respondent coalesced those exceptions into six areas in which it asserts that the ALJ erred with respect to his findings, specifically that:

¹ The following abbreviations are used in this brief: ALJ-Administrative Law Judge; ALJD-Administrative Law Judge Decision; Tr-Transcripts; JT-Joint Exhibit; R BR-Respondent Brief.

- The ALJ erred in finding that the Union did not waive its right to bargain over the “effects” of Respondent’s decision to reduce the hours of dietary employees. (Exceptions 6, 7, 8, 9, 11, 15, 16, 18, 22, and 23);
- The ALJ erred by failing to utilize a “contract coverage” analysis in his decision, which would have relieved Respondent of any obligation to bargain over the effects of its decision to reduce hours. (Exceptions 5, 11, 15, 16, 18, 20, 22 and 23);
- The ALJ erred by failing to defer to the underlying arbitration decision. (Exceptions 11, 12, 13, 14, 16, 18, 22 and 23);
- The ALJ erred by not finding that the Union waived its right to effects bargaining because it made no effects bargaining request to Respondent. (Exceptions 1, 2, 3, 8, 10, 11, 18, 22, and 23);
- The ALJ erred by not limiting effects bargaining to “significant management decisions involving loss of employment and to other management decisions where the union adequately identifies specific effects warranting bargaining.” (Exceptions 11, 15, 18, 22, and 23); and
- The ALJ erred in recommending a remedy consistent with *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). (Exceptions 17, 18, and 19).

I. The ALJ did not err in finding that the Union did not waive its right to bargain over the “effects” of Respondent’s decision to reduce the hours of dietary employees. (Exceptions 6, 7, 8, 9, 11, 15, 16, 18, 22 and 23)

The ALJ appropriately found that the Union did not waive its right to

effects bargaining over Respondent's decision to reduce hours of dietary employees. (ALJD pp. 6-7) In excepting to the ALJ's findings, Respondent asserts that the Union "clearly and unmistakably" waived its right to bargain over effects. In asserting clear and unmistakable waiver, Respondent simply presents three provisions contained in the parties' collective bargaining agreement: Article 3 - Management Rights; Article 4 - Hours of Work and Overtime; and Article 25 - Waiver. Respondent claims that "waiver is explicitly stated" regarding effects bargaining when these articles are read in conjunction with one another. (R BR p. 10.) Respondent makes this claim even though there is no "explicit" mention of effects bargaining in any of these three provisions.

Given that effects bargaining is not explicitly mentioned in these three contract provisions, under Board law, any analysis of clear and unmistakable waiver cannot end with Respondent's cursory claim that effects bargaining is inferred by the provisions. Rather than attempting to draw an inference, an employer claiming a waiver must show that "the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter." *Airo Die Casting, Inc.*, 354 NLRB 92, 93 (2009), citing *Trojan Yacht*, 319 NLRB 741, 742 (1995). See also *Allison Corp.*, 330 NLRB 1363, 1365 (2000).

In the instant case, no such "clear and unmistakable" waiver exists with respect to effects bargaining. The ALJ appropriately found that Respondent failed to provide any evidence that effects bargaining was "fully discussed and

consciously explored” and that the Charging Union “consciously yielded its interest in the matter.” (ALJD pp. 6-7) *Airo Die Casting*, supra, at 93. The contractual language waiving the Charging Union's bargaining rights as to Respondent’s decision to reduce dietary employees’ hours does not constitute a waiver of the right to bargain over that decision's effects. *Natomi Hospitals of California, Inc.*, 335 NLRB 901, 902 (2001).

To further support its claim that the Union waived effects bargaining as a result of the “zipper” clause and other related provisions contained in the parties’ collective bargaining agreement, Respondent cites to *Radioear Corp.*, 214 NLRB 362, 364 (1974); *CBS Corp.*, 326 NLRB 861-862 (1998); and *GTE Automatic Electric, Inc.*, 261 NLRB 1491, 1491-92 (1982). However, Respondent’s reliance on these cases is misplaced.

In *Radioear Corp.*, the Board found that an arbitrator’s decision that a union, pursuant to a zipper clause, had waived its right to bargain over an annual “turkey money” gift to employees was not repugnant to the Act. *Id.* at 364. In so finding, the Board determined that the record established that the parties had “consciously explored a clause which would specifically have required the maintenance of *all* existing benefits, whether mentioned specifically in the agreement or not.” *Id.* In light of those circumstances, the *Radioear* Board found that there was a conscious, knowing waiver of any bargaining obligation as to non-specified benefits, such as the “turkey money” bonus. *Id.*

In the instant case, Respondent proffered no evidence at trial or in its

exceptions that during the bargaining of their current agreement the parties had exchanged proposals, engaged in any bargaining, or, for that matter, had even one passing discussion, regarding effects bargaining over any subject, let alone a reduction of hours for bargaining unit employees. See *Airo Die Casting*, supra, at 93

Respondent's reliance on *GTE* and *CBS Corp.* is similarly misplaced. Respondent asserts that, based upon those cases, it was privileged to use the zipper clause as a shield with respect to any effects bargaining over the reduction of hours issue. (R BR p. 11-12) However, those cases are inapposite to the instant case.

In *GTE*, while finding that an employer may rely on the parties' zipper clause in refusing to bargain over a unilateral change, the Board explicitly stated that its finding was based upon the fact that the unilateral change effected only "nonunion personnel" and later reemphasized that point: "Significantly, [the employer] has not made unilateral changes that directly and adversely affect unit employees. . ." *Id.* at 1491-92. In the instant case, Respondent's reduction in hours directly affected at least 10 bargaining unit employees. (ALJD p. 3)

In *CBS Corp.*, the Board found that a union could use the parties' zipper clause as a shield against an employer attempting to utilize subcontracting. *Id.* at 861. The Board relied on the fact that the parties had expressly discussed subcontracting during negotiations for the collective bargaining agreement and the employer had outright "rejected the possibility of outsourcing unit work." *Id.* In

the instant case, as the ALJ found, Respondent presented not one scintilla of evidence that effects bargaining over a reduction in hours for bargaining unit employees was ever discussed by the parties prior to entering into their current contract. (ALJD p. 8)

Respondent also attacks the ALJ's reliance on *Good Samaritan Hospital*, 335 NLRB 901 (2001), asserting that there was no zipper clause to analyze in that case from which the Board could infer clear and unmistakable waiver of effects bargaining.² (R BR p. 12) Again, Respondent misapprehends what the Board requires to find clear and unmistakable waiver in the absence of contractual language that specifically and explicitly states that the Union waived effects bargaining. While Respondent argues that "there is no requirement that the agreement specifically mention 'effects bargaining' ", Board case law is clear that, absent specific contractual language, an employer claiming a waiver must show that "the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter." *Airo Die Casting, Inc.*, supra; see also *Allison Corp.*, supra.

Given the that the ALJ found that the parties never consciously explored this issue and, as a result, the Union never consciously yielded its right to bargain over

² In Respondent's fourth exception, it asserts that the ALJ's reliance on *Good Samaritan Hospital* for the proposition that effects bargaining is required even when the employer has no obligation to bargain about the decision itself is erroneous as a matter of law. Aside from this notation in the its exceptions, Respondent does not reference Exception four anywhere in its Brief in Support of Exceptions. To whatever extent Respondent supports Exception four in its brief, it will be addressed by Counsel for the Acting General Counsel in this section.

the effects in bargaining unit employees' reduction in hours, Respondent's Exceptions on this issue must be rejected.

II. **The ALJ did not err by failing to utilize a “contract coverage” analysis in his decision which would have relieved Respondent of any obligation to bargain over the effects of its decision to reduce hours.** (Exceptions 5, 11, 15, 16, 18, 20, 22 and 23)

The ALJ appropriately found Respondent failed to bargain over the effects of its decision to reduce hours of bargaining unit employees, in violation of 8(a)(5) of the Act. (ALJD pp. 6-11)

In its Exceptions, Respondent asks the Board to essentially abandon long-standing law and adopt the “contract coverage” analysis applied by various Federal circuit courts. See *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005); *Bath Marine Draftsmen’s Assoc. v. NLRB*, 475 F.3d 14 (1st Cir. 2007); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *Local Union 36, IBEW v. NLRB*, 706 F.3d 73 (2^d Cir. 2013). It should be noted that only the *Enloe* case directly concerned effects bargaining. It should be further noted that at least one other Circuit has had the opportunity to adopt a contract coverage analysis and has explicitly declined to do so. See, e.g., *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008).

Respondent itself acknowledges that the Board has “steadfastly” refused to follow the contract coverage analysis, but nonetheless warns that any decision upholding the ALJ decision in this case is “doomed”. (R BR p. 13) Indeed, the Board has explicitly weighed the costs and benefits of “clear and unmistakable

waiver” versus “contract coverage.” In *Provena Hospitals*, 350 NLRB 808, 812-813 (2007), the Board elaborated at length on this issue, including a discussion of the D.C. Circuit’s use of a contract coverage analysis:

The Board's longstanding adherence to the waiver standard reflects the Supreme Court's approval of the Board's approach. In *C & C Plywood*. . . the Court reviewed the Board's finding that an employer violated Section 8(a)(5) by unilaterally implementing a premium-pay schedule for a classification of employees. The employer argued that the union representing its employees had waived its statutory right to bargain over the matter, but the Board rejected that argument and found no waiver under its clear and unmistakable standard. *C & C Plywood Corp.*, 148 NLRB 414, 416-417 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965). The Court upheld the Board's finding of a violation and explicitly approved the waiver analysis, stating:

[T]he Board relied upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach. . .

More succinctly, the waiver must be clear and unmistakable. No later decision of the Court casts doubt on the continuing approval that the Board's traditional analysis enjoys. . . There can be no dispute, then, that the Board's traditional waiver standard is exceptionally well established. The venerable age of the standard, coupled with its approval by the Supreme Court, makes a powerful case for stare decisis. But the dissent would have the Board break with its own precedent and turn to the “contract-coverage” standard devised by the United States Court of Appeals for the District of Columbia Circuit and followed by the Seventh Circuit, despite the fact that earlier decisions of those same courts, never reversed, applied the waiver standard. Indeed, in a decision pre-dating its enunciation of the “contract-coverage” standard, the District of Columbia Circuit criticized the Board for failing to follow its waiver standard. *Road Sprinkler Fitters Local 669 v. NLRB*, 600 F.2d 918, 922-923 (D.C. Cir. 1979). The court observed that it would “not allow an administrative agency to abandon its past principles without reasoned analysis.” *Id.* at 923. Accordingly, it required the Board to “explain[] why the waiver standard should be changed, and how the new standard furthers the agency's statutory mandate.” *Id.* We can discern neither persuasive reasons for abandoning the waiver standard, nor evidence that a different approach would further the Board's statutory mandate.

(Internal footnotes omitted.)

Respondent, in addition to seeking repudiation of the long standing legal and policy considerations outlined in *Provena*, above, argues that the burden of proof in waiver cases should be shifted, contending that, apparently, because “neither the AGC nor the Union offered any contract language or bargaining history to show that the parties intended to treat the effects differently than the decision itself”, waiver should be found. (R BR pp. 13-14) However, the Board has long recognized that the burden of proof is on the party asserting the existence of a waiver, in this instance, Respondent. *TCI of New York*, 301 NLRB 822 at 824 (1991).

Finally, Respondent argues that neither the Union, the Acting General Counsel nor the ALJ identified any specific “effects” of Respondent’s decision to reduce employee hours “other than those inherent in the decision, i.e., reduced work hours.” (R BR p. 14) However, Respondent cites no case law to substantiate its argument. Moreover, the ALJ noted in his decision that Respondent chose to reduce the hours of a number of bargaining unit employees rather than resort to layoffs. Certainly, the decision of whether to reduce hours or lay off bargaining unit employees in the dietary department is an “effect” of the implemented reduced hours the Union would have sought to negotiate with the Respondent, and indeed, had the right to negotiate under Board law, in this instance. (ALJD p. 3) Based on the above, Respondent’s Exceptions calling for a contract coverage analysis in this case must be rejected.

III. **The ALJ Did Not Err in deciding not to defer to the underlying**

arbitration decision. (Exceptions 11, 12, 13, 14, 16, 18, 22 and 23)

The ALJ appropriately decided not to defer to the underlying arbitration decision in this case. In doing so, the ALJ found that that the scope of the arbitration hearing was limited to contractual interpretation and that the evidence necessary for a resolution of the instant unfair labor practice was not the same evidence that was presented to, and considered by, the arbitrator. Therefore, the ALJ concluded that the issue of whether the Respondent violated its duty to engage in effects bargaining remained litigable before the Board. (ALJD p. 9)

In its Exceptions, Respondent first cites to *Dennison National Co.*, 296 NLRB 169, 170 (1989), asserting that it is proper for the Board to defer to an arbitrator's decision even in cases where the arbitrator was not presented with the facts relevant to the statutory issue. (R BR pp. 17-18) However, the facts surrounding *Dennison* were substantially different than those in the instant case. In *Dennison*, the Board specifically found that the arbitrator was presented "with facts relevant to the statutory issue." *Id.* In the instant case, the ALJ specifically found that the statutory issue of effects bargaining "was not raised either at the arbitration hearing or in the parties' posthearing briefs, and nothing whatsoever in the arbitrator's award purported to address effects bargaining, let alone any kind of bargaining." (ALJD p. 8) Thus, the basis for the Board's decision in *Dennison* is completely at odds with the instant case and cannot be relied on in making a determination as to whether deferral to the arbitrator's decision is appropriate.

Respondent similarly cites *Smurfit-Stone Container Corp.*, 344 NLRB 658

(2005), implying that deferral in the instant case is proper because the arbitrator adequately addressed the statutory issue by determining the contractual issue. (R BR p. 18) However, as noted by the ALJ, “There can be no doubt that the evidence pertinent to effects bargaining was not meaningfully or fully presented at the arbitration hearing”, adding that “nothing whatsoever in the arbitrator’s award purported to address effects bargaining.” (ALJD p. 8) Given that effects bargaining is precisely the statutory issue contained in the instant unfair labor practice charge and complaint, Respondent’s failure to present any evidence regarding effects bargaining and the arbitrator’s resulting failure to address the issue in his award, makes untenable Respondent’s assertion that deferral is appropriate. See *Kohler Mix Specialties*, 332 NLRB 630, 631-632 (2000); *Armour & Co.*, 280 NLRB 824 fn. 2 (1986); *Andersen Sand & Gravel Co.*, 277 NLRB 1204, 1205 (1985).

IV. The ALJ Did Not Err in finding that the Union did not waive its right to effects bargaining. (Exceptions 1, 2, 3, 8, 10, 11, 18, 22, and 23)

The ALJ appropriately found, based on record evidence and established Board law, that the Union at no time waived its right to effects bargaining, in part, by drawing adverse inferences from Respondent’s failure to call Bret Lucka as a witness in this proceeding, and the limited testimony of Karen Szkutnik. (ALJD pp. 4, 7-8)

As the ALJ found, Board law makes clear that Szkutnik , as a management representative, who Respondent called to testify in its case in chief, would reasonably be assumed to be favorably disposed to the Respondent. (ALJD p. 4) In finding an adverse inference due to Szkutnik’s failure to rebut or testify at all regarding conversations she had with Union Representative Fowlkes outlined in Fowlkes testimony during the Counsel for the Acting General Counsel’s case in chief , the ALJ appropriately cited to *Daikichi Corp.*, 335 NLRB 622, 622 (2001) and *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977), enfd. mem. 583 F.2d 1289 (9th Cir. 1978). (ALJD p. 4, Tr. 25,31-36, 39, 44, 45, GC 2, 3)

Similarly, the ALJ drew an adverse inference over Respondent’s failure to call Lucka as a witness to testify about what was said at a December 2011 grievance meeting or in a November 2011 conversation that Fowlkes testified she had with him, relying on well-established Board law on the issue. See, e.g., *Champion River Co.*, 314 NLRB 1097, 1099 fn. 8 (1994); *Douglas Aircraft Co.*, 308 NLRB 1217, 1217 fn. 1(1992). (ALJD p. 4, Tr. 23-25, 31-39, 54) Respondent makes no argument as to why the ALJ’s findings were inappropriate or why the cases cited in the ALJD were not applicable. As such, Respondent’s exceptions on this point must be rejected.

Respondent further excepts to ALJ’s finding that “Finley’s bi-monthly hours were reduced from 80 to between 54 and 60”, arguing that this finding is not supported by the record and is clearly erroneous. (ALJD p. 3, R BR p. 2) Respondent does not cite to any specific trial testimony, transcript page or any

other evidence in making its claim. However, Finley herself testified at the underlying arbitration proceeding that her bi-monthly hours were reduced to between 54 and 60. (JT, p. 10) Moreover, Respondent, in its brief, does recount the Union representative's opening statement at the underlying arbitration hearing in which he stated that Finley's hours were reduced to *approximately* 60 to 64 hours per pay period. (Emphasis added) (R BR p. 5) Given that the ALJ's and the Union Representative's range of hours for Finley overlap, the ALJ's factual finding is in line and completely consistent with the Union representative's statement on the matter which, apparently, Respondent has no issue with. As such, Respondent has not met its burden by showing "by a clear preponderance of the evidence" that the ALJ's factual findings on this point are not supported by the record. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951). Moreover, Finley's bi-monthly hours are not "critical" to the ALJ's ultimate findings and conclusions, e.g., that Respondent failed to bargain over the effects of its decision to reduce hours of not only Finley, but of nine other employees as well. (ALJD, p. 3) See *Jewel Bakery*, 268 NLRB 1326, 1327 (1984). Thus, Respondent's Exception on this issue must be rejected.

With respect to Respondent's contention that the Union waived its right to effects bargaining, Respondent concedes that the Union filed a grievance over the reduction of hours issue and further, that in *Rochester Gas & Electric Corp.*, 355 NLRB 507 (2010), enfd. 2013 WL 174110 (2d Cir. 2013), cited by the ALJ, the Board found that a grievance is sufficient to constitute a request to engage in

effects bargaining. However, Respondent points to *Noblit Bros.*, 305 NLRB 329 (1992), in arguing that the Board has come to a different conclusion on the issue. (R BR p. 19) Counsel for the Acting General Counsel is somewhat perplexed by Respondent's reliance on this case. In *Noblit Bros.*, while the Board does find that the union did waive its right to bargain over effects regarding the removal of unit work, the Board does not base its finding on any purported grievance filing and indeed, makes no mention of any grievance at all. *Id.* at 330, fn. 10. In reviewing the underlying administrative law judge decision in *Noblit Bros.*, it becomes clear why no mention of any grievance was made by the Board: the union admitted at trial that no grievance was filed over the issue because the parties' contract had expired. *Id.* at 357.

Respondent next suggests that the parties' grievance and arbitration procedure alone constituted effects bargaining. (R BR p. 20) Respondent cites to *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), in contending that the grievance and arbitration process is intertwined with the collective bargaining process. (R BR p. 20) While the Court in *Warrior & Gulf Navigation Co.* acknowledged that a grievance and arbitration procedure "is a major factor in achieving industrial peace", it does not appear to pass any judgment as to effects bargaining or relieve an employer of its duty to bargain over effects. *Id.* at 578.

Finally, Respondent argues that, based on testimony in the underlying arbitration proceeding, "it is . . . clear that the parties engaged in substantive

effects bargaining prior to the grievance process being invoked.” (R BR p. 20)

However, in reviewing the arbitration testimony cited by Respondent, there is absolutely nothing “clear” as to effects bargaining. As the ALJ correctly noted in this regard (addressing Union steward Brandi Malone’s testimony at the arbitration proceeding):

The fundamental flaw with this argument is that the record is totally devoid of any foundational requirements necessary for admissible evidence in a formal proceeding. Nowhere did Malone even name the “management” representative(s) with whom she spoke, how many meetings they had, where they occurred, who was present, or who said what. In this regard, she offered no specifics of any conversations. The Respondent did not call her as a 611(c) witness or call Mitter, who the Respondent suggests was the management representative involved. Nor did the Respondent proffer any reason why it could not produce Malone or Mitter as witnesses to bolster its defense that it did engage in effects bargaining.

(ALJD p. 7)

Respondent also argues that the Union representative at the underlying arbitration hearing essentially admitted that Respondent bargained over effects with the Union. (R BR p. 20) However, it is unclear to Counsel for the Acting General Counsel as to what “admission” was made in the opening statement as it concerns effects bargaining. (R BR p. 5) While the Union representative does mention “meetings” with Respondent management as well as the fact that Respondent did eventually restore the hours of a number of employees, there certainly is nothing to suggest effects bargaining took place before, during or after the reduction in hours was imposed by Respondent. To the extent not specifically addressed by the ALJ, Counsel for the Acting General Counsel would certainly

make the same argument with respect to Malone's arbitration testimony, particularly considering the Board's long-held position that a purported contractual waiver of a union's right to bargain is effective only if the relinquishment was "clear and unmistakable." *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-813 (2007).

Based on relevant Board law, it is clear that the Union did not waive its right to bargain over the effects of Respondent's decision to reduce bargaining unit employees' hours. Thus, Respondent's exceptions on this point must be rejected.

V. **The ALJ Did Not Err by not limiting effects bargaining to "significant management decisions involving loss of employment and to other management decisions where the union adequately identifies specific effects warranting bargaining"** (Exceptions 11, 15, 18, 22, and 23).

The ALJ appropriately found that Respondent had the duty to bargain over the effects of its decision to reduce hours of bargaining unit employees within the dietary department. (ALJD, p. 7) In its Exceptions, Respondent, which cites no case law for the proposition, appears to make a policy argument that "when there is no loss of jobs, the Board should at a minimum be able to identify specific effects of the decision before it will find an effects bargaining obligation." (R BR p. 22) Respondent goes on to assert that in the instant case, "neither the Union, the AGC, nor the ALJ has identified any specific 'effects' that Respondent's decision to . . . reduce employee hours had on employees other than those that are

inherent in the decision, i.e., reduced work hours.” (R BR p. 23) Counsel for the General Counsel would contend that the Respondent provided the Union absolutely no opportunity to articulate to Respondent ways in which to ameliorate the effects of its hours reduction, as Union Representative Kim Fowlkes was presented with a fait accompli on the matter. (ALJD pp. 4-5) Apparently, Respondent wants the Board to punish the Union for Respondent’s own bad actions. But, regardless, as the ALJ found, Respondent itself pointed to a possible direction of effects bargaining between the parties, as Respondent chose to reduce dietary employee hours as a whole, rather than lay off any employee. (ALJD p. 3) Perhaps the Union would have preferred to have a less senior employee laid off in favor of providing more hours to more senior employees. Of course, we will never know, as Respondent denied the Union any opportunity to weigh in on the issue. Based on the above, Respondent’s policy argument must be rejected.

VI. The ALJ Did Not Err in recommending a remedy consistent with *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) (Exceptions 17, 18, and 19).

The ALJ appropriately found that a *Transmarine* remedy is standard in effects bargaining cases, citing *Rochester Gas & Electric Corp.*, 355 NLRB 507, 508 (2010); *AG Communications Systems Corp.*, 350 NLRB 168, 173 (2007), petition for review denied sub nom. 563 F.3d 418 (9th Cir. 2009). (ALJD p. 9)

Respondent points to *Good Samaritan Hospital*, 335 NLRB 901 (2001), for the proposition that a *Transmarine* remedy is not awarded in every effects bargaining case. (R BR p. 23) While Respondent is correct on this point, as stated above, the fact remains that the Board has found that the “standard remedy” in effects bargaining cases is a *Transmarine* remedy, absent “unusual circumstances of a case” such as when employees’ terms and conditions of employment are not materially changed. *AG Communications*, supra at 173.

In the instant case, Respondent reduced the hours of approximately 10 employees, with at least one employee, Clondia Finley, subjected to a dramatic reduction in hours, which certainly constituted a material change in working conditions. (ALJD p. 3) Given the material change and given that the Union was met with a *fait accompli* on the matter, a *Transmarine* remedy is wholly appropriate in this case.

Finally, in the event a *Transmarine* remedy is ordered, Respondent seeks a limited remedy, similar to that in *Rochester Gas*, with Respondent’s liability running from the date of any court of appeals decision enforcing the Board’s order. (R BR pp. 23-24) However, as stated above, Counsel for Acting General Counsel contends that a full *Transmarine* remedy is warranted in this case. Moreover, despite Respondent’s implied intention to appeal the Board’s decision in the instant case, such an appeal remains purely speculative at this point, and to the extent a *Transmarine* remedy is ordered, such remedy should run from the date of the Board’s decision.

CONCLUSION

For the reasons set forth above and in Administrative Law Judge Ira Sandron's Decision and Order, it is urged that Respondent's Exceptions be denied in their entirety and the Board affirm the findings of fact, conclusions of law, and recommended remedy of ALJ Sandron in his Decision and Order in this matter.

Dated at Detroit, Michigan this 24th Day of May 2013.

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