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

----------x

WOODCREST HEALTH CARE CENTER

and **Case 22-CA-083628**

1199 SEIU, UNITED HEALTHCARE WORKERS EAST

----------x

CHARGING PARTY'S ANSWERING BRIEF TO THE EMPLOYER'S EXCEPTIONS

Charging Party, 1199 SEIU United Healthcare Workers East ("Charging Party" or "Union"), by its attorneys, Gladstein, Reif & Meginniss, LLP, submits this answering brief in opposition to Woodcrest Health Care Center's ("Employer" or "Respondent") exceptions to Administrative Law Judge William N. Cates's ("ALJ") April 2, 2013 Decision and Order ("ALJD") in the above-captioned case. Herein, the Charging Party addresses only some of Respondent's exceptions and relies on Counsel for the General Counsel's answering brief for all remaining issues.

ARGUMENT

I. THE ALJ CORRECTLY FOUND THAT THE EMPLOYER VIOLATED SECTION 8(a)(1) AND 8(a)(3) OF THE ACT BY ANNOUNCING AND WITHOLDING HEALTH BENEFIT IMPROVEMENTS FROM UNIT EMPLOYEES.

The Employer excepts to the ALJ's finding that the Employer unlawfully announced and withheld improvements in health insurance benefits from unit employees. Respondent's Exceptions at 22-30; Memorandum of Law in Support of Respondent's Exceptions ("Memorandum") at 16-22. However, the ALJ correctly relied on long-standing Board law

which requires an employer, when deciding whether to grant or withhold benefits from eligible voters, to proceed as it would have if the union was not in the picture. ALJD at 15, *citing Great A&P Tea Co.*, 166 NLRB 27 fn. 1 (1976). Here, there is no dispute that unit employees would have received the health benefit improvements *but for* their participation in a representation campaign. ALJD at 15. For this reason, the ALJ correctly found that the Employer's withholding of health benefit improvements from unit employees was unlawful.[1]

An employer's legal duty in deciding whether to grant or withhold benefits while a representation petition is pending is to proceed exactly as it would have if the union was not on the scene. *See, e.g., Lampi, L.L.C.*, 322 NLRB 502, 502 (1996); *Russell Stover Candies, Inc.*, 221 NLRB 441, 441 (1975). Such a rule is necessary to prevent an employer from manipulating the granting or withholding of benefits in order to gain an advantage in a union election. *Pennsylvania Gas and Water Company*, 314 NLRB 791, 793 (1994). For this reason, an employer may not withhold benefits that would have been provided but for the pendency of an election. *See, e.g., The Gates Rubber Company*, 182 NLRB 95, 95 (1970). The same rule applies to the withholding of system-wide benefits, even when the benefits provided are unanticipated. *See, e.g., Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000); *Associated Milk Producers*, 255 NLRB 750, 755 (1981).

The only circumstances under which an employer may withhold system-wide benefits from unit employees is if the employer provides unit employees with adequate assurances that the benefits will be provided after the election, regardless of the outcome, and informs those employees that the sole purpose of the postponement is to avoid the appearance of influencing an election. *See e.g. Noah's Bay Area Bagels*, 331 NLRB at 191; *Atlantic Forest Products, Inc.*,

[1] The Board reached the same conclusion in 22-RC-073078, the case involving the Union's objections to the election. *Woodcrest Health Care*, 359 NLRB No. 58 (2013).

282 NLRB 855, 858 *(*1987). By granting such assurances, unit employees are not left to draw their own conclusions about why the benefits are being withheld or whether they will be provided at all.

Here, there is no dispute that the unit employees would have received the improvements in health insurance benefits but for the union campaign. ALJD at 15; Joint Exhibit 2 at ¶ 4, 5. Furthermore, there is no dispute that the Employer failed to tell unit employees that they would receive the benefit after the election regardless of outcome. ALJD at 14; Joint Exhibit 2 at ¶ 7. In fact, in response to questions from unit employees about their exclusion from the health benefit improvements, the Employer stated that it could not discuss the changes "because right now you are in the critical period with the Union." ALJD at 14; Tr. 37. Accordingly, the ALJ correctly found that the withholding of benefits was unlawful.

The Employer's exceptions to the ALJD are unavailing. First, the Employer claims that the ALJ erred in finding that the health benefit improvements were implemented "system wide." Memorandum at 17. However, the ALJ's findings are clearly supported by the record. HealthBridge manages four nursing homes in New Jersey, including Respondent's. Employees at these facilities are covered by a common health insurance plan. The health benefit improvements were made to this common health insurance plan and applied to all employees at all HealthBridge facilities in New Jersey, except those involved in a representation campaign. ALJD at 14; Joint Exhibit 2 at ¶ 2, 3. There is no credible basis upon which to argue that this does not constitute a system-wide change, nor would a different finding alter the results. The critical undisputed fact is that, when announcing and implementing the health benefit improvements, the Employer failed to proceed as if the Union was not on the scene and failed to

provide the required assurances to employees. As discussed above, this fact alone renders the Employer's conduct unlawful.

The Respondent also incorrectly claims that granting the health benefit improvements to unit employees would have conflicted with its obligations under *NLRB v. Exchange Parts*, 375 U.S. 405 (1964). Memorandum at 18-19, 21. The Employer misunderstands the holding of *Exchange Parts* and ignores the very different context in which the benefit arises here. Neither the granting nor withholding of benefits is unlawful *per se*. In *Exchange Parts* the Supreme Court held that an employer violates Section 8(a)(1) by granting a benefit *in order to* influence the outcome of an election. *Exchange Parts*, 375 U.S. at 409. That case does not address the circumstance in which an employer grants benefits to non-eligible voters, but withholds them from employees eligible to vote.

However, the rationale of *Exchange Parts* is consistent with the Board law discussed above. The Court in *Exchange Parts* was concerned with employers using the grant of benefits to coerce employees. *Id.* at 409-10. Certainly, the same coercive effect can be achieved through a strategic withholding of benefits. *First Student, Inc*., 359 NLRB No. 120 Slip Op. at 5 (2013). In order to prevent this kind of manipulation with respect to the granting or withholding of benefits, the Board simply requires employers to proceed as if the union were not in the picture. *See, e.g., Great Atlantic & Pacific Tea Co.,* 166 NLRB 27, 29, n. 1 (1967); *First Student, Inc.*, 359 NLRB Slip Op. at 5. It is in this sense that employers must maintain the *status quo* – they must not alter the state of affairs because of the presence of the Union.

The Board has rejected employers' claims that Board precedent regarding the granting and withholding of benefits fails to provide adequate guidance to employers. *Noah's Bay Area Bagels*, 331 NLRB at 189 (concluding that "the law in this area is clear"). An employer's

obligation is simply to proceed as if the union were not on the scene. *Id.*; *quoting Lampi, L.L.C.*, 322 NLRB 502, 502 (196). Compliance with this mandate is easy when, as is the case here, the grant of benefits is system-wide. The Board has repeatedly held that an employer can grant system-wide benefits to unit employees during the critical period without any concern that doing so will expose it to liability. *See, e.g., Network Ambulance Services*, 329 NLRB at 1, fn. 4; *Associated Milk Producers,* 255 NLRB at 755.

Here, if the Union had not been on the scene, unit employees would have received the same health benefit improvements extended to all other employees. Prior to the announcement on March 5, all employees at HealthBridge facilities in New Jersey, including the Employer's, were covered by a common health insurance plan under the same terms. Joint Exhibit 2. However, on March 5, the Employer altered the *status quo* of extending the same health insurance benefits to all employees. As of that date, unit employees learned that they would be excluded from the system-wide benefit based only on the upcoming Union election. Joint Exhibit 1. The Employer's actions find no support in *Exchange Parts*.

Finally, the Employer argues that it should not have been obligated to tell employees the reasons the health insurance benefits were withheld, or that they would be provided after the election regardless of outcome, because doing so would have been inconsistent with the Employer's approach throughout the campaign to not discuss "possible changed terms and conditions of employment with voters." Memorandum at 18. There is no record evidence that the Employer adhered to such a policy, nor is it legally relevant.[2] The Employer also inexplicably argues that it went to "extreme lengths" to keep unit employees from knowing about the health benefit changes that applied to non-eligible voters. Memorandum at 19. Again, this

[2] The only evidence relied on by the Employer in support of this claim comes from Assistant Director of Nursing, Chereece Steele, who testified only that she never heard anyone in management, in her presence, discuss improvements that election-eligible employees had an interest in. Tr. 167-68.

claim is neither legally significant nor supported by the record. While the Employer did not directly raise the issue of the health benefit improvements with unit employees, it distributed a memo "at the Employer's facility" to all non-unit employees which made clear that unit employees were excluded from the benefit. Joint Exhibit 2 at ¶ 5; Joint Exhibit 1. It is hard to imagine a method more likely to result in unit employees becoming aware of the changes and their exclusion from them. In fact, memos were left in the employees' break room and were seen by at least one unit employee. ALJD at 13; Tr. 35. There is no question that unit employees were aware of the health benefit improvements and their exclusion from them. Joint Exhibit 2 at ¶ 7. Respondent did not provide the adequate assurances regarding the withholding of benefits. Rather, it left unit employees with the "clear impression" that they were being deprived of the benefits based on the exercise of their Section 7 rights. ALJD at 15. It is precisely this kind of manipulation of the granting and withholding of benefits that the Act is designed to avoid.

CONCLUSION

For the foregoing reasons, along with the reasons cited in Counsel for the General Counsel's answering brief, the ALJ correctly found that the Employer violated Section 8(a)(1) and 8(a)(3) of the Act by unlawfully interrogating employees and by announcing and withholding health benefits improvements from unit employees because of their involvement in a representation campaign. The Board is urged to sustain the recommendations of the ALJ and impose the recommended remedial order.

Respectfully submitted,

/s/ Katherine H. Hansen
Katherine H. Hansen
Gladstein, Reif & Meginniss, LLP
817 Broadway, 6th Floor
New York, New York 10003
(212) 228-7727

Counsel for Charging Party

Dated: June 10, 2013

CERTIFICATE OF SERVICE

This certifies that the foregoing brief was filed electronically with the NLRB and served on the parties via electronic mail as follows:

J. Michael Lightner
Regional Director, Region 22
michael.lightner@nlrb.gov

Marguerite R. Greenfield
Counsel for the General Counsel
margo.greenfield@nlrb.gov

Jedd Mendelson
Counsel for the Employer
jmendelson@littler.com

Dated this 10th day of June, 2013

/s/ Katherine H. Hansen
Katherine H. Hansen
Counsel for Charging Party