

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

800 River Road Operating Company LLC
d/b/a Woodcrest Health Care Center

Employer

NLRB Case No. 22-RC-073078

and

1199 SEIU, United Healthcare Workers East

Petitioner

**REPLY MEMORANDUM TO CHARGING PARTY'S BRIEF
ANSWERING EMPLOYER'S EXCEPTIONS**

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Respondent 800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center (“Woodcrest” or “Employer”) submits this Reply Memorandum in support of its Exceptions to the April 2, 2013 Decision and Order (“Decision”) of Administrative Law Judge William Nelson Cates (“ALJ”) and in reply to the Answering Brief of Charging Party 1199 SEIU, United Healthcare Workers East (“Union”). The Union devoted its entire brief (“CP Brief”) to the ALJ’s conclusion that the Employer violated the Act by announcing prior to the election and implementing as of the election date the reductions in employee health insurance costs. Accordingly, the employee health insurance cost reduction issue is the sole focus of this Reply Memorandum. (The Employer has filed a separate Reply Memorandum that addresses arguments raised by Counsel for the Acting General Counsel in her Answering Brief.)

Although the Employer does not here restate its arguments as to why the Board and all of those to whom it delegated powers and responsibilities were and remain without power to prosecute or decide this case, the Employer incorporates by reference herein the arguments set forth in Point I of its Memorandum in Support of its Exceptions as well as any other arguments adopted by the courts in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) and *NLRB v. New Vista Nursing and Rehabilitation*, 2013 U.S. App. LEXIS 9860 (3d Cir. 2013).

I. THE UNION HAS NOT REFUTED THE EMPLOYER’S ARGUMENT THAT THE ALJ’S CONCLUSION RUNS AFOUL OF *EXCHANGE PARTS* SINCE IN THIS CASE THE EMPLOYER STRICTLY MAINTAINED THE *STATUS QUO* PRIOR TO THE ELECTION.

The most significant attack that the Union lodges against the Employer’s argument that the ALJ’s conclusion is incorrect under *NLRB v. Exchange Parts*, 375 U.S. 405 (1964), is the contention that the Employer did not scrupulously preserve the *status quo* prior to the election. Disposition of this challenge is crucial since the rule of decision that the Employer argues here is narrow, specifically, that strict maintenance of the *status quo* is necessary under *Exchange Parts*

when, as here, a company has itself so preserved the *status quo* and the foundation upon which its election campaign is built is that it cannot even address employee comments and inquiries about changes in terms and conditions of employment except to convey that it is not permitted to address such matters with an election forthcoming.

The Union asserts that there is no factual basis for the Employer's argument since "[t]here is no record evidence that the Employer adhered to such a policy" (CP Brief at 5). The Union contention is mistaken. The record evidence clearly establishes that Employer communications during the campaign were solely to the effect that the Employer could not discuss possible changes in terms and conditions of employment prior to the election (Joint Exhibit 2, ¶¶ 5-7; Tr. 166:11-167:14; 167:20-168:13; 168:20-169:15). Cherece Stelle, Acting Director of Nursing at Woodcrest during the campaign, confirmed that in those instances when employees asked about improved benefits and the like, the Employer replied that we "could not discuss it [such matters], at this time" or words to that effect (Tr. 167:20-168:8). After the election, when the question concerning representation continued because objections were pending, the Employer followed its consistent practice from during the campaign when an employee asked about the health insurance cost reductions announced to the employees who were not election-eligible voters and once again stated words to the effect that we "were not allowed to discuss that matter at this time" (Tr. 167:3-14). Stipulation of fact no. 7 reads as follows: "The Employer did not announce or raise the matter of the health insurance improvements to the election eligible employees either at communication meetings with them or otherwise." That stipulated fact, quite obviously, is consistent with a practice of not discussing possible changes in terms and conditions of employment during an election campaign.

Despite having sought to prove that the Employer conducted itself unlawfully in numerous respects during the election campaign--Counsel for the Acting General Counsel has prosecuted no fewer than 3 alleged unlawful interrogations, two of which took place before the election--there is no allegation, let alone record evidence, of unlawful Employer election campaign communications. Having had ample opportunity to complain of and establish even one violation of the *status quo* as to election eligible voters or a single communication to election eligible voters of possible changes to the *status quo*, there is **not** a scintilla of record evidence, let alone a finding by the ALJ, of a single instance in which the Employer deviated from the prohibition against changes in terms and conditions of employment, promises of benefit, or threatened reductions with respect to employees in the voting unit.¹

Like Counsel for the Acting General Counsel, the Union attacks the Employer's *Exchange Parts* defense on the ground that the Employer changed terms and conditions of employment of personnel outside the voting unit. The Union correctly notes that *Exchange Parts* holds that a company in a representation campaign is at risk if it changes the terms and conditions of employment **of voters**. That, of course, is precisely the Employer's point. *Exchange Parts* establishes a framework that strongly discourages changes in the *status quo* in the voting unit. A company that strictly maintains the *status quo* is in an untenable situation when anyone, including an ALJ or the Board itself, says after-the-fact that it should have altered voters' terms and conditions of employment before an election. Moreover, when an employer has built its campaign around informing voters that it cannot address questions they have or comments they make about possible changes in terms and conditions of employment, the *Noah's*

¹ The Union mistakenly references the representation decision involving this same facility, *Woodcrest Health Care Center*, 359 NLRB No. 58 (2013), as support for the ALJ's conclusion that the Employer wrongfully withheld the health insurance cost reductions from election eligible voters (CP Brief at 5 n. 2). Nothing in that decision addressed the issue.

Bay Area Bagels line of cases offers no solace or refuge since it is inherently inconsistent with the employer's explanation up to that juncture as to how it may address modifications to the *status quo*. The result, as argued in the Employer's Memorandum (at 17-22), is that to the extent the Board does not currently privilege a company to preserve the *status quo* in circumstances such as that here, it necessarily must reconsider its precedent and do so.

II. THE UNION HAS NOT SET FORTH OTHER ARGUMENTS THAT REFUTE THE EMPLOYER'S EXPLANATION AS TO WHY THE ALJ'S DECISION REGARDING THE EMPLOYEE HEALTH INSURANCE COST REDUCTION SHOULD BE REVERSED.

The Union also suggests that the Employer did not do its utmost to limit voter knowledge about the health insurance cost reductions for employees who were not eligible voters and criticizes the Employer for circulating a memorandum to non-voters that "made clear that unit employees were excluded from the benefit" (CP Br at 6). This attack is spurious. The parties stipulated that the Employer distributed the March 5 memorandum **solely** to employees whose job classifications were listed on the memorandum and all such positions were outside the voting unit. The memorandum was directed solely to employees holding positions outside the voting unit to make clear that those employees would receive the cost reduction, not to underscore that other employees (in the voting unit) were not receiving it. Since it was necessary to identify employees who were to receive the reduction so that they knew of it, the Union's assertion that "[i]t is hard to imagine a method more likely to result in unit employees becoming aware of the changes and their exclusion from them" is pure hyperbole. Notably, despite the fact that at least one eligible voter saw a copy of the memorandum that was left in the break room (CP Brief at 6), the ALJ agreed that the Employer did not announce the health insurance cost reductions to election eligible voters (ALJD 15:35 and 15:44). The Union's unsupported assertion that the Employer left employees feeling coerced and under the "clear impression" that they were being

deprived of a benefit based upon the exercise of their Section 7 rights (CP Brief at 6) is belied by the undisputed reality that the Union won the election by a vote of 122 to 81. *Woodcrest Health Care Center*, 359 NLRB No. 58 (2013).

The Union challenges the Employer's argument that the ALJ's finding that the employee cost reduction was "system wide" is unsupported in the absence of evidence regarding other facilities that HealthBridge Management, LLC ("HealthBridge") manages (outside New Jersey) and what changes in employee health insurance cost, if any, transpired in connection with such facilities. However, assuming, *arguendo*, that the cost reduction was system-wide, the Board should reverse the ALJ's finding that the Employer should have announced the employee health insurance cost reduction to the voting unit on March 5 and implemented it as to the voting unit on March 23 since the ALJ assumed without record support that the Employer could dictate and control the changes made to the health insurance plan and the timing of those changes. HealthBridge provided a common benefit and determined that employees at facilities it managed who were subject to a representation election were to be excluded from the employee cost reduction. The Employer was not the entity that made that decision and nothing in the record supports a conclusion that the Employer had the power or authority to countermand the decision made by HealthBridge. It necessarily follows that the Board must reverse and remand the ALJ's conclusion that the Employer violated the Act in connection with HealthBridge's failure to announce and apply the employee cost reductions to voting unit personnel.

Finally, the premise that the Employer violated Section 8(a)(3) here by refraining from announcing and implementing the cost reduction for election eligible voters fails, as a matter of law, given that prior to the election the Employer had no idea whether the voting unit intended to vote for or against union representation. The conclusion that the Employer's withholding of the

reduction from the voting unit would redound to its benefit, as opposed to cast it unfavorably in the eyes of election-eligible voters, is grounded in assumptions that are neither founded nor supported by fact or logic. Moreover, once the election was conducted and the Union won, the Employer could not implement the cost reduction without risking that it would run afoul of Section 8(a)(5) of the Act since at that juncture the Union could at least contend that it held bargaining rights and that any unilateral action by the Employer was unlawful. It necessarily follows that the Board should reverse the ALJ's conclusion that the Employer violated the Act by failing to announce the employee cost reduction prior to the election and, at the very least, reverse the ALJ's conclusion that the Employer should have implemented the employee cost reduction following the election.

CONCLUSION

For the reasons set forth herein as well as the Employer's exceptions and Memorandum in support of its exceptions, the Employer requests that the Board reverse the ALJ's Decision and dismiss the Complaint herein.

Respectfully submitted,

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