

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

REGENCY HERITAGE NURSING AND
REHABILITATION CENTER

AND

Case 22-CA-074343

1199 SEIU, UNITED HEALTHCARE WORKERS
EAST, NEW JERSEY REGION

RESPONDENT'S EXCEPTIONS BRIEF

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INTRODUCTION

This memorandum is filed in support of Regency Heritage Nursing and Rehabilitation's ("Respondent", "employer", "Home") position that the Administrative Law Judge's ("ALJ") recommended order should be reversed and that the instant complaint should be dismissed in its entirety.¹

QUESTIONS PRESENTED

1. Is there a duty to bargain before making changes to minimum rates of pay effective for post probationary persons who are not yet employees of the an employer?

2. Does 10(b) of the Act preclude prosecution of the complaint where the change in minimums noted above commenced several years before the charge were filed?

3. Must the complaint be deferred to arbitration where the actual matter is *sub judice* before the contract arbitrator?

4. Can the remedy exceed the 6 months preceding the filing

¹ This memorandum is written at a time of transition at the Board. Respondent is advised that the Senate confirmed Kent Hirozawa to the Board. Respondent moves for his, and Member Pearce's, recusal. Mr. Hirozawa was a partner in the law firm representing the charging party ("CP") in the litigation of this case. Member Pearce was counsel to the CP involved in this case, Mr. Hirozawa was his chief counsel for the past several years and Member Pearce has already recused himself from consideration of Respondent's matters. (See e.g. 355 N.L.R.B. 603)

of the charge in the case?

STATEMENT OF FACTS

The General Counsel asserted that had the union not pressed the issue (Tr-9) "they probably never would have found out that the Employer was not paying minimums to the people hired after contract expiration." The record will show that the Charging Party had extensive knowledge of the employer's conduct.

GC 3 is the original 26 page contract between Regency Heritage and 1199 (Tr. 20) ("union", "CP") That agreement set minimum rates of pay. (ALJD at fn 2)

GC-4 is the original contract proposal for renewal of the expired contract. (Tr. 26) The contract expired 2/28/11. This was delivered at the August 2, 2011 meeting by lead union negotiator Ron McCalla. (Tr. 25)

At the August 24 meeting, the employer proposed a reduction in the minimum rates. (Tr. 28) Specifically, the Home asked for rates of "\$10 an hour for CNA's, \$8.50 an hour for Dietary, Housekeeping and Recreation Employees, and \$22 an hour for LPN's." (Tr. 48) The union response was; "We certainly told him that we had no intention to agreeing to any reduction of the minimum rates. *That was completely out of the question*". McCalla also later noted, when asked; "Did the Union ever agree that new hires would be paid different rates than the rates outlined in the contract?" that "No, definitely not -- back when it was introduced initially on the second meeting, I

think in August, *we definitely said that this was a non-starter.*" (Tr. 38)

At that meeting, McCalla testified, the subject of whether the Home was "observing the contractual minimum hiring rates of the expired agreement "...wasn't a subject of discussion" (Tr. 29) Also at that meeting, McCalla noted, "And we did, once again, ask for an extension of the agreement by this time. I don't recall exactly when it was stopped but the check off had stopped...this was the meeting where Morris actually stated that the Employer stated that he would be willing to consider resuming the check off." (Tr 30) McCalla, however, did not "recall" that the union filed, on the last day of the 10(b) period, 9/1/11, ULP charges asserting that check off had stopped as of the contract's expiration date. (22-CA-063903)

McCalla noted that the employer, although willing to resume check off was unwilling to sign an extension because "...he said that the Employer did not want to be subject to the arbitration clause of the contracts. So on that basis they couldn't agree to an extension" (TR. 31) It should be noted that the arbitration on failing to pay post probationary minimum rates was already *sub judice* before Arbitrator Martin Scheinman. Thus, obviously, the employer did not want to continue (only) *disciplinary* grievance arbitration while the Union retained the right to strike.

At the September 27th meeting, McCalla testified (Tr. 34) "And both individuals during the course of their separate presentations mentioned that one of the

reasons why they could not agree to an extension was that they could not be bound by the minimum hiring rates in the current contract for the folks that they were hiring during that particular period as we were bargaining...And Morris in the first instance advanced some part of the Act -- I don't recall what it was -- and he said...that he thought that section that he had cited might actually give the Employer the ability to not adhere to the minimum hiring rates" McCalla agreed that the Home's position was that it was likely that it did not need to pay post probationary minimum rates post contract to new hires. (Tr 51) Moreover, McCalla noted that after the presentation in September, "our understanding in the last session they were sketching out their likely possible right to do it. *Their need to do it.* And their likely right to do it, but not the fact that they were doing it." McCalla agreed that the Home's owner said that he needs the right to pay less than the contractual minimum rates. (Tr 50)

When asked specifically whether the expired contract's post probationary rates were being adhered to, an issue *sub judice* before the Arbitrator and by that meeting just time barred under 10(b) of the Act (9/1/11) (Tr. 35) the employer "... said something along the lines of, "I see what you're trying to do here. You want me to say that I'm not -- that we're not following the contract. And I'm not going to do that." And we were surprised because in the first instance we heard the rationale, with the qualification of might, might -- it's possible that the Act gives the Employer that right.

And when we presented it -- it was "You're not going to play gotcha with me. I see what you're trying to do here. I'm not going to fall into that trap. I'm not going to say that I'm not adhering to the contract." McCalla did not ever ask when the employer stopped paying the post probationary minimums. (Tr. 52) McCalla did not mention, however, that the very issue of the minimums were *sub judice* at arbitration. (Tr 53) The reference to "gotcha" obviously related to that and to the time bar applicable with the expiration of the 10(b) period. Respondent obviously feared reviving the expired 10(b) period by its current acknowledging that the minimums had not been adhered to for new hires for over 6 months.

At the outset of the trial, witnesses were sequestered. (Tr. 17) Roy Garcia, a union vice president, was therefore asked to leave the courtroom as he would have been a fact witness. Garcia was never called to testify although, as was seen later, he was the only available witness at the trial that attended the arbitration that dealt with the issues at trial. McCalla testified that he had not participated in the arbitration. (Tr. 53) Roy Garcia, who had done so, was not called to testify (Tr 54) , although present in the court and sequestered in expectation of his testimony.²

At the November 10 meeting (a point clearly after the 10(b) period expired and the arbitrator had stated his opinion) (Tr. 36-7) McCalla noted that "then we caucused

² He could have answered the ALJ's myriad questions about the arbitration.

and then very directly, “Are you adhering to the minimum rates?” And he said that no, they were not... Are you adhering to this [sic] minimums? And then we heard just clearly that no, they were not adhering to the minimums *for the new hires* coming into the facility post expiration.”

McCalla then testified that as a result of this response, he said “we need that list because now we don’t have any idea of what you’re paying folks” (Tr. 38) However, the real list that McCalla was looking for was of the names and positions of the employees, *not* their rates of pay. As McCalla later made clear in extensive testimony, (Tr 42-46) “...clearly one of the issues at Regency Heritage is that it’s very difficult to figure out exactly what the Unit is.” (Tr. 43) Although claiming a discrepancy in the number of employees that were employed by the predecessor employer and the current Respondent, McCalla produced a pre contract list of the predecessor’s employees. That list was 8 years old. (Tr 49) The union has not produced a more recent list (Tr. 49) *although they were getting monthly check off from the predecessor employer.* Moreover, they did not support their argument even though “the employer has repeatedly asked for you to produce a more current list to see if there’s really a discrepancy between the... post contract numbers at the Jewish Home” (Tr 49-50)

McCalla made clear that the minimums in issue in this case come into play only after a 90 day probationary period is served by an employee. (Tr. 46) This is

illustrated by the following question and answer between McCalla and the Court; “just so that I understand, they can pay whatever they want when they hire. But after the 90 -- after the probationary period, then they have to bring them up to the minimum. Is that right? THE WITNESS: Yes, that’s our board [sic] [broad] answer” (Tr 47) Moreover, McCalla acknowledged that It “...could have been” that the post probationary rates were referred to as rates to be applied to the “unborn”. (Tr 56)

McCalla acknowledged that *current* employee rates would not be affected by the failure to pay post probationary minimum rates to new hires. (Tr 59) In fact, the only “impact” of such a failure is, according to McCalla, to be found in “...the mind...” of the employer and how it affects his bargaining for future contracts. (Tr. 59)

Notwithstanding General, and Charging Party, counsel, assertions that the arbitration and extant award does not deal with employees hired post contract, the evidence shows that several affected employees were hired post contract. *Since* their probationary period expired, the *union* made a claim, for their minimums “underpayment”, at the arbitration. (Tr 61, 62, 83,85, 88-9). Respondent exhibit 5, reflects the union’s demand for underpayments of minimums *from information* given to it by the Home in *June 2011*. (Tr 81-2) The union was advised about these employees as a result of spread sheets and other documentation sent to it by the Respondent. (Tr. 71, 81) These notifications were repeatedly sent to the union well

outside of the six month (10)b period. (Tr 72, 73, 81-3) Indeed, the union was aware of the issue of minimums not being paid for *years* before the February 2012 charge was filed in this case. (TR 76, 77,79-80, 82) In fact, CP ex 2 reflects a February 2011 arbitration demand for failure to "...pay the correct wage rates, *including the contractual minimum rates...*" "

This, of course, is a full year before the instant charge was filed.

Moreover, the arbitrator resolved all such disputes *through June 11, 2011 and retained jurisdiction for subsequent periods.* (Tr 62) Thus, the issue of post contract minimum rates was before the arbitrator and was placed there by both parties. (Tr 63, 72)

The instant complaint, and ALJD, seeks a make whole remedy for a period of one year before the instant charge was filed. It seeks retroactive payments to March 2011.

POINT I

THERE IS NO DUTY TO BARGAIN OVER NOT YET HIRED EMPLOYEES

General Counsel exhibit 6 (at "4 of 4") reflects the union's citation of cases in support of the charge. As reflected in the Respondent's response to those cases, Respondent notes that NONE of the cases holds that a contractually imposed

minimum rate for new post probationary employees cannot be changed without an impasse after that contract has expired. Rather, the law cited in those cases supports the Respondent's position that the present complaint should be dismissed. Any violations found in those cases dealt with changes to *current* employees, not persons to be hired in the future and applicants.

As stated earlier, the issues raised in this case are whether the Respondent improperly unilaterally changed the rates of future, applicant employees who are ultimately hired and complete probation. There is no assertion that current employee rates have been altered. Nor is there an assertion that after their employment, such applicant employee rates have been unilaterally changed. The issue therefore is whether the employer, post contract, must continue to apply minimum rates of pay for future post probationary, and as yet unhired, "employees" at rates set by that expired contract. The Board has held,:

"As noted above, however, this rule is applicable only when the contemplated change involves the terms and conditions of employment *of bargaining unit employees*. Thus, when an employer makes decisions involving the interests of individuals *outside the bargaining unit*, the Board will not find an 8(a)(5) violation if the employer fails to notify the union in advance of implementation unless the "third-party concern . . . vitally affects the 'terms and conditions' of [bargaining unit employees'] employment."

Similarly, an employer's changes in hiring practices generally fall into the class of business decisions affecting individuals outside the bargaining unit over which an employer is not obligated to bargain with

the union

n14 *Star Tribune*, 295 NLRB 543 (1989) (applicants for employment are not bargaining unit employees and thus an employer normally is not obligated to bargain over decisions affecting them)."

United States Postal Service 308 N.L.R.B. 1305 (N.L.R.B. 1992) [*emphasis supplied*]

This case cites to *Star Tribune* 295 N.L.R.B. 543 (N.L.R.B. 1989), an oft cited, and critical, case. That case deals with all of the union's claims in this one. The Board there reviewed the holding of the Supreme Court in *Allied Chemical Workers, Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971). In that case, the company *unilaterally* altered the *contractually negotiated* health plans for retired employees. Those plans had been negotiated while the affected employees were employed by the company. The Court there noted, "This obligation [to bargain collectively] extends only to the 'terms and conditions of employment' of the employer's 'employees in the unit appropriate for such purposes' that the union represents."

The Board then held:

Applicants for employment do not fall within the ordinary meaning of an employer's "employees." Applicants perform no services for the employer, are paid no wages, and are under no restrictions as to other employment or activities. And, unlike the intermittent employment situation that gives rise to the need of employers and unions for hiring halls, there is no economic relationship between the employer and an applicant, and the possibility that such a relationship may arise is *speculative*." [*emphasis supplied*]

The Board then dealt with *Laney & Duke Storage* cited by the ALJ in that case. The Board specifically overruled that decision "to the extent that the 8(a)(5) violation is premised on a duty to bargain about applicants". As the Board stated:

"In *Laney & Duke Storage Warehouse Co.*, 151 NLRB 248 (1965), enfd. in relevant part 369 F.2d 859 (5th Cir. 1966), cited by the judge, the Board held there was a duty to bargain about changes in application forms. The facts in that case indicate that the Board's conclusion that the employer's unilateral institution of new application forms violated Sec. 8(a)(5) was based in part on the finding that the new application forms constituted changes in the terms and conditions of employment of unit employees. To the extent that the 8(a)(5) violation is premised on a duty to bargain about applicants, *Laney & Duke* is overruled.

As if parroting the instant complaint claims, the union in that case:

"...argues that the duty to bargain with an exclusive representative about terms and conditions of employment of unit employees extends to conditions of hire, such as the Respondent's applicant drug and alcohol testing requirement. We reject this argument in light of the Court's analysis in *Pittsburgh Plate Glass* finding that the duty to bargain with an exclusive representative about terms and conditions of employment of unit employees does not extend to pensioners' benefits...We further conclude that the applicants could not properly be joined with the active employees in the Guild unit *because they do not share a community of interest broad enough to justify their inclusion in the bargaining unit. Like retirees, applicants are not permitted by the Board to vote in elections or considered to be part of a bargaining unit for purposes of representation elections.* [emphasis supplied]

Finally, the Board required a lot to squeeze into the "vitality affect" exception to impose a duty to bargain about applicant changes;

"An indirect or incidental impact on unit employees is not sufficient to establish a matter as a mandatory subject. Rather, mandatory subjects include only those matters that materially or significantly affect unit employees' terms and conditions of employment. Similarly, the phrase "terms and conditions of employment" is to be construed in a limited sense and does not include all subjects that may merely be of interest or concern to the parties. n15 The judge's observation that applicant testing will to some degree affect the composition of the bargaining unit does not, standing alone, support the conclusion that it vitally affects the terms and conditions of employment of unit employees. Any hiring criterion or individual hiring decision affects the composition of the bargaining unit. If applicant drug testing is deemed to vitally affect the terms and conditions of employment of unit employees solely on the basis that unit composition is affected, then any applicant qualification could be subject to this argument. We conclude that the "vitally affects" test has not been met.

n15 274 NLRB at 1070 (emphasis added) (fns. omitted). Applying this standard, the Board held that the employer did not violate the Act by refusing to bargain with the union over a summer help program under which the employer hired college-age children of unit and nonunit employees to perform both unit and nonunit work on a temporary basis during the summer. The Board concluded that because the program did not reduce the regular hours of work available to unit employees and because unit employees were given priority for any remaining overtime, the program did not "vitally affect" their terms and conditions of employment. "

In this case, there is no impact on the pay rates of current employees. Nor has the "vitally affects" test been met. McCalla's determination of what minimum rate changes do to an employer's "mind", hardly "vitally affects" the other incumbent, and employed, unit employees.³ Accordingly, the complaint should be dismissed on the

³ Of course, McCalla's testimony is "evidence" on the issue, the ALJD (at 19, lines 36-9) is speculation.

merits. There is no duty to bargain over post contract changes to the post probationary rates of unknown, unhired, non employees⁴.

The ALJ does not seem to acknowledge the import of the above cited decisions. (See ALJD at 18, lines30-53) They reflect that there is a duty to bargain on mandatory subjects of bargaining *only* with bargaining unit employees. Employees not yet hired, are not employees. They would be ineligible, as is the case of retirees or applicants, to vote in any election conducted by the Board. That is, of course, because, as non-employees, they have no community of interest with the employees. This is entirely like the duty to bargain over health benefits of former employees. Of course, when they were employees, there was a duty to bargain with the union concerning their health coverage and pensions; a mandatory subject of bargaining. However, once they were no longer employees, the employer had no duty to consult with anyone before changing those health benefits.

Contrary to the ALJ (ALJD at 19, lines 17-41), it follows, that there is no duty to speak to the union about changes in *post probationary* minimum rates of pay for non employees, who are, obviously, not (yet) in the bargaining unit and who have,

⁴ It could even be argued that the parties were at “one issue” impasse on the issue. The union regarded the proposal as a “non starter” and was “completely out of the question”. It was aware, moreover, that the employer “needed” relief from the minimums.

again obviously, not yet completed probation (and may very well *never* do so!).⁵

Since the respondent failed to bargain with the union before changing post probationary rates of non bargaining unit, and non, employees, the complaint alleging 8(a)5 violations should be dismissed on the merits.

POINT II

THE CHARGES ARE TIME BARRED

“Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality.” *Taylor v. Freeland & Krona*, 503 U.S. 638, 644 (1992).

In *U.S. v Kubrick*, 444 U.S. 111, 116 (1979), the Supreme Court stated pertinently as follows:

Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. 135, 139, 25 L.Ed. 807 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a

⁵ The “logical extreme” that the ALJD posits (at 19, lines 29-38) is, therefore, entirely logical. The parties could bargain about retroactive reinstatement of minimum hiring rates, as well as other benefits for employees hired post expiration, just as they can negotiate for retroactive wage and fund increases, for all employees, none of which they are *required* to give pursuant to any mandate of the NLRA. Economic power could be used to achieve these goals rather than improperly imposed government mandate.

reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise...(citations omitted) Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and *we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims...*(citations omitted) We should regard the plea of limitations as a "meritorious defense, *in itself serving a public interest.*" Guaranty Trust Co. v. United States, 304 U.S. 126, 136, 58 S.Ct. 785, 790, 82 L.Ed. 1224 (1938). (*emphasis supplied*)

The Supreme Court reiterated that the 10(b) period reflects the public interest as espoused by Congress. The Court noted

As expositor of the *national interest*, Congress, in the judgment that a six-month limitations period did "not seem unreasonable," H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, barred the Board from dealing with past conduct after that period had run, *even at the expense of the vindication of statutory rights...*"It is not necessary for us to justify the policy of Congress. *It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy*" Colgate Co. v. Labor Board, *supra*, at 363. Cf. Southern S. S. Co. v. Labor Board, 316 U.S. 31, 47.

International Ass'n of Machinists v. NLRB, 362 U.S. 411 (U.S. 1960) [*emphasis supplied*]

Moreover, as the 10th Circuit noted in *State of Colorado v. Westem Paving Corp.*, 833 F.2d 867, 873 (1987);

because of their mechanical application, "statutes of limitation result in hardship to plaintiffs in some cases." *Steele v. United States*, 599 F.2d 823, 828 (7th Cir. 1979). However, "alleviation of that hardship is a matter of policy for the Congress." *Kaltreider Const., Inc. v. United States*, 303 F.2d 366, 368-69 (3d Cir.), cert. denied, 371 U.S. 877, 83 S.Ct. 148, 9 L.Ed.2d 114 (1962). Once Congress, or some state legislative body, has determined what is a sufficient period for bringing a claim, the courts should refuse to hear the claim after that time has passed. "Stale conflict should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain." *Dayco Corp.*, 523 F.2d at 394. *Plaintiffs should not be allowed to argue that no logical reason exists for applying the statute to their case.* After all, "statutes of limitation find their justification in *necessity and convenience rather than in logic*. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, ... They are by definition arbitrary, and their operation *does not discriminate between the just and the unjust claim*, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They present a *public policy* about the privilege to litigate. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945) (footnote omitted). Legislatures enact a statute of limitations to apply to all cases covered by the statute. As the legislature is the one to make such policy decisions, the only decision for the courts is whether the claim is within the coverage of the statute. [*emphasis supplied*]

The Board noted in its decision in *Miramar Hotel Corporation* 336

N.L.R.B. 1203, 1251-1252 (NLRB , 2001) that section 10(b) is designed;

"to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize

existing bargaining relationships." *Machinists Local 1424* (Bryan Mfg.) v. NLRB, 362 U.S. 411, 419 (1960); "*the accommodation between these competing factors has already been made by Congress.*" *Byran* 362 U.S. at 428. [emphasis supplied]

As the D.C. Circuit explained a related 10(b) "rule":

The rule gives charged parties "assurance that, absent the existence of a properly served charge on file, [they] will not be liable for conduct occurring more than 6 months earlier," *Ducane*, 273 NLRB at 1391, and that they will not be called upon to defend themselves against stale charges... The repose that *Ducane* assures also advances § 10(b)'s goal of "stabilizing existing bargaining relationships", *Local Lodge No. 1424*, 362 U.S. at 419, enabling parties "to assess with relative certainty their obligations to each other", *NLRB v. Preston H. Haskell Co.*, 616 F.2d 136, 142 (5th Cir. 1980).

District Lodge 64, International Ass'n of Machinists & Aero. Workers v. NLRB, 949 F.2d 441 (DC Cir, 1991)

The Board has reiterated "the policies underlying Section 10(b), which is intended to 'promote stable collective-bargaining relationships by precluding extended periods of uncertainty regarding the validity of the agreement and the parties' contractual obligations.' *A&L Underground*, supra at 469." *St. Barnabas Medical Center* 343 NLRB 1125 (2004)

"Section 10(b) of the Act confines the issuance of unfair labor practice

complaints to events occurring during the 6 months immediately preceding the filing of a charge and has been interpreted by the Supreme Court to bar finding any unfair labor practice, even though committed within that period, which turns on whether or not events outside that period violated the Act.

North Bros. Ford, Inc. 220 N.L.R.B. 1021

Moreover, the Board has made clear that “[t]he Court's decision in Bryan and the legislative history it cited require "strict adherence" to the 10(b) limitation. Chambersburg County Market, 293 NLRB No. 78 (Apr. 14, 1989).” *A & L Underground* 302 N.L.R.B. 467, 468 (NLRB , 1991)

The Board has articulated a three-pronged test established by the D.C. Circuit in describing the equitable *fraudulent concealment* doctrine. Under that test, fraudulent concealment tolls the 10(b) statute of limitations when (1) there has been *deliberate* concealment of (2) material facts relating to the alleged wrongdoing and (3) the wronged party *does not know* of these facts and *could not have discovered them* through reasonable diligence. The Board has stressed that "the three critical elements" *all* must be present to warrant the tolling of the 10(b) period. *Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996), *enfd.* sub nom. *Machinists District Lodge 64 v NLRB*, 130 F.3d 1083, 1087 (1997), relying on *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (1977)

Nothing blocked due diligence by the union in this case. The union has shop stewards in the facility. There are representatives assigned to the facility that

have access to it⁶. The telephones, internet, email and postal service, all work. At the very least, there have been employee representatives at all of the negotiation sessions. (ALJD at 13, line 39) Demands were prepared based on meetings with employees. In fact, there was nothing hindering the union's timely filing any ULP charges⁷. The ALJD (at 27, lines 18-46), in finding that respondent did not disclose *some* employees in its submissions to CP, knocks out the entire 10(b) defense as some sort of "punishment". However, the respondent's actions in that regard do not diminish one iota the "reasonable suspicion" that the CP surely had of respondent violations of minimum rates of pay and do not explain how with *any* diligence the CP could not have been expected to file ULP charges about these violations.⁸ After all, even if the union was not given information about some employees, it was given information

⁶ McCalla's complaints about a union agent having access is a particularly "red herring" as the Board and the Courts have ordered the employer to deal with the agent. *Regency Heritage Nursing & Rehab. Ctr.*, 353 N.L.R.B. 1027 enforced *NLRB v. Regency Heritage Nursing & Rehab. Ctr.*, 437 Fed. Appx. 65. There are no access charges or contempt proceedings extant.

⁷ Amazingly, the union did not file ULP charges after the September meeting, where they received the "gotcha" response, for close to four and a half *more* months and did not file any ulp charges for three months after they were clearly told that the minimums were definitely not being paid in the November meeting. In contrast, they filed charges alleging a unilateral cessation of check off on 9/1/11. They were obviously content to arbitrate the case. They chose arbitration instead of the Board process.

⁸ In all of the case cited by the ALJ, the respondents affirmatively mislead the charging party concerning the existence of a labor law violation. In this case, only negligence caused the CP to not file timely charges as it knew full well that this employer had a history of not paying the minimums, pre-and-post contract expiration.

about others in the same position.⁹ Most importantly, Respondent did *nothing* to mislead the CP to suggest that it was *in fact* paying the contract minimums. Rather, every indication from the Respondent was clearly that they were not!

The ALJ, while noting “clear and unequivocal notice”¹⁰ is required to trigger a 10(b) defense, utterly fails to apply an equally important 10(b) doctrine, that the notice can be either “actual or constructive”. *Ohio & Vicinity* 344 NLRB 366, 367 (2005, citation omitted). As such “open and obvious” conduct alone can “provide clear notice” of a 10 (b) triggering violation. *Broadway Volkswagen* 342 NLRB 1244, 1246 (2004) enf *East Bay v NLRB* 483 F3rd 628 (9th Cir 2007)

Where the charging party was “on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred” and due diligence could have discovered the violation, adequate notice of an unfair labor practice sufficient to trigger the running of the 10(b) period existed. *Phoenix Transit Systems* 335 NLRB 1263 fn 2 (2001). *Accord United Kiser Services* 355 NLRB 319, 320 (2010).

In *St. George Warehouse*, 341 NLRB 905, 905 (2004), the Board noted

⁹ Nor does this failure explain why just asking employees would not have, again, disclosed to the CP that minimums were not being paid. This ALJ stress upon information received from the Respondent is nothing more than a pivot from the obvious source of employee grievances, the employees themselves. Any question to them would have produced enough to file a charge as it did to file the first 2011 arbitration demand..

¹⁰There is, of course, a difference in notice where there is a subtle change in extant practice and a long running dispute about an issue.

that in "...determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence".

The charges are time barred as the 10(b) period had clearly expired before these charges were filed. The CP union had actual and, at least, constructive notice of violations that it did not timely file charges on. The CP basis for "reasonable suspicion" sufficient to warrant the filing of charges are numerous and independent of simply asking some, if not all, of the employees what they were making.

A) The Respondent stopped applying the minimum rates for employees hired after the contract's February 28, 2011 expiration. Accordingly, CNA's and non CNA employees were hired March 24th, 2011 at lower rates. The union's current charge filed February 7, **2012** alleging the unilateral reduction in rates is therefore barred by section 10(b). Nothing stopped the workers or the union from discovering that the old contract's minimums were not being adhered to.

B) Moreover, the union had already brought an arbitration in October of **2010** alleging that the employer was not applying the proper rates to the current employees when there *was* a contract so it had every reason to be "on the lookout" for rate "violations" after the contract expired.

The charging party (cp ex 2) demanded arbitration alleging that the

charged party was not, under the extant contract, properly resetting the post probation “minimum” rate for its employees. In effect, the CP argued that since the implemented wage increases were not being applied to the base rate, employees hired after the raises that completed probation were being paid less than they should have been, “the minimums”.

There was an arbitration hearing on **May 5th, 2011** (a date well after the contract expired). The arbitrator directed the preparation of a "spread sheet" "indicating the alleged amounts owed to employees for retroactive pay *through June 11, 2011*" [*emphasis supplied*] (see Respondent’s exhibit 1, the arbitrator's award)

Respondent's exhibit 5, an email from union counsel dated June 28, 2011, states “Attached are the Union’s calculations of the back pay owed for failure to pay minimums. The calculations go through 6/11/11...In addition, there is at least one employee whose probation *ended after 6/11* for whom we could not do the calculations, e.g. Regie Reyes...I strongly suggest that your client adjust the rates to the correct level without further delay so we don’t have to continually update. But more importantly, these workers should be paid what they are owed as there is no doubt how *Arbitrator Scheinman views this case*...According to my notes, Marty [Scheinman] stated that if I receive no response within two weeks of presenting the calculations, *we should go to him*”. [*emphasis supplied*] (see ALJD at 7 lines 1-20)

Thus, the Union *in June 2011*, **knew beyond any doubt** that 1) part of its claim *at arbitration* was for employees hired *post* contract, and who were post probation, and whose minimums were not being paid pursuant to the expired (2/28/11) contract (since only employee Reyes had no claim as he had not yet finished probation), 2) that the case was sub judice before Arbitrator Scheinman and 3) that the Union was adequately informed of the rates being paid and the employee dates of hire because of the information given to it (Respondent's exhibit 4), *inter alia*, on *June 17, 2011*. It made a choice to stay at arbitration, not go to the Board.

C) Moreover, a list was submitted and acknowledged by union counsel in an email dated 8/4/11. (see Respondent's exhibit 2 (at "2 of 2")). Union counsel knew that minimum rates were not "right" and noted that there is an ongoing liability. (*Id.* "Of course, if Heritage is still not paying the proper rates, we'll have 2 more months [June through August] of back pay. Any chance you can get Gross to pony up *and correct the rates now?*") (see ALJD at 8, lines 31-35) Thus the union knew that the rates were incorrect at that time. The 2/7/12 charge was thus "late".

Since the list also showed employees hired after the 2/28/11 contract expiration, the union was on notice or had at least a "reasonable suspicion" that the "correct" minimum rate was not being applied such employees.

D) The employer had stated in bargaining all along that it does not want

to renew the contractual minimums applicable to employees to be hired in the future and never denied that it was hiring at rates incompatible with the expired contract's minimums. Again the union should have been alerted to file its charges timely.

In this case, of course, the charging party had a long standing problem that it was litigating and contesting concerning minimum rates of pay. It did not require “diligence” to discover the failure to pay the minimums. It required “negligence” to fail to file unfair labor practice charges.

The Supreme Court, in one of the cases *cited by the union*, made clear that any assertion that the failure of an employer to make monthly fund contributions, post contract, is an unfair labor practice and must be brought within 6 months of the first failure to pay. The Supreme Court does not find a continuing violation in the failure to make fund contributions where the 10(b) period has expired. Neither would the Board apply a continuing violation theory to a case like this where the "change" effected; the failure to apply the expired contract's minimum rates to post probationary employees hired after contract expiration, took place in excess of the 10(b) period. ("In the present case, it likewise *is the alleged change* in the Respondent's method of calculating vacation pay that originally may have given rise to an unfair labor practice. That change, however, took place outside the relevant Sec. 10(b) period. Here, as in *Continental Oil*, *no change took place after that one act*. As our dissenting

colleague concedes, the act of inadvertently leaving the vacation benefits out of the contract took place far before the relevant statutory limit. The Respondent's *continued application* of this method for payment of vacation pay does not give rise to a continuing violation here, just like the analogous situation did not give rise to a continuing violation in *Continental Oil*". *The Arrow Line* 340 NLRB 1 .(2003)).
[emphasis supplied]

The union did not file these charges until February 7, 2012. The charges are therefore time barred and the Congressionally expressed "public interest" in establishing a 6 month statute of limitations in labor law cases will be vindicated, if the complaint is dismissed. This is not a matter of someone "getting away" with something (although that is the result). Rather it is the vindication of a choice made by Congress to apply a short statute of limitations period in labor law cases for "the public interest". The ALJ ignores this public interest by eviscerating it.

The ALJ, moreover, seems to require much more than "facts that reasonably engendered suspicion that an unfair labor practice had occurred". He even requires much more than "reasonable diligence" to become aware of the ULP, but instead seems to require unequivocal notice not just of a *possible* ULP but of a *meritorious, fully perfected*, ULP before the need to file a charge.¹¹ The ALJ cannot

¹¹ Amazingly the ALJD (at 25, lines 29-30), states "the record is somewhat uncertain as to why Reyes was even included in the arbitration process since he was hired after the contract expired". Yet this shows that 1) the parties were arbitrating post

point to any reason why the charging party was not on actual and constructive notice that this employer was not paying its employees the contractual minimums, in general, or that the employees hired post contract expiration, specifically, were not being paid at the expired contract's rates. As far as notice is concerned, can anyone really argue that the union had no "reasonable suspicion" that this employer was not paying the expired contract's minimums when it is clear that the employer was not paying the contract minimums when the contract was extant? Is there any doubt that "due diligence" would have uncovered this failure? All the CP had to do was ask the employees what they were making. There were shop stewards at the facility. There is no evidence of the CP being unable to ask the employees. In fact, that sort of inquiry triggered the union's demand to arbitrate minimums in **2011**. The documents and emails from the CP counsel reflect full knowledge that the minimums were not being paid since ongoing and repeated demands for make whole relief were actually being made by the CP. Certainly, the CP, was "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred". All that was missing, was the timely filing of a charge, not any facts. The ALJD has the exception swallow the rule.

POINT III-THE CASE MUST BE DEFERRED TO ARBITRATION

As noted throughout this memorandum, the parties have an extant arbitration continuing on the issues of the minimums. There has been no challenge to

expiration claims and 2) knew about them well outside of the 10(b) period.

Arbitrator Scheinman's hearing and determining the case before him. Deferral to arbitration is therefore required. *Collyer Insulated Wire*, 192 NLRB 837 (1971), *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). The ALJD notwithstanding (ALJD at 20, lines 23-33), it is well established that wilful participation in an arbitration, waives any claims of arbitrability.¹² The ALJD notes, in fact, that "...the arbitrator's decision makes no distinction between employees hired pre-and-post contract expiration" (ALJD at fn 34). The ALJD stating that because of the contract's expiration, respondent would not be required to, or bound to, arbitrate is, in this case, plainly wrong. (ALJD at 20, lines

¹² In stating this very well established doctrine, the court noted: "This Court has held that a party may not challenge the qualifications of an arbitrator after submitting a dispute to a board of arbitrators whose composition was known by the party before an unfavorable decision was rendered by the board. *Bower v. Eastern Airlines, Inc.*, 214 F.2d 623, 627 (3d Cir.), cert. denied, 348 U.S. 871, 99 L. Ed. 685, 75 S. Ct. 107 (1954). We agree with the extension of this rule by the Ninth Circuit, which recently held that a voluntary participant in an arbitration of a labor dispute waived any objection that there had been no agreement to arbitrate the dispute. *Fortune, Alsweet and Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983) (per curiam). See also *James Dairy Farm v. Local No. P-1236*, 760 F.2d 173, 175 (7th Cir. 1985) ("If a party voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it."); *Piggly Wiggly*, 611 F.2d at 584; *International Brotherhood of Electrical Workers, Local Union No. 323 v. Coral Electric Corp.*, 576 F. Supp. 1128, 1140 (S.D. Fla. 1983) (party waived the right to contest in federal court the enforceability of a prehire agreement that provided for arbitration because the party availed itself of the arbitrator's jurisdiction without objection). Such a rule furthers the strong federal policy favoring the speedy resolution of labor disputes through arbitration. See *Sheet Metal Workers' International Association, Local No. 252 v. Standard Sheet Metal, Inc.*, 699 F.2d 481, 482 (9th Cir. 1983) (citing *Service Employees International Union, Local 36 v. Office Center Services*, 670 F.2d 404, 409 (3d Cir. 1982)). We would frustrate that policy if we allowed Merritt to reject arbitration after the announcement of the award.

Teamsters Local Union No. 764 v. J.H. Merritt & Co., 770 F.2d 40 (3d Cir, 1985)

23-33)

In any event, Respondent is not seeking *Spielberg* deferral in this case. The arbitrator should be permitted to finish this case. In such event, the numerous questions in the ALJD will likely be answered.¹³

POINT IV-THE REMEDY IS PUNITIVE

The ALJD requires “make whole” relief to a point about one year before the filing of the charge. Even assuming that the charge was somehow timely, there is no sustainable rationale for awarding monies for periods before the 10(b) period of six months. There is no showing of concealment or fraud to warrant such “make whole” relief.

CONCLUSION

Based on the forgoing, the complaint must be dismissed.

¹³ Even without “absent” witness Garcia’s testimony.