UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHILDREN'S HOSPITAL AND RESEARCH CENTER OF OAKLAND d/b/a CHILDREN'S HOSPITAL OF OAKLAND

and **Case 32-CA-086106**

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS–WEST

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

On August 1, 2013, Administrative Law Judge William G. Kocol, herein the ALJ, issued his Decision and Recommended Order in the above captioned matter wherein he found that Children's Hospital of Oakland, herein the Respondent, violated Section 8(a)(5) and (1) of the National Labor Relations Act, herein the Act, by refusing to arbitrate grievances that arose under the collective-bargaining agreement between Respondent and Service Employees International Union, United Healthcare Workers – West, herein SEIU-UHW, before SEIU-UHW was decertified. The ALJ's decision is wholly supported by appropriate findings of fact and conclusions of law.

On August 29, 2013, Respondent filed exceptions and a supporting brief challenging the ALJ's determination that Respondent's refusal to arbitrate the pre-decertification grievances violated Section 8(a)(5) of the Act. Respondent essentially advances three arguments why the ALJ erred in his determination: (1) Respondent contends the ALJ misapplied the applicable precedent; (2) Respondent contends it cannot resolve the grievances at issue without negotiating with SEIU-UHW over current terms and conditions of employment and thereby undermining its

replacement bargaining representative; and (3) Respondent contends the ALJ failed to recognize the significance of statements made by the successor union, National Union of Healthcare Workers, herein NUHW, about SEIU-UHW's arbitration of the grievances. Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel submits this brief in answer to Respondent's exceptions. For the reasons discussed below, Counsel for the Acting General Counsel respectfully requests that the Board reject Respondent's arguments and adopt the ALJ's sound determinations in this matter.[1]

1. The ALJ correctly found that Respondent committed an unfair labor practice by refusing to arbitrate grievances that arose under the parties' collective-bargaining agreement and were filed before SEIU-UHW was decertified.

While the precise context in which Respondent's refusal to arbitrate grievances in this matter appears to be one that the Board has not yet explicitly addressed, the guiding principle involved herein is undisputed: an employer's refusal to arbitrate grievances arising under a valid collective-bargaining agreement violates Section 8(a)(5) of the Act. *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243, 250-51; *Indiana & Michigan Elec. Co.*, 284 NLRB 53, 58-59 (1987). Even after a collective-bargaining agreement has expired, the Board and the Supreme Court continue to recognize the right to arbitrate grievances that arose while the contract was in effect. *Local 888, American Fed. of Gov't Employees (Bayley-Seton Hospital)*, 323 NLRB 717, 721 (1997); *Litton Financial Printing Div., a Div. of Litton Bus. Sys. v. NLRB*, 501 U.S. 190, 203-04 (1991); *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243, 249 (1977); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549-51 (1964). Indeed, even after a labor organization's loss of representational status, the Board continues to enforce contractual arbitration rights. *See Antioch Building Materials Co.*, 316 NLRB 647, 647 n.1 (1995) (finding that the employer, "following

[1] References in this brief to the ALJ's Decision shall be designated by page and line number as follows: ("ALJD [page]:[line]"). References in this brief to the Joint Statement of Stipulated Facts shall be designated by paragraph as follows: ("JSSF ¶[paragraph number]").

the decertification of the Union and the expiration of the parties' collective-bargaining agreement, unlawfully repudiated its obligation to arbitrate grievances initiated by the Union during the term of the collective-bargaining agreement and prior to decertification"); *Missouri Portland Cement Co.*, 291 NLRB 1043, 1044 (1988) (holding that, where the union lost its representative status after the employer sold the facility, "the changed circumstances . . . do not affect the grievances" and "it effectuates the purposes of the Act to continue to meet on request with the Union's designated representatives for the processing of these grievances").[2] Moreover, in *Bayley-Seton Hospital*, above, the Board strongly suggested that arbitration rights should be enforced even where a decertified union has been replaced by a successor labor organization.[3]

Despite the clear message from the Board and the Supreme Court that employers have a paramount legal obligation to honor contractual arbitration rights notwithstanding events including contract expiration, decertification, and a loss of majority status, Respondent contends that it has no such obligation in this case because SEIU-UHW was replaced by a successor union before the pending grievances could be moved to arbitration. That contention is without merit. Although Respondent devotes the bulk of its argument to factually distinguishing the cases cited

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[2] Federal circuit courts have come to the same conclusion. *See International Union, United Automobile, Aerospace and Agricultural Workers of Am. v. Telex Computer Products*, 816 F.2d 519, 521 (10th Cir. 1987) (court compelled arbitration notwithstanding the fact that employees had voted to decertify their union; recognizing that arbitration is a creature of contract, the court explained, "decertification does not retroactively obliterate contract rights."); *United States Gypsum Co. v. United Steelworkers,* 384 F.2d 38, 46 (5th Cir. 1967) (finding that the "duration in time of the substantive rights [under the contract] is not affected by decertification," which does not "ordinarily extinguish substantive [contract] rights.").

[3] In *Bayley-Seton Hospital,* the Board concluded that a decertified union's failure to arbitrate grievances did not violate Sec. 8(b)(1)(A) of the Act because the state of the law was unclear at the time as the Board had not yet issued its decision in *Arizona Portland Cement Co.*, 302 NLRB 36 (1991) (clarifying that an employer is not obligated to arbitrate pre-existing contractual grievances with a successor union who is not a party to the contract). Thus, the decertified union's position was reasonable since it was not on notice that its refusal to arbitrate the grievances would effectively result in the termination of the grievances because the successor union was not able to arbitrate them. 323 NLRB at 721. Respondent's argument, at footnote 8 of its exceptions brief, that its actions should likewise be found reasonable under *Bayley-Seton Hospital* is unavailing. Not only does Respondent have the benefit of the Board's *Arizona Portland Cement* decision, but unlike the analysis of whether a union has breached its duty of fair representation by refusing to arbitrate grievances, motivation is not a factor in determining whether an employer's refusal to arbitrate grievances violates the Act.

in the ALJ's decision, neither the ALJ nor the Acting General Counsel have overlooked that SEIU-UHW has been replaced by a successor bargaining representative. Rather, the ALJ found that distinction to be legally insignificant given the Board's past decisions to uphold grievance arbitration rights in other contexts where it could have declined to do so. The ALJ correctly concluded that the Board's past decisions, taken together, "are compelling signals that [Respondent's] conduct here also violated the Act." (JD 4:38-39.) In reaching that determination, the ALJ also considered that NUHW could not itself arbitrate the grievances.[4] This is an important consideration, given that the result urged by Respondent would unjustly leave the grieving employees with no remedy for their pending grievances.[5] Counsel for the Acting General Counsel accordingly urges the Board to adopt the ALJ's sound reasoning and conclude here, as it has in other contexts, that Respondent's legal obligation to arbitrate grievances should not be lightly dismissed, and that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to arbitrate the grievances in this matter.

2. SEIU-UHW's arbitration of the discrete grievances at issue in this case would not interfere with NUHW's representational status.

Respondent speculates that directing an employer to arbitrate disputes with a union that employees have since decertified and replaced might conflict with the Act's principle of exclusive representation. But SEIU-UHW does not assert that it has any representational rights beyond the arbitration provision of its contract with Respondent: it merely seeks to arbitrate pre-existing grievances under the terms of that contract, not set new terms and conditions of

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[4] *See Arizona Portland Cement Co.*, 302 NLRB 36, 37 & n.6 (1991) (clarifying that new representative may not demand arbitration of grievances that arose under prior contract).

[5] *Federation of Union Representatives v. Unite Here*, 736 F. Supp. 2d. 790 (S.D.N.Y. 2010), a district court case relied on by Respondent, is distinguishable as the grievance at issue there had already been taken to arbitration and an award issued, and the court reasoned that the successor union could enforce the arbitral award if it chose to do so. That case did not address a situation where, as here, employees would have to forfeit any remedy for the pre-existing grievances.

employment. Moreover, resolution of those grievances involves nothing more than the interpretation and application of select contract provisions to discrete individual disputes – a discharge and two back pay cases – and would not, therefore, encompass "bargaining" in the traditional sense. *See Telex*, above at fn. 10, 816 F.3d at 524 (observing that arbitration of the meaning of contract provisions is "an essentially passive proceeding in and of itself" where "no bargaining or other such active employee representation . . . is involved.") Respondent's arbitration of the grievances would not dictate how it must resolve future disputes handled by NUHW. Furthermore, it is unclear how retroactive application of the prior collective-bargaining agreement to the three isolated grievances at issue could bleed into Respondent's current negotiations with NUHW over current terms and conditions of employment.[6] NUHW and Respondent are negotiating their own collective-bargaining agreement (see Respondent's Exceptions Brief at page 7) and, in that context, each side is in complete control of their respective bargaining proposals. In such circumstances, both Respondent and NUHW can fully insulate themselves from any arbitral interpretation of the contract provisions involved in the three SEIU-UHW grievances by simply advancing new or different contractual language designed to support their own desired interpretation. In other words, Respondent and NUHW are fully capable of limiting the impact of any adverse arbitration decision through their own respective bargaining proposals and requiring Respondent to arbitrate the three SEIU-UHW grievances does nothing to limit their capabilities in that regard.[7] Accordingly, Counsel for the

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[6] Even if resolution of these disputes could engender some bargaining, the arbitrator could tailor the award to require negotiations with the proper party, which the Fourth Circuit has explained is the proper course. *Glendale Mfg. Co. v. Local No. 520, Int'l Ladies' Garment Wkrs. U.*, 283 F.2d 936, 940-41 (4th Cir. 1960) (holding that directing bargaining with a decertified union was improper, but the arbitrator "may order the employer to negotiate . . . with any properly constituted committee or representative of the employees").

[7] In this regard, Respondent has posed a hypothetical scenario in which it and NUHW agree to continue the old SEIU-UHW contractual language and then would be somehow be bound by a subsequent arbitral interpretation of that language coming out of the SEIU-UHW arbitrations. Putting aside the issue of whether either Respondent or

Acting General Counsel urges the Board to reject Respondent's argument that requiring arbitration of the grievances in this case would run afoul of the Act's principles of exclusive representation.

3. Even assuming NUHW's statements about SEIU-UHW's arbitration of the grievances are relevant to the disposition of this matter, those statements support the Acting General Counsel's position.

Counsel for the Acting General Counsel does not dispute the ALJ's determination that it is unnecessary to consider NUHW's statements about SEIU-UHW's arbitration of the grievances in order to resolve the legal issue in this case. Should the Board choose to consider those statements in making its determination, however, Counsel for the Acting General Counsel submits that those statements clearly support a finding that Respondent's refusal to arbitrate the grievances violated Section 8(a)(5) and (1) of the Act.

On January 17, 2013, NUHW's legal counsel informed Region 32 (the Region) that it had no opposition to SEIU-UHW arbitrating the grievances, and the Region thereafter informed Respondent that NUHW's legal counsel had advised the Region as such. (JSSF ¶¶51-52.) Respondent's awareness of NUHW's position belies any claim that Respondent refused to arbitrate the grievances because it feared that NUHW would file an unfair labor practice charge against it. Clearly, NUHW's non-opposition of the grievances makes sense given that NUHW itself has no power to pursue arbitration of the grievances on behalf of the employees. The statement made by an NUHW business agent that NUHW had "never given SEIU-UHW any indication that NUHW wishes Respondent to bargain or arbitrate with SEIU-UHW with respect to any of Respondent's workers" reflects, at most, the business agent's understanding that NUHW had never requested SEIU-UHW to pursue arbitration of the grievances, and in no way

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NUHW would be bound by an arbitration decision arising out of entirely different collective bargaining relationship and/or agreement, it is plain that both Respondent and NUHW can avoid that outcome by simply agreeing to new or different contractual language or by negotiating to impasse over such new or different language.

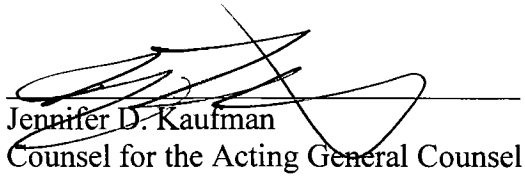
contradicts or conditions NUHW's legal counsel's stated non-opposition to having SEIU-UHW arbitrate the grievances. (JSSF ¶54.) Accordingly, any weight that NUHW's statements have in this matter clearly favors a finding that Respondent's refusal to arbitrate the grievances was unlawful.

4. Conclusion.

For the reasons set forth above, it is respectfully requested that the Board reject Respondent's exceptions, adopt the ALJ's findings that Respondent violated Section 8(a)(5) and (1) of the Act as alleged, and issue an order remedying those unfair labor practices.

DATED AT Oakland, California this 12th day of September 2013.

Respectfully submitted,



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REGION 32

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AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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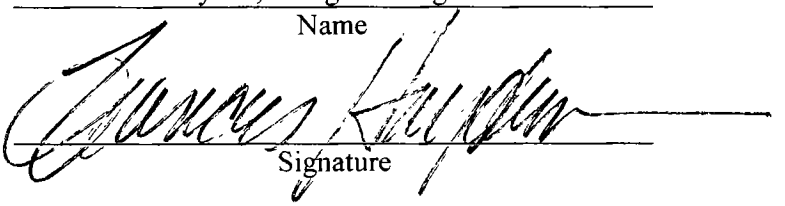

Signature