

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

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**CARE ONE AT MADISON AVENUE, LLC
D/B/A CARE ONE AT MADISON AVENUE**

and

**Case 22-CA-085127
22-CA-089333**

**1199 SEIU UNITED HEALTHCARE
WORKERS EAST**

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**CHARGING PARTY’S ANSWERING BRIEF
TO RESPONDENT’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 Care One at Madison Avenue’s (“Respondent”) exceptions to Administrative Law Judge Mindy E. Landow’s (“ALJ”) July 31, 2013 Decision and Order (“ALJD”) in the above-captioned case. Herein, the Charging Party addresses only some of Respondent’s exceptions and relies on the ALJD and on Counsel for the Acting General Counsel’s answering brief for all remaining issues.

ARGUMENT

I. THE ALJ CORRECTLY FOUND THAT RESPONDENT VIOLATED SECTIONS 8(a)(1) AND 8(a)(3) OF THE ACT BY ANNOUNCING AND WITHOLDING HEALTH BENEFIT IMPROVEMENTS FROM UNIT EMPLOYEES DURING A REPRESENTATION CAMPAIGN.

Respondent excepts to the ALJ’s finding that it unlawfully announced and withheld improvements in health insurance benefits from unit employees. Respondent’s Exceptions at 13-

24; Memorandum of Law in Support of Respondent's Exceptions ("Memorandum") at 4-12. The ALJ correctly found that Respondent's withholding of health benefit improvements from unit employees was unlawful.¹ The ALJ relied on well established 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 were not in the picture. ALJD at 13, *citing Great A&P Tea Co.*, 166 NLRB 27 fn. 1 (1976); *Russell Stover Candies, Inc.*, 221 NLRB 441 (1975); *Lampi, LLC*, 322 NLRB 502 (1996). 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 12; Joint Stipulations at ¶ 11.

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 were 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 and benefits that were unanticipated. *See, e.g., Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000); *Associated Milk Producers*, 255 NLRB 750, 755 (1981).

As explained by the ALJ, the only circumstance in which an employer may withhold system-wide benefits from unit employees is if the employer provides adequate assurances that

¹ The Board reached the same conclusion in 22-RC-072946, the case involving the Union's objections to the election at Respondent's facility. *Care One at Madison Avenue*, September 13, 2012 (not reported in Board volumes).

the benefits will be provided after the election, regardless of the outcome, and informs unit employees that the sole purpose of the postponement is to avoid the appearance of influencing an election. ALJD at 14; *see also Noah's Bay Area Bagels*, 331 NLRB at 191; *Atlantic Forest Products, Inc.*, 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.

Respondent's exceptions to the ALJD are unavailing. First, Respondent claims that the ALJ erred in finding that the health benefit improvements were implemented "system wide." Memorandum at 6. However, the ALJ's findings are clearly supported by the stipulated record. Care One manages twenty-one nursing homes in New Jersey, including Respondent's. ALJD at 2; Joint Stipulations at ¶ 2. Employees at these facilities are covered by a common health insurance plan. Care One made improvements to this common health insurance plan and applied those improvements to all employees at all Care One facilities in New Jersey, except those involved in a representation campaign. ALJD at 11; Joint Stipulations ¶ 9-11. There is no credible basis upon which to argue that this does not constitute a system-wide change. Nor would a different finding change the outcome here. The critical undisputed fact is that, when announcing and implementing the health benefit improvements, Respondent 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 Respondent's conduct unlawful.

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 7-10. Respondent 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 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.

Regardless, as clearly explained by the ALJ, the rationale of *Exchange Parts* is equally applicable to the facts in this case. ALJD at 13-14. The Board has repeatedly recognized that an employer can coerce employees by both the granting and the withholding of benefits. ALJD at 14; *see also First Student, Inc.*, 359 NLRB No. 120 Slip Op. at 5 (2013). To prevent any such concern, 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.

Furthermore, 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 (1996). 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. Respondent's actions find no support in *Exchange Parts*.

Finally, Respondent 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 Respondent's policy throughout the campaign to adhere to *Exchange Parts*. Memorandum at 8-11. First, there is no record evidence that Respondent adhered to such a policy.² Nor is any such claim legally relevant. It is undisputed that unit employees were aware of the health benefit improvements and their exclusion from them and that Respondent failed to provide the required assurances regarding the withholding of benefits. The ALJ properly concluded that Respondent's actions would lead unit employees to reasonably believe that they were being denied the benefits because of their union activity. ALJD at 14. 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 the ALJD and in Counsel for the Acting General Counsel's answering brief, the ALJ correctly found that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by announcing and withholding health benefits improvements from unit employees because of their involvement in a representation campaign. The Board is urged to adopt the recommendations of the ALJ and affirm the recommended remedial order.

² The parties stipulated only to the fact that, when asked by eligible voters whether it could grant a specific benefit, Respondent stated that it was not allowed to discuss the issue with them at that time. Joint Stipulations at ¶ 12.

Dated: November 5, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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Dated this 5th day of November, 2013

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