

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE

AAA RESIDENTIAL SERVICES
OF MONTANA, INC.

and

Cases 19–CA–072863
19–CA–076279

SEIU HEATHCARE 775NW

AAA RESIDENTIAL SERVICES, INC.

and

Cases 19–CA–072734
19–CA–087298
19–CA–092314

SEIU HEATHCARE 775NW

Ryan Connolly, Atty. for the General Counsel.

Gregory A. McBroom, Atty. (Livengood, Fitzgerald & Alskog), of
Kirkland, Washington; *Joseph O'Connor, President*; and
Paul Larson, Administrator, of Tacoma, Washington, for Respondents.

Judith Krebs, Atty., SEIU Healthcare 775NW,
of Federal Way, Washington, for Charging Party.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, ADMINISTRATIVE LAW JUDGE. This consolidated proceeding involves two related corporate entities, AAA Residential Services of Montana, Inc. (Respondent Montana or AAA-Montana) that formerly engaged in business at Missoula, Montana, and AAA Residential Services, Inc. (Respondent Washington or AAA-Washington) (jointly Respondents) that currently engages in business at Tacoma, Washington. Both entities employ workers who provide home healthcare services to the elderly and persons with special needs. Since late 2008, Respondents have recognized SEIU Healthcare 775 NW (Charging Party or Union) as the exclusive collective-bargaining representative of Respondents employees.

The Union filed Cases 19-CA-072734 and 19-CA-072863 on January 17, 2012.¹ The regional office served both charges at Respondents' locations in Montana and Washington. On March 9, the Union amended 19-CA-072863 to allege AAA-Montana as the employer, and filed Case 19-CA-076279 against AAA-Montana. On March 13, the Union amended 19-CA-072734 to allege AAA-Washington as the employer in that case. Based on these charges, the Regional Director for Region 19 consolidated 19-CA-072863 and 19-CA-076279 on June 28, and issued a consolidated complaint alleging that AAA-Montana engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). On the same date, the Regional Director issued a complaint in Case 19-CA-072734 alleging that AAA-Washington had also violated Section 8(a)(1) and (5). Respondents filed timely answers denying the unfair labor practices alleged and advancing several affirmative defenses.

The Union filed Cases 19-CA-087298 and 19-CA-092314 against AAA-Washington on August 15 and October 30, respectively. Both charges alleged violations of Section 8(a)(1) and (5). On November 14, the Regional Director consolidated these two cases and issued a consolidated complaint alleging AAA-Washington violated the sections of the Act alleged in the charges. On the same date, the Regional Director consolidated all three outstanding complaints pursuant to Section 102.33 "for the purposes of hearing, ruling, and a decision by an Administrative Law Judge."² AAA-Washington filed an answer to the complaint in Cases 19-CA-087298 and 092314 on the second day of the hearing. The General Counsel and the Charging Party objected to the late-filed answer but I allowed the answer over their objections.³

Following the consolidation of all pending complaints on November 14, Respondents filed a motion to "unconsolidate" the Montana and Washington cases. I heard oral argument on this motion at the outset of the hearing. In support of the motion, Respondents relied essentially on the fact that the two entities are, or were, separate corporations. I denied the motion on the ground that sufficient overlapping ownership and management existed between these two, relatively small corporate entities as to foreclose any rational conclusion that the Regional Director acted arbitrarily by his consolidation of all pending complaints for a single hearing. See *Service Employees Local 87 (Cresleigh Management)*, 324NLRB 774 (1997), citing *Teamsters (Overnite Transportation Co.)*, 130 NLRB 1020, 1022 (1961) (decision of the General Counsel's office to consolidate under Section 102.33 may only be reviewed for arbitrariness.)

¹ Unless shown otherwise, the dates used below refer to the 2012 calendar year.

² Sec. 102.33(a)(2), the portion of the Rules and Regulations pertinent here provides:

Whenever the General Counsel deems it necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay, he may . . . order that such charge and any proceeding which may have been initiated with respect thereto:

* * *

(2) Be consolidated with any other proceeding which may have been instituted in the same Region . . .

³ In his posthearing brief, the General Counsel withdrew his objection to the receipt of this answer. GC Br. at p. 2, fn. 1.

I heard this case at Seattle, Washington, on December 2, 3, and 4. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondents, I make the following

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Findings of Fact

I. Jurisdiction and labor organization status

10 AAA-Montana was a State of Montana corporation with an office and place of business in Missoula, Montana, where it was engaged in the business of providing residential long-term care assistance.⁴ Between February 29, 2011, and February 29, 2012, a period representative of all times material, AAA-Montana, in conducting its business operations had gross revenues valued in excess of \$250,000. During the same period, AAA-Montana provided services valued
15 in excess of \$50,000 to clients with special needs and the elderly paid for by the State of Montana, an entity directly engaged in interstate commerce. (GC Exh. 3.) Accordingly, I find that AAA-Montana was, at material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

20 Respondent Washington is a State of Washington corporation with an office and place of business in Tacoma, Washington, where it is engaged in the business of providing residential long-term care assistance. Respondent Washington, during a representative 12-month period of its business operations had gross revenues valued in excess of \$250,000. During the same
25 period, Respondent Washington provided services valued in excess of \$50,000 to clients with special needs and the elderly paid for by the State of Washington, an entity directly engaged in interstate commerce. (GC Exh. 2.) Accordingly, I find that Respondent Washington was, at material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

30 Respondents' answers denied that the Union, with which it had a collective-bargaining relationship for the 5-year period prior to this proceeding, is a labor organization within the meaning of Section 2(5) of the Act.⁵ However, the parties stipulated that the Union is a "labor organization" without reference to the statutory provision. (GC Exhs. 2 and 3.) Ample, credible evidence establishes that the Union, a regional labor organization chartered with a geographical
35 jurisdictional extending throughout the states of Washington and Montana, represents long-term homecare, and nursing home employees. The Union maintains collective-bargaining agreements with several employers, including the Respondents, operating within its jurisdictional area that contain the terms and conditions of employment for the employees it represents. Additionally, employees represented by the Union participate in its operational affairs. They occupy the vast
40 majority of the Union's executive board positions, vote on matters essential to the Union's organization and operation, serve on bargaining committees, and act as workplace advocates

⁴ As discussed in detail below, AAA-Montana ceased operation at the end of February 2012.

45 ⁵ Sec. 2(5) provides that the "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(stewards). Accordingly, I find the Union is a labor organization within the meaning of the Section 2(5).

5 II. The Due Process Issue

At the hearing, AAA-Washington denied service of the consolidated complaint in Cases 19–CA–087298 and 19–CA–092314 that issued on November 14. In its late filed answer to that consolidated complaint, AAA-Washington asserted that the Region’s failure to serve that consolidated complaint until the day before the hearing violates due process.⁶ (R. Exh. 3.)

Section 102.113(e) of the Board’s Rules and Regulations provides the following with respect to the service of papers by the Agency in its proceedings:

15 **Proof of service.** In the case of personal service, or delivery to a principal office or place of business, the verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same. In the case of service by mail or telegraph, the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed shall be proof of service of the same. *However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.* (Emphasis added)

The affidavit of service for this consolidated complaint reflects that it was sent on November 14 by certified mail to Paul Larson at two separate addresses, one certified item no. 70101870000255882851 (item 2851) to a street address, and the other, certified item no. 70101870000255882868 (item 2868), to a post office box address. Neither affidavit of service reflects a return receipt request and no return receipts are appended.

30 However, the USPS online tracking search engine for these two certified items reflects the following delivery dates: November 15 for item 2851, and December 13 for item 2868.⁷ The affidavit also shows that the complaint was sent by regular mail to Respondent’s counsel, who had withdrawn his appearance at the time but who reappeared on the second day of the hearing. (GC Exh. 1(dd).)

35 The affidavit of service for the November 14 consolidated complaint reflects that it was mailed to the same addresses as all other complaints served on both Respondents although not all were mailed to both the street address and the post office box address as here. (Compare GC Exhs. 1(p), 1(w), 1(dd), and 1(ff).) Additionally, the order consolidating all of the outstanding complaints that issued on November 14, was mailed separately to Respondent Washington at the same location as all other documents mailed to that entity. In its subsequent prehearing motion to “unconsolidate” the various complaints grounded on the notion that the Regional Director had

45 ⁶ Respondent’s answer to the November 14 complaint acknowledged that counsel for the General Counsel emailed a copy of that complaint to Respondent’s counsel the day before the hearing. As is discernible from the record, the date of Respondent’s answer to the November 14 complaint is not accurate.

⁷ The URL for the United States Postal Service’s search mechanism is <https://tools.usps.com>.

improperly consolidated the outstanding complaints against both Respondents, AAA-Washington made no claim that consolidated complaint in Cases 19-CA-087298 and 19-CA-092314, clearly referred to in that order, had not been served.

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To the degree that doubt remains concerning the delivery of the November 14 consolidated complaint, the federal common law “mail box rule” would come into play. It provides that the proper and timely mailing of a document raises a rebuttable presumption that the addressee has received the document in the usual time. This rule is designed as a tool for aiding finders of fact to determine in the absence of direct evidence of either receipt or nonreceipt whether or not receipt has actually been accomplished. *Schikore v. Bankamerica Supplemental Retirement Plan*, 269 F3d 956, 961 (9th Cir. 2001). Here, the service documents all reflect proper mailing to the same addresses where Respondent Washington admittedly received documents in the past and concurrent with the disputed consolidated complaint. Accordingly, I find a rebuttable presumption of receipt arose in this situation.

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The only evidence offered to rebut the presumption of receipt with respect to the November 14 consolidated complaint are the last minute, self-serving assertions by O’Connor and Larson at the first day of hearing. They do not deny receiving all of the other documents in this case mailed to Respondent Washington at the same address. I do not credit their assertions that Respondent Washington did not receive the November 14 consolidated complaint.⁸ Instead, I find that they advanced their untruthful claims of nonreceipt to avoid the consequences of having failed to file a timely answer to the November 14 consolidated complaint. Accordingly, I conclude Respondent Washington failed to rebut the presumption of receipt and find that the November 14 complaint was properly served and timely received.

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III. Alleged Unfair Labor Practices

A. Introduction

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The Respondents provide home health care services pursuant to contracts with the states of Montana and Washington under the Medicare/Medicaid programs. Joseph O’Connor, Pennie Halajian (O’Connor’s wife), Paul Larson, and Dr. Richard Peterson own AAA-Washington and serve as its board of directors.⁹ O’Connor served as the corporate president and Larson served as its administrator in charge of the day-to-day operations. Halajian served as the chief financial officer. The owners and board of directors for AAA-Montana included the four owners of AAA-Washington as well as Brian Dopp, Caroline Anderson, and Mary Mendenhall.¹⁰ O’Connor served as AAA-Montana’s president and administrator. Halajian performed at least some of its

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⁸ In addition, based on my observations at the hearing, I have not credited other aspects of their testimony where contradicted by the other witnesses and the documentary evidence.

⁹ The transcript is corrected to reflect a spelling of Halajian’s name that accords with her signature that appears in the case exhibits as well as in allegation No. 6 of an ERISA complaint brought against Respondents on March 16. R. Exh. 12.

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¹⁰ No evidence shows that Dopp, Anderson, Mendenhall, or Peterson occupied any corporate position or served in any managerial or supervisory role with AAA-Montana. Larson also denied that he played any role in the operation of Respondent Montana.

financial duties. The documentary evidence suggests that O'Connor largely controlled both entities at relevant times but in March 2012 Larson verbally asserted to Union Agent Driscoll that he had become the majority stockholder of AAA-Washington. However, Larson never provided the Union with a written verification of that fact as Driscoll requested.

AAA-Washington entered into a collective-bargaining agreement with the Union effective from July 1, 2007 to June 30, 2009 (2007–2009 agreement) wherein it recognized the Union as the representative of the AAA-Washington employees. Around November 1, 2008, the parties extended the 2007–2009 agreement to the AAA-Montana employees but the specific terms of that arrangement are unknown.

The parties stipulated that the employees of AAA-Montana and AAA-Washington constitute separate appropriate units. (GC Exhs. 2 and 3) The stipulation between counsel for the General Counsel and AAA-Washington provides that the Union's recognition as the exclusive bargaining agent as set forth in the parties' 2007–2009 collective-bargaining agreement. (GC Exh. 17.) Based on these stipulations and the terms of the recognition clause of the 2007–2009 agreement, I find the appropriate units to be as follows:

AAA-Montana: All employees .who are employed by the Employer throughout the State of Montana in the position of home care worker, who perform home care and personal services, or, work in any position related to the delivery of such in-home services, including but not limited to: home care workers, caregivers, personal care assistants, Certified Nursing Assistants (CNA or NAC), Nurse Aide Registered (NAR), Licensed Practical Nurses (LPN or LVN), Registered Nurses (RN), and any other similar job title or classification; excluding all managers, confidential employees, office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

AAA-Washington: All employees .who are employed by the Employer throughout the State of Washington in the position of home care worker, who perform home care and personal services, or, work in any position related to the delivery of such in-home services, including but not limited to: home care workers, caregivers, personal care assistants, Certified Nursing Assistants (CNA or NAC), Nurse Aide Registered (NAR), Licensed Practical Nurses (LPN or LVN), Registered Nurses (RN), and any other similar job title or classification; excluding all managers, confidential employees, office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

After the 2007–2009 agreement expired, a dispute emerged as to whether the parties concluded a successor agreement applicable to the period from July 2009 through the end of June 2011 (2009–2011 agreement).¹¹ Clearly, the Union believed there was an agreement but

¹¹ Labor unions usually obtain employee ratification, if required, before requesting that the employer sign an agreement. Whether O'Connor's enterprises became legally bound by some unsigned agreement with the Union in 2010 is a separate question that is not before me.

Respondents felt otherwise.¹² O'Connor repeatedly expressed his agitation toward the Union for obtaining employee ratification of a successor agreement in 2010 because he had not yet signed the document.

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Regardless, on June 3, 2011, Leslie Liddle, the agent who managed Union's collective-bargaining activities at the time, emailed O'Connor seeking his acquiescence in extending the 2009-2011 agreement through the end of October because of a legislative session in Washington that could potentially affect negotiations for a 2011-2013 agreement. (R. Exh. 2.) O'Connor refused.¹³ On June 18, 2011, O'Connor sent union official Seth Hemond a letter demanding that the parties conclude a new agreement by July 1, 2011, and submitted article-by-article proposals for changes to the existing (or the last agreement between the parties) several of which appear to be unusually regressive. (R. Exh. 15.) O'Connor also proposed dates in the latter part of June to negotiate for both AAA-Montana and AAA-Washington but no bargaining occurred at that time.

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At O'Connor's request, Don Driscoll, the union agent who succeeded Liddle, and Hemond, Driscoll's manager, met with the AAA-Washington board of directors (O'Connor, Halajian, Larson, and Dr. Peterson) at a restaurant in Lacey, Washington, on September 17, 2011, in an effort to resolve their existing differences. Following that meeting, Driscoll sent a written proposal to O'Connor on September 20 with proposed collective-bargaining agreements attached, one covering the Washington unit and the other covering the Montana unit. Driscoll's letter stated:

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This letter is a follow up to our conversation on Saturday, September 17, 2011. There are two issues I want to address, ground rules and a proposal to resolve the agreement between the parties going forward.

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On ground rules:

1. The union recognizes that your board is responsible for approving the agreement. Both parties agreed that the board should participate in bargaining in order to effectuate tentative agreements in a timely manner before the union hold's a ratification vote.
2. In principal the union agrees to separate the Montana and Washington state bargaining units and have separate agreements.
3. On tentative agreements. The union's position is that once a tentative agreement is reached and initialed by the parties it becomes part of the final package for ratification unless both parties agree to change it.

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¹² I took official notice of the NLRB charges the parties filed against each other about this subject on April 19, 2011 (19-CA-033060) and June 28, 2011 (19-CB-010288 and 010289). Even though those cases are not before me for resolution (all three charges were withdrawn on July 22, 2011), they shed light on the basis for the parties' conduct and claims discussed below.

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¹³ In his response to Liddle, O'Connor also demanded that the Union produce a "certified" copy of a 2009-2011 agreement containing his signature, a demand he made on several other occasions throughout the period relevant here. O'Connor claimed that the Union initiated and sought to arbitrate unpaid wage grievances against AAA-Montana based on a 2009-2011 agreement. He asserted the lack of a binding agreement in rejecting those grievances.

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Both parties expressed a strong interest in reaching a prompt solution.

5 In that spirit and as we discussed, the attached complete proposals are separate agreements for Montana and Washington that would resolve all issues between the parties. The offer is valid for nine days, expiring at midnight on Friday, September 30, 2011.

10 If the package proposals are accepted, the union is in a position to waive past participation and contributions in the Training Partnership, as long as AAA participates in the fund in Washington State going forward as described in the Washington contract in the package proposal.

15 If it is not accepted then we will revert to normal bargaining and ask that you propose dates to meet.

(GC Exh. 18.) Respondents rejected the Union’s proposed agreements. Instead, after speaking to “many employees” to get “their ideas,” O’Connor submitted a counterproposal to the Union on October 17, 2011, that the Union rejected. (GC Exh. 20.)

20 The events that followed provides the grist for the General Counsel’s complaints alleging Respondents violated 8(a)(5).¹⁴ The AAA-Montana complaint also alleges that it independently violated 8(a)(1) by soliciting the Montana employees to sign a decertification petition and a form revoking their dues-checkoff authorizations. By the time of the hearing, AAA-Montana had
25 ceased operation. However, just prior to the hearing, the parties concluded a new collective-bargaining agreement covering the Washington unit. This case deals with the leftover debris from the intervening period.

30 *B. Soliciting the Montana employees to decertify the Union
and revoke their Union dues checkoff authorizations*

The consolidated complaint in Cases 19-CA-072863 and 19-CA-076279 alleges that Respondent Montana violated 8(1) in December 2011 by soliciting its unit employees to sign a decertification petition, and union dues checkoff revocation forms.

35 On November 22, 2011, O’Connor conducted one (or possibly two) meetings for the employees in the Montana unit at the Missoula office. Jerrold Stetka, a licensed practical nurse who worked for AAA-Montana at the time, attended this meeting along with 10 or 12 others.

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14 Sec. 8(a)(5) provides in pertinent part that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” Sec. 8(a)(1) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” Sec. 7 provides, in pertinent part, that employees
45 “shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.”

When he arrived, Stetka saw a long table set up in the meeting room with a few stacks of paper on it. O'Connor asked the employees to take a copy of the materials from the stacks on the table. He recalled that one of the items included two forms on a single sheet of paper with space on each for the employee's signature. One was a statement that the employee desired to "oust" the Union and the other was a dues-checkoff revocation form.

During the meeting O'Connor told the employees they were not working under a union contract. He also told them that the union was no good and that they should get rid of it. He asked the employees if they wanted to stop having union dues taken out of their pay. O'Connor also spoke to the employees about his plan to set up an employee stock ownership plan (ESOP). At the end of the meeting, Stetka returned the paper with the two forms related to ousting the union and revoking his dues deductions unsigned. When O'Connor asked Stetka why he had not signed the forms, Stetka simply told him he did not want to sign them.

Because she lived over 150 miles from AAA-Montana's Missoula office at the time, Nola Martz could not attend the November 22 meeting but she remembered receiving a call from O'Connor that day after the meeting. During the call, O'Connor talked to her about his ESOP plan. He also told her there was no contract in effect between AAA-Montana and the Union so he legally did not have to checkoff her union dues. He asked her if she wanted him to stop her dues checkoff. She told him that she preferred that he continue her dues checkoff.

O'Connor asserted that he held the November meeting to address several business matters, including his idea for creating an ESOP. According to him, around that time, several employees had become upset with the Union because its agents had been advising workers to find employment with another provider in anticipation of AAA-Montana going bankrupt. He also asserted that the Union brought a "lawsuit" against AAA-Montana around that time but apart from his assertion, no evidence of such a lawsuit was provided. As a result, two of the workers, an unnamed nurse supervisor and an employee named "Hoot" prepared the decertification/dues-checkoff revocation forms and put them on the same table used for the distribution of the company's documents. When their form came up at the meeting, O'Connor claims that he left the room.

Analysis and Conclusions. In *Mickey's Linen & Towel Supply*, 349 NLRB 790 (2007) the Board summarized the principles applicable to cases alleging unlawful employer assistance with a decertification effort. Its summary states:

It is well settled that an employer violates Section 8(a)(1) of the Act by "actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative." *Wire Products Mfg. Co.*, 326 NLRB 625, 640 (1998), *enfd. sub nom. mem. NLRB v R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000). In determining whether an employer's assistance is unlawful, the appropriate inquiry is "whether the Respondent's conduct constitutes more than ministerial aid." *Times Herald*, 253 NLRB 524 (1980). In making that inquiry, the Board considers the circumstances to determine whether "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned." *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) (citing *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967)); see also *Hall*

Industries, 293 NLRB 785, 791 (1989), enfd. mem. 914 F.2d 244 (3d Cir. 1990) (employer violated Sec. 8(a)(1) by actively assisting a decertification effort “in the context of serious unfair labor practices”); *Sociedad Española de Auxilio Mutuo y Beneficia, de P. R., Inc.*, 342 NLRB 458, 459 (2004), enfd. 414 F.3d 158 (1st Cir. 2005) (employer violated Sec. 8(a)(1) by advising employees how to collect signatures for a decertification petition, asking them to sign the petition, and telling them they would no longer receive previously promised raises because they had become unionized).

10 Id. at 791.

The General Counsel, satisfied that Stetka and Martz testified truthfully, argues AAA–Montana violated 8(a)(1) at and after the November 22 meeting by the conduct of O’Connor in actively soliciting employee signatures on the decertification/dues revocation forms.

15 Respondent, citing O’Connor’s testimony that he left the meeting after talking about his ESOP plan so that Stetka and an antiunion employee identified only as “Hoot” could duke it out over the dues revocation/decertification issues, argues that the General Counsel provided insufficient evidence to prove this allegation. I disagree.

20 The credible evidence establishes that O’Connor actively integrated the decertification/dues revocation effort into his ESOP meeting on November 22, or permitted the effort to become an integral part of that meeting. Although O’Connor denied any active involvement in the dues revocation/decertification effort, he did not specifically deny the specific assertions made by either Stetka or, more importantly, Martz, a witness I found to be especially credible, concerning his conduct at, and after, the November 22 meeting. Based on O’Connor’s own account of the meeting, his claim that he was uninvolved in this effort is not credible. That evidence shows O’Connor at the very least carefully reviewed the forms turned in at the meeting and sought an explanation for Stetka’s failure to sign. When he called Martz, O’Connor initiated their exchange by talking about revoking her dues-checkoff authorizations. The sum of this conduct merits the conclusion that it exceeds mere ministerial assistance that an employer may provide. Accordingly, I find that Respondent Montana violated 8(a)(1) by O’Connor’s conduct at and after the November 22 meeting.

C. The information requests

35 The complaint in Case 19–CA–072734 alleges that AAA–Washington violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with information it requested on October 27, 2011, for purposes of collective bargaining. The consolidated complaint in Cases 19–CA–087298 and 19–CA–092314 alleges that AAA–Washington violated 8(a)(5) and (1) by insisting that the Union withdraw its unfair labor practice charges before it furnished the information requested by the Union for collective bargaining on July 20, 2012. The consolidated complaint in Cases 19–CA–072863 and 19–CA–076279 also alleges that AAA–Montana violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with information it requested for purposes of collective bargaining on October 27, 2011. In addition, this consolidated complaint alleges that AAA–Montana failed and refused to furnish information the Union requested on February 14, 2012, in order to engage in effects bargaining.

Relevant facts. On October 27, 2011, Driscoll sent O'Connor a 5-page letter detailing information the Union needed from the Respondents to prepare for contract negotiations (the October 27 information request). Driscoll detailed the information the Union sought about bargaining unit employees for the period from January 1, 2010, to the current time. It included individual wage and benefit data, a breakdown of the Respondents wage and benefit costs, the various employee job descriptions and schedules, the types and cost of the various health plans selected by unit employees, the types and costs associated with employee retirement plans, all current work rules, any staffing studies, turnover rates, the results of background checks undergone by employees, training information for new hires, low-wage worker information in Montana, and copies of the timesheets filed for Montana workers since January 2009 as well as records showing when the employees had been paid for hours worked.

The final category of information sought states:

M. Legal and Regulatory Status

- 1) Any documents, records or correspondence pertaining to state surveys of care delivered by the company and its employees in either Montana or Washington, including audits.
- 2) Any and all documents, records or correspondence pertaining to AAA Residential's legal and regulatory authority to service Medicaid clients in any state or county that it currently or formerly conducted business in, including discussions about or impositions of stop placement orders.
- 3) Any current legal or regulatory proceedings, suits, charges against the company.

(GC Exh. 25.) Driscoll's letter provides no explanation for the Union's need to have the Category M information apart from a vague, unsupported reference to its members' liability fears resulting from their employment with the Respondents. Likewise, he provided no explanation during his testimony apart from claiming that the entire information request amounted to the Union's standard operating procedure in preparation for contract negotiations.

O'Connor perceived the Union's document request to be harassment. As the following testimony by O'Connor demonstrates, he apparently based this conclusion primarily on his interpretation of the Category M requests:

Q Can you take me back in time? There was – well, were you involved with the 2007 to 2009 Collective Bargaining Agreement?

A Yes.

Q Okay. Did the Union request – make a huge document request like they did this time around for the corporation?

A The Union at that time had four categories. There was one to do with the benefits, one to do with the wages, one to do with vacation, and I believe the other was if we had anybody working overnight, things like that. This is a long time.

But the one thing I objected to, all of his new documents requests and information, was he wanted me to provide personally to him a background check saying who I was. He wanted me to give him a resume. He wanted me to give him what I'm doing now. What did I do the last ten years. And did I have a history of criminal activity from my Board. He wanted background checks. I found that very inappropriate.

Q About when did that occur, if you remember?

5 A That started with him when he first started his request to bargain, and his information request to us always had those categories in there, that I totally rejected and just ignored him. I told him: I'm not doing this.

Q So just to get quick. I mean, are you saying that he's commonly requested irrelevant information from –

10 A I think anytime a person asks you after you've been in business for almost ten years for a State background check every time with the Highway Patrol, for him to do that – he never did that with Catholic Community Services. He never did that to KWA, because I've talked to Peter and Peter. He's never requested those things from anybody. It was just pure harassment by Mr. Driscoll.

15 (Tr. 403-404) Despite his claim that he made inquiries of other local employers in the industry, no evidence that O'Connor ever provided any documented, or documentable, objection to the Union about any of the items in the October 27 request. To the contrary, he admittedly "rejected and just ignored" the Union's entire October 27 information request.

20 Having received no responsive information, Driscoll sent O'Connor an email on December 10 asking that Respondents furnish the information requested 6-weeks earlier. O'Connor replied by email on December 14. In pertinent part, O'Connor stated:

25 The information request is simple[:] you have all the information already that you are requesting for us to put in a package and give to you.

We supply you with that information on a monthly basis[;] all you have to do is go back to your records and put it together at your cost.

30 Also I reviewed all of the CBA[']s the 2007-2009 that the union refused to extend . . . doesn't say we need to do that.

35 The 2009-2011 CBA isn't very clear on the subject also it was never signed or legal and the package proposal that we sent for 2011-2013 CBA clearly outlines that those unforeseen cost[s] by the union is your responsibility not ours.

If am mistaken[,] please provide me with a certified copy of the CBA that you are using to request this information from us so I can have my lawyer review it.

40 Not a copy of a CBA but a legal binding certified copy of the CBA that you are using to base your request upon [b]ecause in our pagakeg [sic] proposal we don't need to do that [as] its consider [sic] a unseen cost by the union so tell us by the 18th of December 2011 or we will consider that request closed.

45 (GC Exh. 28.) Larson also claimed that AAA- Washington provided the Union with monthly reports containing the information sought in the October 27 request but no evidence shows that he documented this claim in any of his exchanges with any union agents. Respondents did not offer any exemplars of the alleged monthly reports to support their claims.

5 In late January or early February, the Union learned that AAA-Montana had informed the State of Montana that it intended to close its program in that state. In connection with its request to bargain over the effects of the closure on the employees in the Montana unit, Union Agent Clarence Gunn emailed O'Connor on February 14 requesting to meet for effects bargaining. He also asked O'Connor to provide the Union with the following information to prepare for that bargaining: (1) the names of the employees who had company-provided health insurance as of January 1; (2) the type of health insurance coverage and the monthly cost the cost of that coverage to the employee; and (3) the names of employees with accrued, paid time off as of 10 January 1. (GC Exh. 6.) In a message sent early the following morning, O'Connor essentially told Gunn that, as he was too busy, the Union could get the health insurance information requested from the SEIU Health Benefits Trust (Trust) and that the rest of the information would not be completely "totaled" until the end of the month. (GC Exh. 6) AAA-Montana, which ceased operations at the end of February 2012, never provided the information Gunn requested 15 on February 14. As described later, no effects bargaining ever occurred.

20 Larson verbally notified Driscoll on March 22 that he had become the majority shareholder of Respondent Washington and suggested that he wanted to resolve the issues with the Union. Early the next morning, Driscoll sent Larson the package proposal offered to AAA-Washington on September 20, 2011. He requested that Larson propose dates to meet, and ask that Larson furnish the Union with the information first requested on October 27. (GC Exh. 38.) On March 25, Larson responded that he would be available the second week in April but made no mention of the information issue. Driscoll replied on March 29 saying the Union would not be available on the dates Larson proposed and again asked for the requested information. 25

30 The Union received no response to Driscoll's renewed request of March 29. However, on July 13, Larson wrote to Driscoll asking that he send a new information request after segregating out the AAA-Washington information from the AAA-Montana information contained in the Union's original request of October 27. Larson also requested that the Union make its revised request less burdensome but made no other specific objection. (R. Exh. 8.)

35 On July 20, Driscoll sent Larson a revised information request limited to AAA-Washington. It amounted to the October 27 request all over again save for the elimination of a request for information about the Montana operation, minor revisions to the information sought concerning healthcare benefits, and a relettering of Category M to Category L.

40 There is no evidence of a specific response by Larson until late September when he emailed Driscoll asserting that AAA-Washington found "areas of your information request "to be unnecessary to the bargaining process and also unnecessarily time consuming to our administrative personnel." He went on to inform Driscoll that AAA-Washington would "evaluate your information request to determine what we feel is actually needed for the bargaining process" and after making that determination, he would contact Driscoll. Larson went on to tell Driscoll that if the Union "truly wants to bargain" AAA-Washington would need to have the Union "drop the NLRB actions against (AAA-Washington)," a matter he described 45 as important as the Union's information request. (GC Exh. 42.) Driscoll testified without contradiction that the Union never received any of the information it requested on October 27, 2011, or July 20, 2012.

Analysis and Conclusions. Based on well-established Supreme Court precedent, the duty to bargain in good faith within the meaning of 8(a)(5) requires an employer to furnish information requested by its employee’s bargaining representative that is relevant and necessary to properly perform its representative duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). In determining relevance, the Board treats wage and related information pertaining to bargaining unit employees as presumptively relevant because that information “concerns the core of the employer-employee relationship.” As to this type of information, a union is not required to show the precise relevance of it, unless the employer provides some effective rebuttal. However, a union must demonstrate as an initial matter, by reference to particular circumstances, the relevance of other information sought if it does not pertain to the unit employees’ terms and conditions of employment. *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993), quoting *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965). The Board uses a liberal, discovery type standard to determine relevance. *Quality Building Contractors, Inc.*, 342 NLRB 429 (2004).

When a union makes a request for relevant information, the employer has a duty to supply the information in a timely manner or adequately explain its failure to do so. *Regency Service Carts*, 345 NLRB 671, 673 (2005); *Beverly California Corp.*, 326 NLRB 153, 157 (1998). In determining whether the requested information has been furnished in a timely manner, the Board does not apply a per se rule; instead, it looks to the totality of the circumstances to determine whether the employer made a “reasonable good faith effort to respond to the request as promptly as circumstances allow.” *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993), citing *E. I. Du Pont & Co.*, 291 NLRB 759 fn. 1 (1988).

I find all of the information sought by the Union in its October 27, 2011, February 14, and July 20 requests, other than that described in Category M (or L), is presumptively relevant inasmuch as it clearly pertains to the wages, hours and other terms and conditions of employment for the unit employees. As to the presumptively relevant information, Respondents had a legal duty to provide those materials within a reasonable time, or notify the Union of legitimate issues it perceived with respect to the Union’s requests. As to the Category M (or L) information, I find Respondents never had a legal obligation to furnish those materials until the Union justified its need for such information, which never happened. 311 NLRB 425.

As to the presumptively relevant information (which constitutes all of the February 14 information request and all but the Category M (or L) in the other requests), Respondent’s provided none of it at anytime. Furthermore, 6-weeks passed before O’Connor provided any response to the October 27 request. When he did, he essentially refused the request claiming the so-called monthly reports regularly provided to the Union contained all of the information sought. In addition he argued that the Union lacked any contractual basis for seeking the requested information in the first place.

I reject O’Connor’s and Larson’s assertions that Respondents provided the Union with the presumptively relevant information in the form of some unspecified monthly reports. The failure to provide even a sample of the reports by which to assess their assertions merits the conclusion that their claims are little more than self-serving declarations unworthy of belief.

Moreover, in the context found here O'Connor's assertion about the lack of a contractual provision requiring the Respondents to provide information serves as further support for my conclusion that he lacked good faith in his approach the Union's request for information from the outset and maintained that posture throughout. For a contractual provision to serve as a defense to an employer's refusal to provide information that the union is statutorily entitled to receive, the Board requires specific language waiving the union's right to such information. *West Penn Power Co.*, 339 NLRB 585, 586 (2003). That is not the case here. Even O'Connor admitted that in his December 11 email to Driscoll that he had found no provision at all concerning the Respondents duty to provide information in their collective bargaining agreement.

However, in my judgment, General Counsel misreads Larson's email (GC Exh. 42) used to support the allegation that Larson conditioned the furnishing of information on the withdrawal of the pending NLRB charges. I read this email as nothing more than Larson's request that the Union withdraw the pending charges to facilitate the bargaining process underway at the time. That process eventually resulted in a collective bargaining agreement just prior to the hearing.

Accordingly, I conclude Respondents violated 8(a)(5) and (1) by failing to provide the information (other than that requested in Category M (or L)) sought by the Union on October 27 and July 20, and by failing to provide the Union with the information requested from AAA-Montana on February 14 for the purpose of engaging in effects bargaining.

D. The failure to bargain over the effects of closing AAA-Montana operations

The consolidated complaint in Cases 19–CA–072863 and 19–CA–076279 alleges that Respondent Montana refused to bargain with the Union since February 15 about the effects of closing its Montana operations and the layoff the Montana unit employees without providing the Union with prior notice and an opportunity to bargain over the effects of the closing and layoffs.

Relevant facts. O'Connor provided written notification dated January 27 to an official (James Driggers) at the Senior and Long Term Care Division of the Montana Public Health and Human Services Department that AAA-Montana would be "closing our programs" effective February 29. Sometime later, Driggers provided the Union with a copy of O'Connor's letter.

After learning about the closing, the Union assigned its agent, Clarence Gunn, to bargain over the effects of the Montana closing. In an email sent at mid-afternoon on February 14, Gunn requested to meet with O'Connor at AAA-Montana's Missoula office at 9 a.m. on February 17. Gunn also requested that O'Connor provide the Union with the information detailed in Section C, above. (GC Exh. 6.) Following the exchange of emails about the Montana effects information, Gunn obtained O'Connor's agreement to meet at 9:30 a.m., February 17, at a Missoula hotel arranged by the Union to begin effects bargaining. Gunn then notified the three Montana employees serving on the Union's bargaining committee to inform them of the arrangements. On February 16, Gunn, whose office was located in the Seattle area, traveled to Missoula in order to meet with O'Connor at the appointed time the next day.

On February 17, Gunn and the Union's bargaining committee waited at the hotel meeting site but O'Connor never appeared and never contacted anyone at the Union to explain his absence. Gunn placed several calls to AAA-Montana's office in an effort to speak with

O'Connor but no one answered his calls. O'Connor acknowledged that he did not appear for the scheduled effects bargaining session on February 17 as agreed. He explained that he was so busy with what was going on at the Missoula office that he "honestly forgot."

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Early the following week Gunn attempted unsuccessfully to reach O'Connor by telephone for an explanation of his failure to appear the previous Friday as agreed and to schedule another session. Late in the morning of February 23, Gunn emailed O'Connor calling attention to several message left at his office requesting a call back in order to discuss the effects bargaining and the request the Union had made to the FMCS for the appointment of an arbitrator to hear the Union's grievances concerning unpaid wages in the Montana unit. O'Connor responded to this email late that afternoon challenging the validity of the grievances but making no mention of the request to meet for effects bargaining.

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The following morning O'Connor again replied to Gunn's email. After again challenging the pending grievances, O'Connor made a delusional proposal pertaining to the closing of AAA-Montana operations. It reads, in haec verba, as follows:

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I have not agreed to any arbitration also for your information I do not have one employee any more that is union Montana

The program is closed.

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But can I use to use the company in Mexico
 If the country has no Union? And it doesn't what happens?
 Does that mean am not union any more ? or would I still be union and help you guys
 break into Mexico
 That would be fun

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Do you guys have charter with the Mexican government? If i move the company I would love to set a new cba reflecting all of are hard commitments and to tell you the truth most of your stuff will have to go

but If we need to we can talk about that later

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I don't want to do anything illegal with Montana so I am asking for the union advise on this situation about moving this Montana company to Mexico it could be a good thing for all of us kick it to your Bosses and see what they say

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Gunn made further unsuccessful attempts to meet with O'Connor for bargaining over the effects on employees of the closing of the Montana operation before filing an unfair labor practice charge related to that issue. No effects bargaining ever occurred prior to the layoff of the employees in the Montana unit, or at any time thereafter.

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In an email to Driscoll on March 30, O'Connor acknowledged that AAA-Montana had not agreed to new dates for effects bargaining. He justified his actions by claiming that Gunn expected him to sign anything the Union demanded and be bound to such an agreement without the approval of the AAA-Montana board of directors, Gunn's failure to provide any proposals prior to a bargaining session, AAA-Montana's lack of time to seek legal advice before

scheduling another meeting with the Union, and the Union’s failure to provide the information the Respondents sought, presumably, the conditions for bargaining contained in his October 25, 2011, letter to Driscoll. (GC Exhs. 24 and 38.)

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Analysis and Conclusions: In *First Nat’l Maint. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court concluded that Section 8(a)(5) obligates an employer to bargain with the representative of its employees over the effects of its decision to close its business “in a meaningful manner and at a meaningful time.” Id. 681-682. AAA-Montana never came close to fulfilling this requirement.

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Instead, O’Connor failed to provide even the limited effects information requested by Gunn, skipped the bargaining session on February 17, refused to reschedule another bargaining session in a timely manner, laid off the Montana workforce without prior notice to the Union, and contemptuously dismissed the entire process with his “Move to Mexico” proposal. I further find that the excuses he made to Driscoll in March amounted to nothing more than another stall tactic designed to avoid the obligation to engage in meaningful effects bargaining. By O’Connor’s conduct, I find AAA-Montana violated 8(a)(5) and (1), as alleged, concerning its bargaining obligations with respect to the closing the Montana operation.

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E. The refusal to schedule meetings to negotiate a successor agreement

The complaint in Case 19–CA–072734 also alleges that AAA-Washington violated 8(a)(5) and (1) by refusing to bargain for a successor collective-bargaining agreement since October 11, 2011, and by refusing to meet and bargain for a successor agreement until the Union agreed to Respondent’s ground rules.

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Relevant facts. In an October 24, 2011 letter, Driscoll requested that O’Connor provide the Union with the dates when the Respondents negotiating team would be available to meet for negotiations broken down by dates they would be available to meet in Montana, and the dates they would be available to meet in Washington.

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O’Connor wrote a lengthy letter Driscoll the following day that does not acknowledge receipt of Driscoll’s October 24 letter nor discuss when the Respondents’ negotiators would be available to meet for bargaining. Instead, referencing their September 17 meeting in Lacey, O’Connor requested that the Union provide by no later than October 31 its agreement written on the stationery containing the Union’s letterhead agreeing that: (1) Respondents board of directors would have final approval for all collective-bargaining agreements; (2) there would be separate agreements covering the the Montana and the Washington units; and (3) the Union recognized that the legal rights of AAA-Montana and AAA-Washington “are the same” as the Union’s. In addition, O’Connor’s letter stated that tentative agreements reached during the bargaining in Montana had to be provided 2 weeks in advance of signing so he could review it with the company’s lawyer, accountant, and its board of directors. He also asserted that Driscoll was bargaining in bad faith by not submitting a counter proposal for a AAA-Washington agreement that he apparently had submitted to the Union by email on October 9. (GC Exh. 24.)

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On October 28, Driscoll responded to O'Connor's letter by again requesting that O'Connor provide the Union with dates the Respondents' bargaining team would be available for negotiations by location. With respect to the September 17 meeting, Driscoll stated:

We agreed that negotiations would be conducted with your board so that the tentative agreements we reach in bargaining would automatically be authorized by the company. The many confusing individual interactions that have taken place make a good argument on their face for having all the key players involved. Obviously neither party can decide who can bargain for the other. In our earlier letter we sought to remind you of what you had said to us previously and suggest that such a discussion would make resolution easier. If your board chooses to have a lone negotiator at the table without authority to reach settlement that is AAA Residential's prerogative. We just want to be clear from the start that this is what you intend to do.

(GC Exh. 26.)

Between December 8 and December 14, Driscoll and O'Connor exchanged a series of emails. Driscoll again requested that O'Connor furnish dates the Union with dates the AAA Residential bargaining team would be available for negotiations and that AAA Residential furnish the information the Union requested on October 24.

In his responses, O'Connor never provided the Union with the dates to meet for bargaining. Instead, O'Connor again demanded in his December 14 email that the Union provide on stationery containing its letterhead its written acquiescence to the demands he made on October 25, refused to provide the Union with the information requested on October 27, accused Driscoll again of acting in bad faith, and requested that he step aside as the Union's negotiator in favor of someone with authority to sign the letter recognizing the Respondent's "legal rights." (GC Exhs. 27 and 28.)

On December 27, O'Connor wrote a lengthy letter (ostensibly from the board of directors but signed "Joe") to David Rolf, the Union's president, again insisting that the Union put in writing its acquiescence in to the demands he made in his October 25 letter to Driscoll and reiterated on several, subsequent occasions. His letter then concludes with this paragraph:

Once our basic legal rights are recognized by SEIU Healthcare 77SNW, the union, in writing, *we are then requesting to meet with you the President of SEIU Healthcare 775NW in order to bargain a fair and equitable contract fur AAA Residential Services of Washington and Montana.* And to show you our vision for our company's so we may move forward. (Emphasis added)

(GC Exh. 29.)

On January 3, Driscoll responded on behalf of the Union to O'Connor's December 27 letter as President Rolf's "designee to lead negotiations with your company." In his response, Driscoll repeated his request that Respondents furnish dates to commence negotiations and assured O'Connor that the Union would negotiate over the Company's ground rules at "any meeting you can agree to in Washington or Montana." On January 9, Driscoll again requested

that O'Connor furnish dates for bargaining sessions. O'Connor sent an email on January 10 to Rolf that essentially reiterated the demands made in his December 27 letter. In it, O'Connor asserted on behalf of the Respondents that they "will not meet with Mr. Driscoll." O'Connor also sent Driscoll an email on the same date in which he asserted, "Also Don, you may be the lead Negotiator be we won't negotiate with you personally. Whave made that clear."

Finally, in a February 2 mail, 6 days after he provided written notice to the State of Montana, that AAA-Montana would close its program in that state, O'Connor offered to meet with Driscoll between February 22 and 29 to negotiate a 2011–2013 collective-bargaining agreement, provided Driscoll brought a letter signed by Rolf "recognizing Montana has its own legal entity and that our board has the final say in any sign agreement between us."

The following day, O'Connor emailed Driscoll requesting that he furnish dates to negotiate a new agreement with AAA-Washington. On February 7, Driscoll responded to O'Connor as the president of AAA-Montana offering to meet for effects bargaining on dates between February 16 and 24, and asking which dates would be acceptable for the company. Driscoll added that the Union would be happy to "begin negotiations on Washington as soon as the Montana effects negotiations are completed" and reiterated his request for information for both locations.

As found above, O'Connor failed to show up for the Montana effects bargaining session scheduled for February 17 after agreeing to meet with Union Agent Gunn and the Union's committee on that date. On February 8, O'Connor sent a 3 page plus email to Driscoll reiterating his demand for a signed letter from Rolf containing the Union's acquiescence the demands he had been making since September but that saying nothing about his availability to negotiate.

On March 22, Larson telephoned Driscoll to report that he had become the majority shareholder of AAA-Washington and asked to begin contract negotiations with the Union. Driscoll sent Larson an email early on March 23 offering the Union's proposed agreement originally made on September 20 but informed Larson that it would be withdrawn at 6 p.m. that day. This opening led to a series of emails between the two in the next few days. (GC Exh. 38.)

In a March 26 email, Larson offered to meet with Driscoll to review the proposal but not until the afternoon of April 11, 12, or 13. Driscoll replied on March 29 saying that the Union could not meet on the dates Larson proposed but offered to answer questions he had about the expired proposal by email and notify him of a change in the Union's availability on the dates Larson suggested. Driscoll also requested that Larson furnish additional dates to negotiate a new AAA-Washington agreement in Washington as well as to engage in effects bargaining resulting from the closure of the Montana operation.

Analysis and Conclusions. Section 8(d) defines bargaining collectively as the "performance of the mutual obligation of the employer and the representative of the employees to *meet at reasonable times* and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party." (Emphasis added.)

The evidence detailed above reflects that O’Connor, on behalf of AAA-Washington, dodged the obligation to meet and bargain using the subterfuge that the Union generally, and Driscoll specifically, failed to provide the assurances he sought in his October 25 message, which amounted to, at best, only permissive subjects of bargaining. His later insistence that these assurances be provided in a specific form, i.e. on the Union’s letterhead, signed by the Union’s president, demonstrate unequivocally that this demand amounted to little more than an effort designed to evade AAA-Washington’s obligation to meet with the Union’s negotiators. O’Connor’s unlawful conduct reached its nadir in late December when he even signified his unwillingness to negotiate with anyone other than the Union’s president. Accordingly, I find that O’Connor’s insistence from late October 2011 until late March the next year on nonmandatory and irrelevant conditions as a predicate for meeting with the Union’s designated negotiators to bargain over the terms of a successor agreement violated Section 8(a)(5) and (1), as alleged. *Success Village Apartments, Inc.*, 347 NLRB 1065, 1068 (2006).

F. The unilateral change in health insurance plans

The consolidated complaint in cases 19–CA–087298 and 19–CA–092314 alleges that Respondent Washington violated 8(a)(5) and (1) by unilaterally changing the unit employees’ health insurance plan on May 1, 2012.

Relevant facts. Among other provisions, article 17.1 of the 2007–2009 agreement provides that for the duration of the agreement “the Employer shall provide comprehensive employee health care, dental and vision benefits through” the SEIU 775 Multi-Employer Health Benefits Trust (Trust), an entity that provides “medical, dental, pharmacy and vision coverage for eligible works.” (GC Exh. 17.)

Following the expiration of the agreement, AAA-Washington continued to purchase its employee’s health insurance from the Trust. However, on March 15, the Trust filed a civil complaint against Respondents and the O’Connor–Halajian marital community seeking approximately \$105,000 in unpaid contributions, including interest, for employee healthcare coverage from July 2011 to the date of the complaint, a period of 7½ months. The complaint’s recitals allege a past history of late payments beginning in May 2009 and the lack of any explanation for the current delinquency. It also alleges that the States of Montana and Washington have paid Respondents for “some or all of the cost of the health benefits” for their employees. (R. Exh. 12.)

Effective in May, AAA-Washington terminated its participation in the Trust and purchased healthcare insurance for its employees directly from the source that provided their insurance through the Trust without prior notice to the Union. This new insurance plan contained a substantial yearly deductible (\$3500). The Trust plan contained no deductible. In addition, the employee office visit copay increased substantially. (GC Exh. 16.)

On May 9, Driscoll emailed O’Connor and Larson saying that the Union had no notice of the health plan change. He asked to it be provided with a copy of Respondent’s contract with the provider, the plan documents, the summary of the plan accompanying the plan documents, the per-month cost of the plan per employee, and the cost being charged to participating employees. In response, O’Connor explained that the Respondents had been forced to change plans because

of the Trust's "threat" in the lawsuit that employees could lose the healthcare coverage.¹⁵ After ruminating extensively over the Trust's lawsuit seeking unpaid contributions and a class action lawsuit contemplated by him and others against the Trust, he requested to meet with Driscoll and Hemond on May 14. The discernable tenor of his email suggests that he mainly sought to have the union agents assist in resolving the Trust's lawsuit rather than negotiating a successor agreement.¹⁶ There is no evidence that parties met on the date O'Connor proposed. Likewise, there is no evidence that AAA-Washington ever provided any of the information requested concerning the health insurance change or that any bargaining about that subject ever occurred.

Driscoll sent Larson an email on July 9 asking for his availability to engage in negotiations between July 23 and Labor Day when the union negotiators had several available dates. He also requested that Larson "verify in writing (his) status as (AAA-Washington's) representative and the extent of his authority to make agreement(s) for the company," and to furnish the Union with the information that it had requested. (GC Exh. 41)

Analysis and Conclusions. An employer violates Section 8(a)(5) and (1) by changing the unit employees existing health care insurance plan and benefits, a mandatory subject of bargaining, without providing the employee bargaining agent with prior notice and an opportunity to bargain over any proposed changes. *Larry Geweke Ford*, 344 NLRB 628 (2005).

Here, Respondent admits that it obtained a different policy, albeit with the same insurer provided by the Trust. As a defense, the Respondent Washington asserts, in effect, that the arrangement for its employees' health insurance is none of the Union's business because its contract for that benefit was with the Trust not the Union. This assertion lacks merit.

Article 17.1 of the 2007–2009 agreement contractually obligated Respondent Washington to obtain its health benefit coverage for the unit employees through the Trust. Even assuming that the parties never arrived at a binding, successor agreement thereafter, Respondent Washington had a legal duty to continue in effect the employment terms and conditions for the unit employees contained in that agreement until it negotiated changes with the employees' agent, or came to an impasse attempting to do so. It is well settled that an employer violates section 8(a)(5) of the Act by making unilateral changes in the existing terms and conditions of employment, absent an impasse in negotiations or a waiver by the employee representative. *NLRB v. Katz*, 369 U.S. 736 (1962); See also *United Paperworks Int'l Union v. NLRB*, 981 F.2d 861, 866 (6th Cir. 1992).

¹⁵ The threat perceived by O'Connor is seemingly based on par. 12 in the Trust's complaint that states in boilerplate-like language: "Defendants' ongoing delinquencies place defendants' employees at risk of losing their health benefits, affect the Trust's financial viability, and impact the Trustees' fiduciary obligations." R. Exh. 12, p. 4.

¹⁶ O'Connor explained that he wanted to meet "to see if we can come to deal that everybody can live with and stop all the law suit before they take a life of their own you know what mean it has to be that day because am filing the rest of my paper work with the NLRB on the 15th if we cannot come to some agreements. Don You Seth have nothing to lose by meeting so lets meet ok Seth has to be thier at the meeting." GC Exh. 40.

Even assuming that AAA-Washington's legal obligation to purchase its employee's health insurance somehow expired with the 2007–2009 agreement, it still had the duty to maintain the same insurance benefits to its employees that it had under the Trust plan until it negotiated a change with the Union or reached an impasse in attempting to do so. The expiration of the 2007–2009 agreement does not provide Respondent Washington with a justification for racing out to buy a cheaper policy on its own when it perceived a slight by the Trust because it brought a lawsuit against Respondent Washington for failing to pay the premiums for its employees insurance coverage.

Clearly, the Union never waived its right to bargain over this subject. It was actively seeking to get Respondent Washington to the bargaining table when this change occurred. No evidence reflects the requisite prior notice and opportunity to bargain over proposed changes before Respondent Washington unilaterally purchased a separate policy on its own that contained significantly lower benefits.

At the same time, no evidence shows that the parties finally resolved this issue in the deal they struck for a new agreement just days before the hearing. Accordingly, I conclude that Respondent Washington violated 8(a)(5) and (1), as alleged, by changing its health insurance plan around May 1, 2012. As the evidence fails to show that the parties actually resolved this issue in their latest agreement, the remedial provision constructed below provides for the restoration of the status quo ante upon the Union's request.

Conclusions of Law

1. By assisting with the circulation of a decertification petition and forms withdrawing authorization for the checkoff of union dues, Respondent Montana engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By failing and refusing to provide necessary and relevant information requested by the Union for the purpose of engaging in collective bargaining; by insisting that the Union agree to nonmandatory and irrelevant conditions in order to meet for the purpose of engaging in collective bargaining; by failing to meet with the Union to engage in collective bargaining; and by failing to provide the Union with information it requested in order to engage in bargaining over the effects on employees resulting from the closure of its operations, and by failing and refusing to meet with the Union for the purpose of engaging in effects bargaining, Respondent Montana engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), and Section 2(6) and (7) of the Act.

3. By failing and refusing to provide necessary and relevant information requested by the Union for the purpose of engaging in collective bargaining; by insisting that the Union agree to nonmandatory and irrelevant conditions in order to meet for the purpose of engaging in collective bargaining; by failing to meet with the Union to engage in collective bargaining; and by changing its employees health insurance plan without providing the Union with prior notice and an opportunity to bargain over the changes to the health insurance plan, Respondent Washington engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), and Section 2(6) and (7) of the Act.

Remedy

5 Having found that the Respondent Montana and Respondent Washington engaged in certain unfair labor practices, I find that each must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act

10 With respect to Respondent Montana's failure to engage in timely and meaningful effects bargaining, the General Counsel requests a remedy patterned upon that provided for in *Transmarine Navigation Corp.*, 170 NLRB at 389 (1968). As the *Transmarine* remedy is the standard remedy in effects bargaining cases where a violation is found, see e.g. *Melody Toyota*, 325 NLRB 846 (1998), the request for that remedy is granted. The requirements are set forth in my recommended Order.

15 With respect to Respondent Washington, the General Counsel requests that it an order requiring the restoration of the employees' prior health insurance benefits and that employees be made whole for any added expenses they incurred in obtaining their health care under the new insurance plan. That requested remedy is standard for violations of this sort. *Larry Geweke Ford*, supra. Accordingly, my recommended order requires that Respondent Washington restore the health insurance coverage for the unit employees in effect prior to its unilateral change in 2012 and reimburse the unit employees for any added expenses they incurred because of that unilateral change. The reimbursement to employees shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily. 25 *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 3 (2010).

30 The General Counsel's requests that the requirements of *Latino Express, Inc.*, 359 NLRB No. 44 (2012), be applied to the out-of-pocket expenses incurred by employees as the result of the change in their health insurance benefits. No such request is made for the potential payments under the *Transmarine* remedy for Respondent Montana's employees. In my judgment, the General Counsel's remedial requests are backwards.

35 In the *Latino Express* the Board addressed the difficulties employees encounter with the Social Security Administration as well as with Federal and State tax authorities after receiving a lump-sum payment for backpay under a Board order. To address the adverse consequences employees often encounter, the Board decided to "routinely require a respondent to: (1) submit the appropriate documentation to the Social Security Administration (SSA) so that when backpay is paid, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse a discriminatee for any additional Federal and State income taxes the discriminatee may owe as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year." 40 NLRB No. 44, slip op p. 1.

45 The *Transmarine* remedy would clearly result in reportable income and potential tax consequences. It also would appear to have significance for Social Security purposes, especially if the employee had no other income in the calendar quarter to which the payment could be allocated. Hence, I have concluded that the *Latino Express* requirements should be applied to the Respondent Montana remedy for failing to engage in effects bargaining.

However, I fail to see how the *Latino Express* requirements apply to the reimbursements required of Respondent Washington in order to make its employees whole for the added out-of-pocket expenses incurred for their health care following the unilateral change made to their health insurance plan in May 2012. Payments of this nature would not ordinarily constitute income for purposes of either Social Security Act, or the Federal and State tax laws. For this reason, and in the absence of any supporting rationale for applying *Latino Express* to reimbursement payments of this type, I perceive of no reason for such an order in this instance.

As the Respondent Montana’s operations are now closed, it will be required to mail the Notice to Employees attached as Appendix A to its former employees at its own expense.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

Respondent, AAA Residential Services of Montana, Inc., formerly of Missoula, Montana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Refusing to bargain, upon request, with the SEIU Healthcare 775 NW (Union) as the exclusive representative of the employees in the following appropriate unit concerning the effects of closing its operation and laying off its employees and, if an understanding is reached, embody the understanding in a signed agreement:

All employees who are employed by the Employer throughout the State of Montana in the position of home care worker, who perform home care and personal services, or, work in any position related to the delivery of such in-home services, including but not limited to: home care workers, caregivers, personal care assistants, Certified Nursing Assistants (CNA or NAC), Nurse Aide Registered (NAR), Licensed Practical Nurses (LPN or LVN), Registered Nurses (RN), and any other similar job title or classification; excluding all managers, confidential employees, office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

b. Insisting that the Union agree to nonmandatory irrelevant conditions before meeting with its designated agents for the purpose of engaging in collective bargaining.

c. Failing and refusing to provide the Union with information it requested for the purpose of engaging in collective bargaining concerning the effects of closing its operation and laying off its employees.

¹⁷ Absent exceptions as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

d. Failing and refusing to meet with the Union to engage in collective bargaining concerning the effects of closing its operation and laying off its employees.

5 e. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

10 a. Pay the former employees in the unit described above their normal wages when in Respondent Montana's employ from 5 days after the date of this Decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent Montana bargains to
15 bargaining occurs; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the Union to request bargaining within 5 business days after receipt of this Decision, or to commence negotiations within 5 business days after receipt of the Respondent Montana's notice of its desire to bargain with the Union; or (4) the subsequent
20 failure of the Union to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date in February 2012, when the employee was terminated as a result of the closing of Respondent Montana's operation, to the time he or she secured equivalent employment elsewhere; provided, however, that in no event shall this sum be less than that these employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent Montana's employ, with
25 interest, as set forth in the remedy portion of this decision.

b. Compensate the unit employees for adverse tax consequences, if any, resulting from receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

30 c. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
35

d. Furnish the Union with the information it requested on February 14, 2012, for the purpose of engaging in effects bargaining.

40 e. Within 14 days after service by the Region, mail copies of the attached notice marked Appendix A,¹⁸ at its own expense, to all employees in the above unit who were employed by Respondent Montana at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work for that entity. The notice shall be mailed to the

45 ¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

last known address of each of the employees after being signed by the Respondent Montana's authorized representative.

5 f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

10 I further issue this recommended¹⁹

ORDER

15 Respondent, AAA Residential Services, Inc., of Tacoma, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

20 a. Refusing to bargain, on request, with SEIU Healthcare 775 NW (Union) as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

25 All employees .who are employed by the Employer throughout the State of Washington in the position of home care worker, who perform home care and personal services, or work in any position related to the delivery of such in-home services, including but not limited to: home care workers, caregivers, personal care assistants, Certified Nursing Assistants (CNA or NAC), Nurse Aide Registered (NAR), Licensed Practical Nurses (LPN or LVN), Registered Nurses (RN), and any other similar job title or classification; excluding all managers, confidential employees, office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

30 b. Insisting that the Union agree to irrelevant conditions before meeting with its designated agents for the purpose of engaging in collective bargaining.

35 c. Failing and refusing to provide the Union with information it requests for the purpose of engaging in collective bargaining.

40 d. Unilaterally changing health insurance plans or other terms and conditions of employment for the employees employed in the above unit without providing the Union with prior notice and an opportunity to bargain concerning any proposed changes.

e. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

45 ¹⁹ Absent exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

5 a. If requested, provide the Union with the information in its possession as originally sought on July 20, 2012.

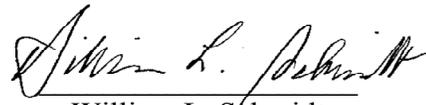
b. Upon request, restore the health insurance plan applicable to the employees in the above unit to that which existed prior to the changes made on or about May 1, 2012.

10 c. Reimburse the employees employed in the above unit for any losses they incurred as the result of changing the health insurance plan applicable to them on or about May 1, 2012, with interest, in the manner set forth in the remedy section of the decision.

15 d. Within 14 days after service by the Region, post at its facility in Tacoma, Washington, copies of the attached notice marked "Appendix B."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 28, 2011.

25 e. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 28, 2014

35 
William L. Schmidt
Administrative Law Judge

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45 ²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain in good faith with the SEIU Healthcare 775 NW (Union) as the exclusive representative of the employees in the following appropriate unit:

All employees who are employed by the Employer throughout the State of Montana in the position of home care worker, who perform home care and personal services, or, work in any position related to the delivery of such in-home services, including but not limited to: home care workers, caregivers, personal care assistants, Certified Nursing Assistants (CNA or NAC), Nurse Aide Registered (NAR), Licensed Practical Nurses (LPN or LVN), Registered Nurses (RN), and any other similar job title or classification; excluding all managers, confidential employees, office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT insist that the Union agree to nonmandatory and irrelevant conditions before meeting with the Union's designated agents to engage in collective bargaining for a successor collective bargaining agreement.

WE WILL NOT refuse to meet with the Union's designated agents to engage in collective bargaining about the effects of closing of our Montana operation and the termination of the unit employees.

WE WILL NOT fail or refuse to provide the Union with information it requested for the purpose of engaging in collective bargaining concerning about the effects of our closing our Montana operation and laying off the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL pay our former employees in the unit described above their normal wages for the period specified by the NLRB in cases where an employer fails to timely engage in meaningful bargaining over the effects resulting from the closure of a business, with interest.

WE WILL compensate the unit employees for adverse tax consequences, if any, resulting from receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL furnish the Union with the information requested on February 14, 2012, to engage in collective bargaining over the effects on employees from our closing of our business in Montana.

AAA Residential Services of Montana, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

915 2nd Avenue, Federal Building, Room 2948
Seattle, Washington 98174-1078
Hours: 8:15 a.m. to 4:45 p.m.
206-220-6300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 206-220-6284.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with SEIU Healthcare 775 NW (Union) as the exclusive representative of our employees in the following appropriate unit:

All employees who are employed by the Employer throughout the State of Washington in the position of home care worker, who perform home care and personal services, or, work in any position related to the delivery of such in-home services, including but not limited to: home care workers, caregivers, personal care assistants, Certified Nursing Assistants (CNA or NAC), Nurse Aide Registered (NAR), Licensed Practical Nurses (LPN or LVN), Registered Nurses (RN), and any other similar job title or classification; excluding all managers, confidential employees, office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT insist that the Union agree to nonmandatory and irrelevant conditions before meeting with the Union's designated agents to engage in collective bargaining for a successor collective bargaining agreement.

WE WILL NOT fail or refuse to provide the Union with the necessary and relevant information it requests to engage in collective bargaining.

WE WILL NOT unilaterally change our health insurance plan or other terms and conditions of employment for the employees employed in the above unit without providing the Union with prior notice and an opportunity to bargain concerning any proposed changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL provide the Union with the information with the information it requested on July 20, 2012.

WE WILL, upon request, restore the health insurance plan applicable to the employees in the above unit to that which existed prior to the changes we made on or about May 1, 2012.

WE WILL reimburse the unit employees for any losses they incurred as the result of the changes we made on or about May 1, 2012, to their health insurance plan with interest provided by law.

AAA Residential Services, Inc.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

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