

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2

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GODDARD RIVERSIDE COMMUNITY CENTER, :  
 :  
 Respondent-Employer, : Cases Nos. 2-CA-39604/39928  
 :  
 and :  
 :  
 LOCAL 74, UNITED SERVICE WORKERS UNION, :  
 IUJAT, :  
 :  
 Charging Party-Union. :  
 :  
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**RESPONDENT'S CROSS EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE AND ANSWERING BRIEF**

Paul Galligan  
SEYFARTH SHAW LLP  
620 Eighth Avenue  
New York, New York 10018  
(212) 218-5500

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**RESPONDENT’S CROSS EXCEPTIONS TO THE  
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Pursuant to Section 102.46 of the National Labor Relations Board’s (“NLRB” or “Board”) Rules and Regulations, Respondent Goddard Riverside Community Center (“Goddard” or “Respondent” or “Employer”) hereby submits the following Cross Exceptions to the Decision and Recommended Order (“Decision” or “ALJD”) of Administrative Law Judge Raymond P. Green (“ALJ Green”) dated August 3, 2011, as well as an Answering Brief in response to Counsel for the General Counsel’s (“General Counsel” or “GC”) Exceptions.

**RESPONDENT’S CROSS EXCEPTIONS**

Respondent takes the following Exceptions to the ALJ’s Decision, only as to 2-CA-39604:

1. **Judicial Estoppel.** The ALJ erred in failing to decide whether the Complaint in 2-CA-39604 should be dismissed on the ground of judicial estoppel because it is contradicted and refuted by the position taken by General Counsel (Region 2) in its complaint filed in 2-CB-22304, filed November 4, 2009, and subsequently resolved between the parties in a Sec.

101.9(c)(1) Settlement Agreement, dated January 4, 2011. In the 2-CB-22304 complaint, paragraphs 7 and 8 allege:

7. (a) Pursuant to a re-opener clause in Article XX of the [CBA] the Employer and Respondent [Local 74] began negotiating changes in the Unit's health benefits on or about June 25, 2009. (b) On or about July 1, 2009, and on several occasions thereafter, Employer verbally and in writing requested that Respondent furnish the Employer with the following information: ... (c) The information requested by Employer as described above in subparagraph 7(b) is necessary for and relevant to negotiations between the Respondent and the Employer as described above in paragraph 7(a).

8. By the conduct described above in paragraph 7, Respondent [Local 74] has been failing and refusing to bargain collectively with an employer in violation of Section 8(b)(3) of the Act.

(Resp. Ex. 26 [the 2-CB-22304 complaint].)<sup>1</sup>

The instant Complaint alleges that Goddard has *not* been negotiating with Local 74 over “changes in the Unit’s health benefits” and has *not* been “affording the Union the opportunity to bargain” over those changes. (GC Ex. 1i.) This conduct of the GC’s plays actionably fast and loose with Board powers and processes and, most important, Board integrity. It thereby triggers the equitable doctrine of judicial estoppel, no less applicable in Board proceedings than in Court proceedings, which doctrine “forbids a party from ‘taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.’” Teledyne Industries, Inc. v. N.L.R.B., 911 F.2d 1214 Para. 11 (6<sup>th</sup> Cir. 1990). Cf. New Hampshire v. Maine, 532 U.S. 742, 750-1 (2000), where the Supreme Court held that the purpose of the

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<sup>1</sup> References to ALJ Green’s Decision are designated herein as “ALJD \_:\_.” References to the transcript of the hearing are designated herein as “Tr. \_.” General Counsel’s exhibits are designated herein as “G.C. Ex. \_” and the Respondent’s exhibits are designated as “Resp. Ex. \_.” References to General Counsel’s Exceptions and Brief in Support are designated as “GC Ex. \_” and “GC Br. at \_” respectively.

doctrine is “to protect the integrity of the judicial process,’ ... by ‘prohibiting parties from deliberately changing positions according to the exigencies of the moment.’”

Applied to the instant Complaint, the doctrine of judicial estoppel equitably bars the General Counsel from asserting in this case, contrary to his position in 2-CB-22304, that Goddard has not been negotiating with Local 74 over changes in the unit’s health benefits. Surely the GC should not be given a dispensation in the instant case just because the “success” achieved by his assertions in 2-CB-22304 was a Board Settlement Agreement rather than a Board Decision and Order. That distinction should not make a difference in a case like this one implicating Board integrity. Least of all, the Board should not fall into the hairsplitting in which the GC engages by distinguishing the actual bargaining requested by the Union (transfer to the Union health plan) in response to the Employer’s announcement of its July 1, 2009 plan changes, from the bargaining (over those changes) that the Complaint alleges it was unlawful for the Employer not to offer. Bargaining over transfer of the unit employees into the Union’s plan, and bargaining over the Employer’s changes in its plan, are identically bargaining over “changes in the Unit’s health benefits.” (Resp. Ex. 26, ¶7a.)

The GC’s deliberate changing of its position successfully asserted in the first (CB) case that the Employer *has* been bargaining “over changes in the Unit’s health benefits,” its expedient asserting in this second (CA) case that the Employer has *not* been so bargaining, is impermissible and should be struck down under the doctrine of judicial estoppel.

This is Goddard’s second application to the Board to dismiss 2-CA-39604 on the ground of judicial estoppel. The first application, by pre-trial motion dated Jan. 28, 2011, was opposed by GC’s Opposition dated Feb. 9, 2011, and conclusorily denied by the Board’s Order Denying Motion dated Feb. 28, 2011. Based on a review of the full record, the application should now be

granted. Goddard presented its judicial estoppel argument to ALJ Green in its post-hearing Brief, but ALJ Green did not address the issue in his Decision.

2. **Section 10(b)**. Goddard excepts to ALJ Green's failure to dismiss the 2-CA-39604 portion of the Complaint because it was untimely under Section 10(b) of the Act. ALJ Green refused to consider the undisputed fact that unit employees, particularly shop steward Connie Fradera, received actual or constructive knowledge of the July 1, 2009 plan changes on Tuesday, June 2, 2009, the date of Goddard's "Importance: High" e-mail notice of the changes sent To All Staff on June 2, 2009 at 8:14 AM. (Resp. Ex. 13A.) Connie Fradera's receipt of this email should be imputed to Local 74 for Section 10(b) purposes.

Focusing only on Sal Uy's testimony that he sent the Union notice of the plan changes on May 29, 2009, ALJ Green found that the Employer had not met its burden of proving that it notified the Union of those changes on May 29, 2009 (i.e. more than 6 months before filing of the Union's first ULP charge complaining of those changes). ALJD at 7:32-34. However, ALJ Green did not rule on the Employer's argument made to him (Employer's Post-Hearing Brief, Point IV at 22-5), that the Employer so notified the Union via its shop steward and other unit members, by imputation, on June 2, 2009, also a date more than 6 months before that filing. (See Resp. Ex. 13A; Tr. 190, 207 [exhibits speak for themselves]; Dana Corp., 356 NLRB No. 49, fn 3 (2010) ("The LOA speaks for itself".) In fact, General Counsel himself cites to this document in admitting in his post-hearing brief (p. 2) to ALJ Green and in his Brief supporting Exceptions to the Board (GC Br. at 2) that "[t]he unit employees were notified of the change to the health insurance on June 2, 2009." (Resp. Ex. 13). Q.E.D.

Employee Fradera's receipt of that notification on June 2, 2009 should be imputed to Local 74 for 10(b) purposes, because Sal Alladeen, the Union's president since 2003 and the Union's negotiator in the 2004 and 2008 contract negotiations and the 2009-2011 Article XX health plan reopener negotiations, testified that Connie Fradera was "the only shop steward we had," adding that he didn't know if there was currently (i.e. on May 23, 2011, the date Mr. Alladeen was testifying) a shop steward. (Tr. 71). Chris Dempsey, "the union's business agent who is responsible for servicing the shop" (ALJD at 7:12), then testified: (i) that "When I received the site in April [2008], [Connie Fradera] wasn't [the steward] anymore, *but you know, she still spoke to me and let me know.* JUDGE GREEN: Okay. THE WITNESS: Let me know *what was going on.*" (Tr. 116:9; Tr. 117:15-18); (ii) that Connie Fradera in fact spoke to him and let him know what was going on (Tr. 96), specifically that the July 1, 2009 changes "were coming down" (Tr. 105), "Probably early to – first week in June" (Tr. 97), though "Truthfully the months are running together. I don't really remember which month it was" (Tr. 100); and (iii) that Connie Fradera in fact "organized" (Tr. 114) the vote which the Union then arranged and took later that same month among its members. The voting ballot was created by Connie Fradera and designated *her* as the Union person to return the ballots to. (See Resp. Ex. 14, Tr. 114.)

This testimony establishes out of the Union's own mouth that Connie Fradera was "closely tied" to Local 74 for purposes of imputing to Local 74 her receipt of the June 2nd high importance email notice of the July 1, 2009 health plan changes. See Courier-Journal, 342 NLRB 1093 (2004) (imputing notice received by a unit employee to the union, and dismissing charges over July 1, 2001 health plan changes as untimely under Act Section 10(b)).

It matters not, in this 10(b) context, that “The union asserts that it .... did not learn of the change until after June 2, 2009,” an assertion, by the way, for which there is no support in the record. ALJD at 7:10-11. What counts is when *Connie Fradera*, the Union’s man in Havana at Goddard, learned of the changes, on June 2, 2009, i.e., before June 3, 2009, the conceded first day of the 6-month Section 10(b) limitations period.

3. **Further Evidence of the Meaning of Article XX.** The Employer excepts to ALJ Green’s failure to find, not only that the Union’s failure to object to the five (2002, 2003, 2004, 2005 and 2007) pre-July 1, 2009 plan changes “constitutes evidence that the parties understood that the terms of Article XX *meant* that the employer retained the right to make these kind of changes on a *unilateral basis*,” (ALJD at 10:23-25) (emphasis added), but that the 2004 and 2008 contract negotiations, and the 2009-2011 Article XX reopener negotiations, also constitute such evidence. ALJ Green amply sets forth the facts as to these three sets of negotiations. ALJD at 4:38-5:39 [2004 contract negotiations]; 6:29-40 [2008 contract negotiations] 8:1-9:4 [2009-2011 Article XX reopener negotiations]. However, ALJ Green fails to explicitly draw the point that all three sets of negotiations constitute *further* evidence, further to Local 74’s failure to object, that Article XX means “the employer retained the right to make these kind of changes on a unilateral basis.” ALJD at 10:23-25.

4. **D.C. Circuit’s Contract Coverage Test.** The Employer excepts to ALJ Green’s failure to adopt the D.C. Circuit’s “contract coverage” test for determining whether it was an unlawful refusal to bargain for the Employer to make the mid-contract plan changes complained

of in this case. See NLRB v. U.S. Postal Service, 8 F.3d 832, 836-7 (D.C. Cir. 1993). The parties' Article XX provision would pass with flying colors, on the following grounds:

(a) The parties in fact bargained over the Employer's combination obligation/right to make such changes, in 1991, 2004 and 2008, and incorporated the results of that bargaining in their respective 1991, 2004 and 2008 contracts, which grant and recognize that obligation/right, and the Board itself violates the statute of which it is a creature and guardian, and the public interest in private-sector collective bargaining, by ignoring and disregarding that bargaining and those results. With every respect, it seems idle for the Board, in a case like this where the parties have agreed that the Employer may (in both senses) make mid-contract health plan changes, to analyze the case as one where the union has waived the right to bargain over such changes.

(b) It seems unfair and unjust, where, as here, an employer and union, for better or worse, have bargained and agreed that the employer shall have the right/obligation to make for unit employees the same mid-contract health plan changes made for its non-unit employees, for the Board to leapfrog the parties' agreement and instead create and impose, in such mid-contract cases like this one, a second so-called "waiver" test of whether, in so bargaining and contracting, the union "clearly and unmistakably" waived its statutory right to bargain over such changes. This second, waiver test can create the opposite result from the first, contract coverage test, just as the rules applied to 8(d) and unilateral change cases are "profoundly different – often result-altering." American Benefit Corp., 354 NLRB No. 129, p. 10 fn. 13 (2010). Let there be two different kinds of results in these unilateral change cases, just as "the remedy for a contract modification is the more substantial one of ordering adherence to the contract for its terms; the remedy for a unilateral change permits the restoration of the change

after bargaining to an impasse.” Bath Iron Works Corp., 345 NLRB 499, 502-3 (2005) aff’d Bath Marine Draftsmen’s Ass’n v. NLRB, 475 F.3d 14 (1<sup>st</sup> Cir. 2007). In this case, we submit that General Counsel does not prevail under either test.

(c) No self-respecting union will ever, in agreeing that the employer shall have the obligation/right to make the same mid-contract health plan changes for unit as for non-unit employees, use the W for waiver word. So for the Board to set a test where a union’s use of the W word is the best evidence an employer can produce will, on the one hand, fail most employers at the outset, and will, on the other hand, require the Board and the parties to engage in the wasteful and esoteric exercise, case after case, of inquiring and determining whether there is evidence of waiver, though nobody ever used the W word. Failure to adopt the “contract coverage” test in a case like this has this baneful effect too.

(d) In American Benefit Corp., Member Schaumber, back in the day when he and Chairman Liebman were deciding cases as a 2-member panel, “adheres to the position that the Board should apply a ‘contract coverage’ test, but he acknowledges that the ‘clear and unmistakable waiver’ standard is extant Board law and applies it for the purpose of deciding this case.” Supra, 354 NLRB No. 129, p. 1 fn. 4. Both of these Board members have departed. The Board can and should apply the contract coverage test in mid-contract change cases like this one.

5. **Waiver.** ALJ Green erred in failing to also dismiss the Complaint on grounds of waiver. This is not a past practice case like either Courier-Journal, supra or Caterpillar, Inc., 355 NLRB No. 91 (2010), it is a contract *right*/contract coverage/contract modification case, but we can and perforce must urge a waiver objection. In the case at bar, the record evidence shows that waiver also occurred in this case, in all the ways recognized in the case law, i.e., “[1] by express

provision in the collective bargaining agreement, [2] by the conduct of the parties (including past practices, bargaining history, and action or inaction), or [3] by a combination of the two.”

Chesapeake & Potomac Telephone Co., 687 F.2d 633, 636 (2d Cir. 1982).

The following contract provisions (and the absence of conflicting contract provisions) establish contractual waiver of the right to bargain over mid-contract changes of the Employer’s health insurance plan, including employee contributions, as long as they are made for the non-unit employees covered by the plan.

(a) The 1991 Article XX “will be covered” clause, still in effect unchanged, despite Local 74’s efforts in the 2004 and 2008 contract negotiations (and in the 2009-2011 Article XX reopener negotiations), to change its nature as a contract clause. The Article XX “will be covered” clause is a two way street, it gives the Employer the right, one could say, to apply to unit employees plan changes which generally *raise* employee health costs, as did the July 1, 2009 plan changes (unless, of course, the Employer agrees in bargaining with the Union to waive that right), but gives the Employer the obligation, one would then have to say, to apply to unit employees plan changes which *lower* employee health costs, as did the July 1, 2010 plan changes. Thus, the Article XX “will be covered” clause is not a management rights clause. The parties’ contract *has* a (broad) management rights clause, providing that “[a]ll management functions, rights and responsibilities which have not been modified or limited by specific provisions in this Agreement are retained and vested exclusively in the Agency.” (Resp. Ex. 2A, [Art. IV Management Rights, Sect. 1].) The Article XX “will be covered” clause is exactly such a “specific provision” that “modifies or limits” the Employer’s otherwise management right to, in Member Liebman’s bald phrase in Courier-Journal, “do whatever it wants.” Supra 342 NLRB at 1097. Because of this clause, the Employer’s *can’t* “do whatever it wants” to unit employees.

(b) The 1991 contract has a grievance and arbitration procedure providing for the presentation “within five (5) calendar days after it knows, or reasonably should have known, about the conditions giving rise to the grievance *or the grievance will be deemed waived.*” These parties know how to write a waiver provision! This procedure provides for final and binding arbitration, of “any and all grievances, complaints, disputes or questions as to the interpretation, application or performance of this Agreement.” (Resp. Ex. 2A [Art. V].) The Union has never invoked the procedure to challenge any of the plan changes except for late grievances over the July 1, 2000 and 2010 changes, both of which were denied as “deemed waived” under the five calendar day requirement. (Resp. Ex. 16B, 25.)

(c) The 2004 Article XX *exclusio unius* health plan reopener clause, first invoked by the Union in 2005 and 2006 (Tr. 212) and pursuant to which “the Employer and [Local 74] began negotiating changes in the Unit’s health benefits on or about June 25, 2009” (Resp. Ex. 26, CB Complaint, Para. 7(a)), still in effect.

(d) The 2008 Extension Agreement provides for the continuation of all of the foregoing provisions, among others, “in full force and effect until June 30, 2011.” (Resp. Ex. 2C at 2.)

The following conduct of the parties also establishes waiver.

(i) The parties’ past practice of announcing and making the same plan changes, including employee contributions, for the unit employees as for the non-unit employees, effective the beginning of plan years 2002, 2003, 2004, 2005, 2007, 2009 and 2010, without objection from the Union until its unfair labor practice charge and grievance both late-filed on Dec. 1, 2009.

(ii) The parties’ bargaining history, including both the Union’s failed efforts in the 2004 and 2008 contract negotiations to amend Article XX to require bargaining of any plan

changes during the term of the contract and to eliminate employee contributions, and the Union's efforts in the Article XX reopener negotiations that began June 25, 2009, to amend Article XX to substitute the Union's Taft-Hartley Welfare Plan for the Employer's plan, and continued into 2011.

(iii) The Employer's action in announcing and making plan changes since 2002, and the Union's inaction: "And in all cases until 2009, the union did not seek to bargain about this series of changes, file any grievances challenging the changes, or file any unfair labor practice charges until December 1, 2009." ALJD at 10:20-22.

(iv) As ALJ Green held: "To my mind, *this is not simply a matter of acquiescence in prior changes*, but constitutes evidence that the parties understood that the terms of Article XX meant that the employer retained the right to make these kinds of changes on a unilateral basis." ALJD 10:22-25. Surely, on the facts as correctly found by Judge Green and as otherwise established by the record, Local 74 also "waived" any right to bargain over the mid-contract health plan changes complained of in this case.

6. **Question of Fait Accompli.** Based on the facts established in the record, ALJ Green erred in finding that Local 74 was notified of a fait accompli regarding the July 2009 and July 2010 health plan changes. ALJD at 7:4, 8:24-26. First, these findings of fait accompli do not, address or answer the ALJ's own framed issue, "whether the company's changes in 2009 and 2010, to medical insurance coverage for employees represented by Local 74 constituted violations of Section 8(a)(5) of the Act because the changes were made without offering to bargain about them with the union." ALJD at 8:52-9:4. The Union had options under the collective bargaining agreement and chose to exercise those options.

Second, “fait accompli” is the wrong term for describing the Employer’s announcing of health plan changes. Googling fait accompli brings up various dictionary definitions: “The enemy’s defeat was a fait accompli long before the final surrender”; a thing accomplished and presumably irreversible; creation of a situation which is irreversible and with which other parties will have to live, even if grudgingly; an action which has already been done and which cannot be changed; etc. None of these definitions fit the situation here where, worst case, the Board will order the Employer as a remedy to reverse health plan changes.

In fact, Local 74 did not at the time treat the announced plan changes as faits accomplis, nor did the Employer. Both sprang into mid-contract bargaining action under the Article XX health plan reopener clause. See Resp. Ex. 26 [CB Complaint, ¶7(a)]. In this respect, ALJ Green erred in not considering the undisputed fact that Goddard first ascertained from its broker that it could remove the Local 74 employees from its plan *during the plan year*, at a 7% re-rating cost for the employees remaining in the plan. (Tr. 140-1.)

Also, ALJ Green failed to consider the fact that the parties reached (but never signed or implemented) a proposed “2009 Agreement To Amend Article XX, Health and Hospitalization, of 2008 4-Year CBA” providing that unit employees “will be covered” by the Local 74 Plan, “*starting Dec. 1, 2009.*” (Resp. Ex. 15; ALJD 8:18.). ALJ Green also failed to consider the bargaining between the Employer and UAW Local 2320 over the July 1, 2009 changes resulting in their 2009 Extension Agreement. (Resp. Ex. 3.)

Collective bargaining reverses faits accomplis every day of the week, not even to speak of bargaining with insurance carriers. As Sal Uy testified:

“Q: Okay. And did you make any exceptions to the [July 1, 2009 changes]?”

A: We made one exception. ... One of the staff in our senior center’s husband was dying of cancer. He was in last stages

of survival and hospice care would have been much more affordable under the old plan and so we asked for Aetna to keep her on at that plan and they did.”

(Tr. 141.)

It was Local 74 who decided to put all its eggs into the basket of Article XX re-opener bargaining. The Union’s belated position that it felt it could not undo the 2009 health plan changes (which had not even occurred yet) is merely self serving post hoc justification for deciding to use the event to try to march the employees into its health plan. (Tr. 74; GC Br. at 4.)

**RESPONDENT'S ANSWERING BRIEF IN SUPPORT  
OF THE ADMINISTRATIVE LAW JUDGE'S DECISION**

**GC's Exceptions in 2-CA-39604:** Judge Green recommends dismissal of 2-CA-39604 for the following set of imposing record-based reasons with which General Counsel's Exceptions but barely engage:

... I think that the parties had, *by the terms of their contract and by long standing practice*, effectively agreed that the respondent had retained the right to change the medical insurance it purchased and to change, (after negotiations with the insurance carriers), the terms of the purchased medical and dental policies. That is, I think that it can be said that the union, by its conduct from 2002 to 2008, had "acquiesced" to the Respondent's "right" to make the same changes affecting the union employees as it made for its managerial and supervisory employees.

ALJD at 11:11-17 (footnotes omitted) (emphasis added). We understand GC's Exceptions to this Analysis to raise three questions,<sup>2</sup> none of them meriting reversal of Judge Green's Decision.

1. **The Question of Local 74's Awareness of pre-July 1, 2009 Changes.** General Counsel excepts to ALJ Green's analysis on the ground that the record doesn't show that Local 74 was aware of the Employer's pre-July 1, 2009 plan changes, and therefore Local 74's conceded failure to object to those changes doesn't constitute waiver or consequential acquiescence. ALJ Green didn't, of course, hold that Local 74's acquiescence shows that it waived any right to bargain over those changes, all of them mid-contract changes, by the way, and none of them mid-hiatus changes. General Counsel's argument is fundamentally flawed because it completely ignores the central tenet of ALJ Green's holding:

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<sup>2</sup> We note that General Counsel's Brief in Support of its Exceptions fails to specify the questions involved and to be argued with regard to its Exceptions, as required by R&R 102.46(c)(2), so we have stated the questions implicitly raised by General Counsel's one overall Exception regarding 2-CA-39604.

To my mind, this [failure to object] is not simply a matter of acquiescence in prior changes, but constitutes evidence that the parties understood that the terms of Article XX meant that the employer retained the right to make these kind of changes on a unilateral basis.

ALJD at 10:22-25.

ALJ Green also found that the Employer's notice of changes "was openly made to all staff covered by the health plan and it is unlikely that the Union officers and representatives were not aware of these changes either before or after they were made." ALJD at 4:9-10. In fact, the record shows Local 74's awareness in spades.

First, in the 2004 contract negotiations, conducted while changes in the Employer's plan were being openly announced at the bargaining table (Tr. 192) and to the unit employees (Resp. Ex. 7; Tr. 196), Local 74 first proposed the transfer of unit employees into the Local 74 plan, then withdrew that proposal and proposed freezing the plan for the duration of the new contract. As the Employer's negotiator testified, without contradiction:

At that first meeting Mr. Alladeen said that he did not want us to change the co-pays. .... He addressed both the Aetna parts of the plan, co-pays, and so forth. He did not want us to change those during the life of the new contract. And he did not want us to change Employee contributions which is not an Aetna part of the plan; it's the Goddard piece of the plan. These proposals for us not to change either portion of the Employer's plan told me that he was aware of the previous changes.

(Tr. 188.) As found by ALJ Green and not excepted to by GC:

At the bargaining sessions held on June 16 and 25, 2004, the union's representative Sal Alladeen stated that he was withdrawing for the present, the idea of transferring the employees to the union's plan and instead wanted the company to agree to keep the Aetna plan and eliminate all employee contributions. The employer rejected this proposal. The union also demanded that there be bargaining over any future changes in health insurance and the employer's position was that because this plan mostly covered non-union employees, it reserved the right to make changes as needed without the necessity of bargaining.

ALJD at 4:44-5:2 (footnote omitted.) The negotiations resulted in the parties' 4-year 2004-2008 Extension Agreement (Resp. Ex. 2B) amending Article XX, but only "to reflect that the parties agreed that either side could, any time before June 30, during any contract year, reopen Article XX for the purpose of bargaining about the transfer of the Local 74 represented employees from the company's insurance into the union's plan." ALJD at 5:5-9. (See Resp. Ex. 2B, 2004-2008 Extension Agreement, p. 1).

Second, in the 2008 contract negotiations, Local 74 similarly made proposals to limit the scope of Article XX, specifically "that no changes be made to the health plan," inescapably implying total Local 74 awareness of prior unilateral plan changes. ALJD at 6:29-30.

Third, ALJ Green found it "unlikely that the Union officers and representatives were not aware of these changes [openly made to all covered staff] either before or after they were made" but we find it close to impossible that they were not aware given the inherently attention-getting nature of those openly-announced changes, i.e., the introduction of (2002) and increasing of employee contributions (2004, 2005, 2007) and the increasing of co-pays (2003, 2004, 2007).

Fourth, neither GC witness Ahmed Cumberbatch (Local 74's Business Representative at Goddard at the time of the 2004 negotiations and who attended those negotiations (Tr. 198-9)), nor GC witness Sal Alladeen, Local 74's president who conducted those negotiations for Local 74, stooped to testifying under oath that he was not aware of the Employer's prior changes (in 2002 and 2003) or of the plan year July 1, 2004 changes announced at the table and to the employees during those negotiations. Cumberbatch didn't remember (Tr. 198, 200), and Alladeen wasn't asked. It demeans Board processes for GC to claim otherwise as a basis for its Exceptions.

To the extent that ALJ Green made credibility determinations regarding Local 74's awareness of the pre-2009 plan changes, those determinations should not be overturned by the Board under well settled law.

2. **Question of Applicable Legal Theory.** GC excepts to ALJ Green's analysis on the ground that, even if Local 74 was aware of the pre-July 1, 2009 plan changes, it was unlawful for the Employer to apply the July 1, 2009 and 2010 changes to unit employees, bringing up and variously arguing from the following four Board decisions in unilateral-change cases in each of which, *unlike the case at bar*, the union requested bargaining over the change and the employer refused to bargain:

(i) Courier-Journal, 342 NLRB 1093 (2004), dismisses a complaint involving "*post-contract* expiration changes in employee health benefits" (Member Liebman, dissenting, at 1095), which this case does not, on the theory that "a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo – not a violation of Section 8(a)(5)." (panel majority at 1094). ALJ Green does not use a status quo theory of violation relied on by the Board majority in Courier-Journal. Nevertheless, General Counsel goes to great lengths in its Supporting Brief to distinguish Courier-Journal, but ignores several facts in the record regarding the Union's awareness of health plan changes, specifically its efforts to stop said changes in the 2004 and 2008 negotiations. (GC Br. at 8.) In fact, the instant case falls quite easily into the theory embraced by Member Liebman's dissent, that a unilateral change made during the life of a contract, pursuant to "clear language of the contract, granting the Respondent the freedom to make unilateral changes of health benefits only during the life of the contract" is not a violation of Section 8(a)(5). Supra at 1096. That is exactly this case.

Whatever the factual differences, Member Liebman's dissent in Courier-Journal entirely cooks GC's goose in this case.

(ii) Berkshire Nursing Home, LLC, 345 NLRB 220 fn. 2 (2005), sustains a complaint over the employer's unilateral *post-election, pre-certification* changes in employee parking locations and employee health care contributions, rejecting the employer's "newly-raised contention, relying on our decision in Courier-Journal, that no duty to bargain arose because these changes were made as a continuation of a longstanding practice and were essentially a continuation of the status quo." Again, ALJ Green uses no such theory of violation, and the changes disputed in this case were made during the life of, and pursuant to explicit terms of a *contract* in force at the time.

(iii) Trojan Yacht, 319 NLRB 741, 742-3 (1995), finds an unlawful refusal to bargain where the employer changed a pension plan during the term of a contract, but only revealed and announced the change to the union and employees two *years* after the effective date of the change, after the negotiation of a successor contract, because, among other reasons: "we do not agree with [Member Cohen, dissenting] that the general contractual language in question – i.e., that the pension plan will be 'maintained in the same *manner* and to the same *extent* such plans are *generally made available and administered* on a corporate basis' (emphasis added) – means ... that the pension provisions for unit employees are *required by the collective bargaining agreement to be the mirror image* of those for non-unit employees."). By contrast in the present case, the changes disputed were announced a month in advance, both years, and the Article XX "will be covered" clause, by its terms and as interpreted and applied by the parties over the years, *requires* the health plan for unit employees to be the same as, the mirror image of, that for non-unit employees.

(iv) Caterpillar, Inc. 355 NLRB No. 91 (2010), slip op. at 3, finds a violation where the employer changed the prescription drug benefits provided under the parties' two sets of insurance plan agreements, during the term of the labor contract, and argued to the Board that "it had no duty to bargain concerning the 'generic first' program because it 'was not a substantive change in the plan itself. It was simply an administrative change in how the prescription drugs were administered.'" Unlike the instant case, as ALJ Green recognized (ALJD 9:48-10:25), the contract in Caterpillar did *not* contain "clear language of the contract, granting the Respondent the freedom to make unilateral changes of health benefits only during the life of the contract" as does the paradigm case described in the Liebman dissent in Courier-Journal.

Not one of the four cases cited in GC's Supporting Brief calls for a finding of unlawful refusal to bargain in this case.

**GC's Exceptions in 2-CA-39928:** We understand GC's Exceptions to raise the following questions, none of them meriting reversal of ALJ Green's Decision to dismiss this portion of the Complaint, which we now take up.

**3. Question of refusal to bargain before April 13, 2010 bargaining session.** GC does not except, we note just in case, to the following finding of Judge Green rejecting GC's claim that it was an unlawful refusal to bargain for the Employer to refuse to meet with Local 74 between Jan. 5 and early April 2010:

Although the General Counsel contends that the Respondent unduly delayed the commencement of negotiations, I don't think that this was the case. Although it is true that the election was held on January 5, 2010, the company's reluctance to commence bargaining was due to the fact that the Region's Certification was in error and was not corrected until March 16, 2010.

ALJD at 17:48-51 n. 6). This finding accordingly binds.

**4. Question of Judge Green's reliance on pre-certification bargaining.**

Regarding ALJ Green's dismissal of 2-CA-39928, GC excepts only to ALJ's reliance on pre-certification bargaining in his conclusion that Goddard bargained in good faith and reached impasse. (GC Statement of Exceptions No. 2.)<sup>3</sup> The GC does not appear to dispute ALJ Green's summary of GC's position that his "argument boils down to the fact that there having been only one bargaining session after the Certification of Results, the employer was not entitled to declare an impasse." ALJD 17:10-14. As ALJ Green also notes, and GC's sole Exception on the matter confirms, GC wants everyone to forget that the parties had discussed the newly represented group of employees (totaling 11) and the terms and conditions that they should have on several occasions from October 2009 up to the Globe election on January 5, 2010. ALJD at 11:29-34, 14:26-30.

Indeed, the undisputed evidence shows that Goddard was willing to recognize the Union as the representative of this group of 11 without an election and that it wanted to have them covered by the existing labor agreement with the Union and openly discussed their wages and benefits. ALJD at 14:34-36. As ALJ Green noted, however, the respective positions of the parties had crystallized regarding the terms and conditions of employment of the group of 11,

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<sup>3</sup> GC does not except to ALJ Green's findings with regard to the April 13, 2010 negotiations, or the legal framework for such negotiations after the Certification of Results was issued, but nevertheless mischaracterizes the April 13 meeting in his Supporting Brief. (GC Br. at 11-12.) Goddard did not "refuse to consider any of the Union's proposals" and walk out, it took the good faith position that "unless the union could demonstrate that there was some difference between the job functions of the new people and the employees covered by the existing contract, the new group's wages and benefits should be the same..." ALJD 13:15-18. Notwithstanding the GC's lecture on *Federal Mogul* (GC Br. 12) Goddard's position was entirely consistent with its obligations pursuant to the Certification of Results. The union failed to even respond, resulting in the walk out.

with the Union wanting additional wage increases and Goddard consistently proposing accretion. ALJD at 14:40-45. Like it or not, this colored the April 13 sit down negotiations on the matter. It was also central to Mr. Rosenfeld's April 22, 2010 letter position that the parties were at impasse "as we have been for months." ALJD at 13:24-46.

Nevertheless, GC excepts to any consideration of the bargaining history prior to Certification,<sup>4</sup> citing a single case that merely holds that "the *duty* to bargain obligation arises at the time of the election." *Livingston Pipe & Tube*, 303 NLRB 873, 879 (1991). (GC Br. at 11.) GC argues, without explanation, that prior negotiations or discussions are "not relevant." (GC Br. at 11.)

GC also argues, again without explanation, that the testimony regarding the (undisputed) pre-Certification discussions was "vague and conclusory" (GC Br. at 13) notwithstanding ALJ Green's detailed discussion of such testimony (ALJD at 17:21-45), testimony from both Rosenfeld and Alladeen and Rosenfeld's April 22 letter. To the extent that GC is challenging Rosenfeld's testimony in this regard, it should be noted that the ALJ specifically credited Rosenfeld's testimony and the Board should not overturn the ALJ's credibility findings. ALJD at 14:36.

Moreover, no case, theory, policy or reason supports GC's "newly-raised contention [that he] failed to raise ... before the judge," Berkshire Nursing Home, LLC, 345 NLRB 220 fn. 2 (2005), that it was error for Judge Green to rely on "alleged pre-certification bargaining" in

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<sup>4</sup> On January 13, 2010, the Region issued an erroneous Certification of Representative, which was objected to by the Employer and subsequently withdrawn by the Region on March 16 and replaced with a Certification of Results, fitting the Globe election. ALJD 12:11-13:8. Surreptitiously (i.e. without filing an exception), GC argues in its Supporting Brief that the Employer somehow "delayed in meeting" with the Union until April 13, less than a month later. (GC Br. 11, 12.) The Board should also disregard this argument not least because there is no actual evidence of delay on the part of the Employer, unless the GC wants to hold its lawful objection to his own defective Certification of Results against it. (See ALJD 17:48-52, n. 6.)

reaching his conclusion to dismiss 2-CA-39928. It would have been error for Judge Green *not* to look at what happened at the shop pre-certification, since it colored the parties' respective positions.

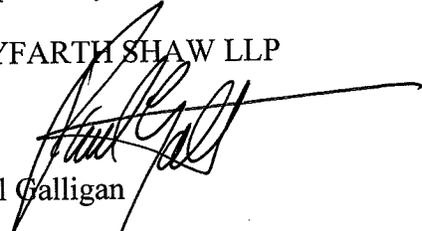
**CONCLUSION**

The Board should adopt Judge Green's Order recommending dismissal of GC's entire Consolidated Complaint, for the reasons set forth in his Decision dated Aug. 3, 2011, and for the additional reasons set forth in the Employer's Cross-Exceptions.

DATED: October 27, 2011

Respectfully submitted,

SEYFARTH SHAW LLP



Paul Galligan

Attorneys for Respondent Goddard  
Riverside Community Center

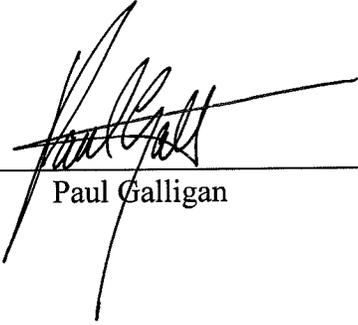
**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that he caused a true and correct copy of the *Employer's Cross Exceptions and Answering Brief* to be served upon the following parties by e-filing and e-mail and U.S. Mail (as indicated below) this 27th day of October, 2011:

Executive Secretary  
National Labor Relations Board  
1099 14th Street, N.W.  
Washington, D.C. 20570-0001  
(original and 8 copies)

James Kearns, Esq.  
Counsel for the General Counsel  
National Labor Relations Board, Region 29  
Two Metrotech Center  
5th Floor  
Brooklyn, NY 11201

Andrew Grabois, Esq.  
O'Dwyer & Bernstein, LLP  
52 Duane Street  
New York, NY 10007



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Paul Galligan