

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

-----	X	
BETH ISRAEL MEDICAL CENTER,	:	
Respondent,	:	
-and-	:	Case Nos. 02-CA-039486
		02-CA-039574
LOCAL 814, INTERNATIONAL	:	
BROTHERHOOD OF TEAMSTERS,	:	
Charging Party,	:	
-and-	:	
LOUIS GUGLIOTTA, AN INDIVIDUAL,	:	
Charging Party.	:	
-----	X	

RESPONDENT'S MEMORANDUM IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT AND
ISSUANCE OF DECISION AND ORDER

I. PRELIMINARY STATEMENT

This memorandum is submitted by Respondent Beth Israel Medical Center ("Respondent" or the "Medical Center") pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or the "Board"), in opposition to Counsel for the General Counsel's December 22, 2011 Motion for Summary Judgment and Issuance of Decision and Order by the Board.

As demonstrated in this opposition as well as Respondent's Answer to the Consolidated Complaint, there are numerous issues of material fact that must be

decided by Administrative Law Judge of the Board following an evidentiary hearing, which has been noticed for February 27, 2012, in New York, NY. That hearing should be allowed to proceed as scheduled.

The Board consistently has held that on a motion for summary judgment, "unless the moving party (here the General Counsel) establishes by admissible evidence that there is 'no genuine issue as to any material fact,' the burden does not shift to the opposing party to show that there is a genuine issue for hearing." *Lake Charles Memorial Hospital*, 240 NLRB 1330, 1331 (1979.) When, as in this case, "the pleadings and submissions of the parties raise substantial material issues of fact and law which may be best resolved at a hearing conducted before an Administrative law Judge," a motion for summary judgment should not be granted. *Id.* at 1331.

Accordingly, and for all the reasons discussed below, Counsel for the General Counsel's motion must be denied.

II. STATEMENT OF THE CASE

The Consolidated Complaint issued by the Acting Regional Director on October 31, 2011 (hereafter referred to simply as the "Complaint"), is based on an unfair labor practice charge filed by Local 814, IBT ("Local 814" or the "Union") against Respondent on September 15, 2009, and served the following day (Case No. 02-CA-039486), as well as a charge filed by Louis Gugliotta¹ against Respondent on September 28, 2009, and served that same day (Case No. 02-CA-039574). (Complaint, Para. 1) (We note that

¹ Mr. Gugliotta was a member of the bargaining unit represented by Local 814 at the time that he filed his unfair labor practice charge with the NLRB.

Local 814, the collective bargaining representative of the Medical Center's security officers at the time of the alleged unfair labor practices, no longer represents those employees, having been replaced by the Special and Superior Officers Benevolent Association ("SSOBA") following a secret-ballot election conducted by the NLRB on or about August 19, 2010.)

The Complaint alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or the "Act") from on or about March 15, 2009, to on or about August 19, 2010, by failing and refusing to contribute to the Local 814 Health and Welfare, Pension and Annuity Funds as required by the terms of a collective bargaining agreement between the Medical Center and Local 814 that expired on March 15, 2009. (Complaint, Para. 6)²

Respondent filed a timely Answer on November 14, 2011, denying the alleged unfair labor practices, asserting several affirmative defenses, and demanding that the Complaint be dismissed in its entirety. That pleading raises material issues of fact and law requiring a hearing before an Administrative Law Judge and precludes the Board from granting Counsel for the General Counsel's Motion for Summary Judgment and Issuance of a Decision.

First, Respondent's Answer raises material issues of fact and law with respect to the Board's statutory authority to find any violation of Section 8(a)(1) and (5) of the Act based on conduct occurring after the March 15, 2009 expiration of the collective

² As we demonstrate below (*see pp. 13-17*), on the face of the Complaint both charges appear to be time-barred, having been filed more than six (6) months after the occurrence of the alleged unfair labor practice.

bargaining agreement between Respondent and Local 814 covering a bargaining unit of "guards" as defined in the NLRA, there being no dispute that Local 814 also represents non-guards. As a "mixed union," Local 814 is both disqualified from certification as the representative of a guards unit by operation of Section 9(b)(3) of the Act and precluded from obtaining relief under Section 8(a)(5) and 8(d) for any post-contract unilateral changes under the *Wells Fargo* doctrine. (See pp. 5-8, below.)

Second, Respondent's Answer raises material issues of fact and law as to whether the indisputable limitations on Local 814's authority to negotiate with Respondent concerning contributions to the Local 814 Funds -- in particular the Local 814 Pension Fund -- and the Union's intransigence with respect to the enormous increases in contributions that were demanded at the behest of the Trustees of the Local 814 Funds, precluded Respondent from bargaining to a good faith impasse, made it futile to do so, and effectively created an impasse privileging the Medical Center to take the action that is the subject of the Complaint. (See pp. 8-12, below.)

Third, Respondent's Answer raises material issues of fact and law as to whether the Complaint is time-barred by Section 10(b) of the Act based not only on the fact that on the face of the Complaint the charges were filed and served more than six (6) months after the alleged unfair labor practices occurred, but also the fact that Local 814 and members of the bargaining unit were unquestionably on notice, well outside the Section 10(b) limitations period, that contributions to the Union's funds would cease. (See pp. 13-17, below.)

III. ARGUMENT

COUNSEL FOR THE GENERAL COUNSEL IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ALLEGATIONS OF THE COMPLAINT

Point 1

Material Issues of Fact and Law Exist as to Whether Respondent's Cessation of Contributions to the Funds Was Permitted Under the *Wells Fargo* Doctrine

There is no dispute that Local 814 is a mixed union, disqualified from certification as the representative of guards under Section 9(b)(3) of the NLRA because it admits to membership employees other than guards. Nor is there any dispute that the security officers who were represented by Local 814 at the time of the alleged unfair labor practice were employed as "guards" as defined in Section 9(b)(3).³

Although Section 9(b)(3), by its terms, only prohibits the Board from certifying a mixed union as the representative of a guards unit, for many years that statutory provision has been construed by the NLRB and the Second Circuit also to preclude the Board from enforcing a bargaining obligation with a mixed union as the representative of guards following the expiration of a collective bargaining agreement.

That was the NLRB's holding more than 25 years ago in *Wells Fargo Corp.*, 270 NLRB 787 (1984), and it remains the law today. In *Wells Fargo*, the Board held that

³ Local 814 was recognized as the exclusive representative of the Employer's guards many years before this dispute arose, based on a certification issued by the New York State Labor Relations Board, prior to the NLRB's assertion of jurisdiction over private not-for-profit hospitals and other health care institutions.

. . . there is no basis for . . . drawing a distinction between initial certification and, as here, the compulsory maintenance of a bargaining relationship through the use of a bargaining order. In either case, saddling the employer with an obligation to bargain presents it with the same set of difficulties and the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid.

270 NLRB at 789. Accordingly, the NLRB dismissed a complaint challenging Wells Fargo's post-contract withdrawal of recognition from a Teamsters local that represented certain employees meeting the statutory definition of "guard."

The Board concluded that Wells Fargo was privileged to take that action and the Second Circuit agreed, observing that "based on the language and legislative history of Section 9(b)(3), the Board was warranted in interpreting the section as proscribing Board direction to an employer to bargain with a mixed guard union despite prior voluntary recognition of that union by the employer." *Truck Drivers Local Union No. 807, IBT v. N.L.R.B.*, 755 F.2d 5, 10 (2d Cir. 1985). Significantly, the Court went on to state that "[m]ixed guard unions are appropriate *only so long as an employer consents to recognize them.*" 755 F.2d at 10 (emphasis added).

In *Temple Security, Inc.*, 328 NLRB 663 (1999), the NLRB revisited the 9(b)(3) issue decided in *Wells Fargo* and concluded that "the Board's legal analysis in that case was correct and its sound reasoning should continue to apply." 328 NLRB at 665. The following year, on a petition for review filed by the union, the Seventh Circuit declined to read Section 9(b)(3) beyond its literal terms, as had both the Board and Second Circuit 15 years earlier in *Wells Fargo*. *General Service Employees Union, Local No. 73, SEIU v. N.L.R.B.*, 230 F.3d 909 (7th Cir. 2000). On remand, the NLRB accepted the

Seventh Circuit's decision as the "law of the case." However, the Board declined to overrule either its original decision dismissing the complaint or the earlier ruling in *Wells Fargo*.⁴

Based on this body of law, holding that there is no duty to bargain with a mixed guard union in a guards unit after the collective bargaining agreement expires, Respondent maintains that the Regional Director has no authority to seek a Board Order requiring the Medical Center to make retroactive contributions to the Local 814 funds for any period after the expiration of the 2006-2009 agreement on March 15, 2009.⁵ No meaningful distinction can be drawn between the complete withdrawal of recognition that occurred in *Wells Fargo* and *Temple Security*, and what might be described as the "partial withdrawal" that occurred in this case. The essence of a withdrawal of recognition is an employer acting unilaterally with respect to employee terms and conditions of employment. That is precisely what happened here.⁶

⁴ We note that the General Counsel took the position in the Seventh Circuit, in defense of its holding in *Temple Security*, that in a consensual collective bargaining relationship such as this one, "once the term of a CBA is up, the Act entirely ceases to apply to the parties." 230 F.3d at 914.

⁵ Counsel for the General Counsel erroneously asserts that "[o]n Respondent counsel's construal [sic] of *Wells Fargo* . . . there is no difference between withdrawal of recognition during the term of an agreement and such withdrawal after expiration." (GC Br. at 7) That is not and has never been Respondent's position. The Medical Center took no action during the term of the collective bargaining agreement in derogation of Local 814's representative status and none is charged.

⁶ Contrary to General Counsel's position, the Medical Center was not "attempting to gain the possible advantages of a collective-bargaining relationship and agreement, e.g., labor peace and/or waiver of employee rights, while simultaneously avoiding the responsibilities of such a relationship, including good faith bargaining." (GC Br. at 8) Local 814 at all times remained free to accept or reject the conditions under which Respondent was willing to continue this entirely consensual bargaining relationship. In addition, the unit employees had the right at all times to seek representation by an all guards union, qualified for certification by the Board under Section 9(b)(3) and able to enforce a bargaining obligation under Sections 8(a)(5) and 8(d) of the Act. In fact, those employees exercised their right to do just that in August 2010, when they voted for representation by the SSOBA, terminating Local 814 as their collective bargaining agent.

The Medical Center could have lawfully withdrawn recognition from Local 814 under the *Wells Fargo* doctrine as of March 15, 2009, set new terms and conditions of employment for its security officers, and then re-extended recognition to Local 814. It simply compressed a two-step process into one.

Accordingly, the Respondent's Answer and its First Affirmative Defense raise issues of fact and law as to whether there is any material difference between the cessation of contributions to the Local 814 Funds that occurred after the collective bargaining agreement covering the Medical Center's guards expired on March 15, 2009, and the complete withdrawal of recognition that occurred in *Wells Fargo* and *Temple Security*. We submit that there is none.

Point 2

Material Issues of Fact Exist as to Whether the Limitations on the Union's Authority to Negotiate Contribution Rates to the Local 814 Funds and its Intransigence on That Mandatory Subject of Bargaining, Precluded Respondent From Negotiating to a Good Faith Impasse, Made It Futile to Do So, and Resulted in an Impasse

The Board has long held that "a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's good faith can be tested." *Times Publishing Company*, 72 NLRB 676, 683 (1947). If the union's tactics are such that the employer's good faith "cannot be tested, its absence can hardly be found." *Id.*, at 683.

As we demonstrate below, this is just such a case. On critical subjects of bargaining, the Union came to the table, at the direction of the Trustees of the Local

814 Funds, "with a predetermined resolve not to budge from an initial position," which the U.S. Supreme Court has held is inconsistent with the duty to bargain in good faith under Section 8(d) of the NLRA. *NLRB v. Truitt Manufacturing*, 351 U.S. 149, 154 (1956).

As noted above, the 2006-2009 collective bargaining agreement between BIMC and Local 814 expired on March 15, 2009. Two months earlier, on or about January 12, 2009, the Medical Center notified the Union in writing of its intention to cease participation in the Local 814 Funds upon contract expiration.

Negotiations for a successor agreement with Local 814 began in or around early February, 2009. The Union's demands included whopping increases in the Medical Center's contributions to the Local 814 Pension Fund from \$2.65/hour to \$5.65/hour (113%), as well as increases in contributions to the Local 814 Welfare Fund from \$5.00/hour to \$6.19/hour (24%) effective as of April 1, 2009, with a further increase to \$6.73/hour (an additional 9%) as of April 1, 2011. (Beyond that, Local 814 was unable to commit to the Medical Center.)

The Union informed the Medical Center that its steep demands for increased contributions to the Local 814 Funds were dictated by the Trustees of the Funds and that the Union was unable to negotiate lower rates of contribution for the Medical Center or for any other participating employer.

With respect to the Medical Center's continued participation in the Local 814 Pension Fund, the increases were dictated by a Funding Improvement Plan ("FIP") adopted by the Trustees on or about November 20, 2008, notice of which was given to

Respondent on or about December 19, 2008. The FIP was adopted to comply with the requirements of the Pension Protection Act of 2006.

Absent an employer's withdrawal from the Pension Fund -- an option expressly contemplated by the FIP -- all participating employers would be required to contribute a minimum of \$5.65/hour to the Fund, without any accrual of additional service credits by members of the bargaining unit. The Union informed the Medical Center that for Plan participants to accrue an additional one-half service credit (\$26.50/month for each year of credited service) would require contributions in the amount of \$6.35/hour (an increase of 136% over the existing \$2.65), and \$7.00/hour (an increase of \$164%) for a full credit (\$53.00/month). The Union demanded these higher contribution rates from the Medical Center and insisted upon them as a condition of continued participation in the Fund.

Contributions to the Local 814 Welfare Fund were based on the Trustees' determination of the level of funding necessary to provide medical and other benefits to covered employees pursuant to provisions of the Plan. Local 814 advised the Medical Center on multiple occasions -- both before and after expiration of the 2006-2009 collective bargaining agreement -- that contributions rates to the Local 814 Welfare Fund, like contributions to the Local 814 Pension Fund, were beyond the Union's authority to negotiate with BIMC, or any other contributing employer, inasmuch as those rates were established by the Fund's Trustees acting pursuant to their fiduciary responsibility to the Plan participants.

In addition, the Union took the position in negotiations with the Medical Center that it had absolutely no authority to negotiate over the Trustees' requirement that collective bargaining agreements between the Union and all participating employers (including the Medical Center) contain a clause binding the employer to all provisions of the Agreement and Declaration of Trust governing the Local 814 Funds as well as "rules, regulations and requirements as the Board of Trustees shall, from time to time adopt, promulgate or amend," including, *inter alia*, any mid-term increases in employer contributions adopted by the Trustees.

During the term of the 2006-2009 Agreement, the Trustees of the Local 814 Welfare Fund unilaterally increased the Medical Center's contribution rate from \$4.00/hour -- agreed to in collective bargaining with Local 814 -- to \$5.00/hour, a 25% increase, which an arbitrator ordered the Medical Center to pay to the Welfare Fund. The Medical Center made it plain to Local 814 that elimination of that provision was an essential condition of remaining in the Funds. Local 814 responded that it had no authority to change that provision, much less agree to its elimination.

By its own admission, Local 814 was unable to engage in any meaningful collective bargaining with respect to the Medical Center's continued participation in the Local 814 Funds at contribution rates other than those dictated by the Trustees acting in their fiduciary capacity. As the Medical Center has maintained throughout the investigation of this matter, bargaining over contributions to the Funds was an exercise in futility.

Here, as in *Roadhome Construction Corp.*, 170 NLRB 668, 672 (1968), where the union's negotiator acknowledged to the employer that he could not and would not vary the terms of an area agreement, Respondent was "not required to go through an exercise in futility" by negotiating its exit from the Local 814 Funds when the only terms on which it could continue to participate were those that were imposed by the Trustees and were non-negotiable. Unlike in *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), here there is "evidence of bargaining intransigence sufficient to justify the Respondent's unilateral implementation." See also *Monroe Manufacturing, Inc.*, 323 NLRB 24, 24, 63 (1997) ("the Union's 'intransigence' on the temporary layoff issue privileged the Respondent to act unilaterally, even though impasse had not been reached in bargaining for a contract").

Contrary to Counsel for the General Counsel's assertion (GC Br. at 12), an impasse is not required where the proof shows, as it plainly does in this case, that the Union adopted a "take it or leave it" approach making it utterly futile to engage in bargaining. Local 814's conduct effectively created an impasse privileging Respondent's actions.

Plainly, material factual issues abound relating to the course and conduct of bargaining between the Medical Center and Local 814 that can only be decided after an evidentiary hearing before an Administrative Law Judge of the Board on the allegations of the Complaint and Respondent's Second and Third Affirmative Defenses.

Point 3

Material Issues of Fact Exist as to Whether the Complaint is Barred by Section 10(b) of the Act

The Complaint alleges that the unfair labor practice occurred beginning on or about March 15, 2009, when it is claimed that Respondent unlawfully ceased contributions to the Local 814 Funds. (Complaint, Para. 6)

As noted above, on the face of the Complaint it would appear that the charges on which it is based were not filed and served on Respondent within six (6) months after the occurrence of the alleged unfair labor practices.

The charge in Case No. 02-CA-039486 was filed by Local 814 on September 15, 2009, and served by regular mail the following day, September 16, more than six (6) months after the unilateral change that is the subject of the Complaint. The charge filed in Case No. 02-CA-039574 was even more untimely, having been filed and served as late as September 28, 2009.

Counsel for the General Counsel maintains that there is no genuine issue of fact concerning the timeliness of the charges, arguing that the unilateral change occurred not on March 15, 2009 -- as alleged in the Complaint -- but rather on March 16. In addition, he argues that the six (6) month statute of limitations did not begin to run until March 17, the day after the alleged unilateral change was made, relying on Section 102.111 of the Board's Rules and Regulations, which states that "[i]n computing any period of time prescribed or allowed by these rules, the day of the act, event, or default

after which the designated period of time begins to run is not to be included.” (GC Br. at 13.) We respectfully submit that Counsel for the General Counsel is in error.

First, he is mistaken as to the date of the alleged unfair labor practice, ignoring the fact that the Complaint itself alleges that the unilateral change occurred on March 15, 2009, not March 16. *Second*, he misapplies Sec. 102.111 of the Board’s Rules and Regulations, which by its terms applies only to a “period of time prescribed or allowed **by these rules.**” (Emphasis added.)

The Rules and Regulations applicable to unfair labor practice proceedings neither prescribe nor allow a time for the filing of unfair labor practice charges with the Board. Indeed, they do not address the subject at all. Rather, the Act prescribes the time for filing a charge in Section 10(b), and the statute says nothing that would operate to advance the date on which the unfair labor practice allegedly occurred for purposes of marking the start of the six (6) month limitations period.

We acknowledge that in the two cases cited by Counsel for the General Counsel in his brief -- *Geiger Ready-Mix Co.*, 315 NLRB 1021 (1994) and *Local 264, Laborers [D&G Construction Co.]*, 216 NLRB 40, 43 (1975) -- the Board, relying on Section 102.111, concluded that the statute of limitations began to run on the day after the date on which the alleged unfair labor practice occurred. (GC Br. at 13)

To the extent that the Board based its decisions on Section 102.111 of the Rules and Regulations, it appears to have incorrectly decided the statute of limitations issue in those cases. Section 102.111 is very clear; it is limited to time periods prescribed by the Board’s Rules and Regulations, not filing periods established by the Act.

In any event, irrespective of whether the alleged unfair labor practice occurred beginning on or about March 15 or 16, 2009, and regardless of when thereafter the Section 10(b) limitations period began to run, Respondent's Answer and its prior submissions to the Regional Office during the investigation of these unfair labor practice charges raise a material issue as to whether Local 814 was unequivocally on notice of the change well in advance of March 15, such that the filing of the charge on September 15 was untimely by any measure.

Beginning as early as January 12, 2009, the Union was notified in writing of the Medical Center's intention to cease contributions to the Local 814 Funds for any work performed by members of the bargaining unit after expiration of the 2006-2009 collective bargaining agreement on March 15, 2009.

In February and early March 2009, representatives of the Medical Center met on several occasions with agents of the Union, including its President and legal counsel. Each time, the Medical Center renewed the notice previously given by letter dated January 12 that participation in the Local 814 Funds would cease effective March 15, 2009.

On or about March 5, 2009, Respondent notified Local 814 that enrollment forms were about to be presented to the unit employees to cover them under the Medical Center's benefits program for management and other non-union employees, so that there would be no break in coverage when the Local 814 Welfare Plan lapsed. There

was no objection from the Union and commencing on or about March 6, 2009, the Medical Center began to enroll the security officers in its program.⁷

Even assuming Respondent's January 12, 2009 letter advising the Union of its intention to exit the Local 814 Funds upon expiration of the 2006-2009 collective bargaining agreement on March 15 was not adequate to place it on notice of the alleged unlawful unilateral change and to start the limitations period, surely the Medical Center's act of distributing enrollment forms and enrolling the unit employees in the non-union medical plan during the first week of March -- with the knowledge and acquiescence of Local 814's leadership -- was more than sufficient to do so.

If the cessation of contributions to the Local 814 Funds was an unfair labor practice -- which we dispute for a variety of reasons -- then the enrollment of the bargaining unit employees in the Medical Center's plan was no less a violation of Section 8(a)(1) and (5) of the Act. Indeed, it was inseparable from the later cessation of contributions to the Union's pension and benefit funds. As such, the Union's filing with the Board on September 15, 2009, was at least 10 days late, and the charge filed by the individual Charging Party on September 28, 2009, missed the mark by weeks.

As the Board has said, the 10(b) period begins to run "when a party has clear and unequivocal notice of a violation of the Act." *See, e.g., CAB Associates*, 340 NLRB 1391, 1392 (2003). The notice to the Union in this case could not have been clearer; Local 814 was an active participant in the process of enrolling members of bargaining unit in the Medical Center's own plan.

⁷ Months later, the Union prevailed on the Medical Center to reopen the enrollment process to accommodate members of the bargaining unit who had not enrolled in March 2009.

Based on the foregoing and Respondent's Fourth Affirmative Defense, there plainly are material issues of fact and law concerning the timeliness of the underlying unfair labor practice charges that must be decided by an Administrative Law Judge. In the circumstances, the Board cannot grant Counsel for the General Counsel's Motion for Summary Judgment and Issuance of a Decision and Order.

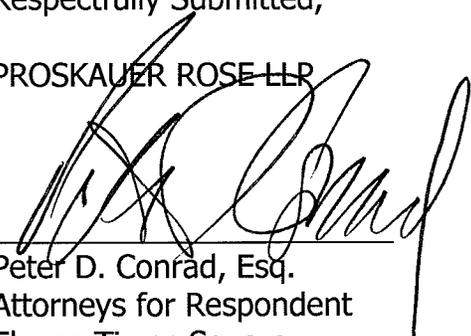
IV. CONCLUSION

For all the foregoing reason, Counsel for the General Counsel's Motion for Summary Judgment and Issuance of a Decision and Order should be denied and this matter should be remanded to the Regional Director for a hearing before an Administrative Law Judge of the Board on the allegations of the Complaint and Respondent's Affirmative Defenses.

Dated: February 6, 2012
New York, NY

Respectfully Submitted,

PROSKAUER ROSE LLP

By: 

Peter D. Conrad, Esq.
Attorneys for Respondent
Eleven Times Square
New York, NY 10036
212.969.3020 (tel)
212.969.2900 (fax)
pconrad@proskauer.com

CERTIFICATE OF SERVICE

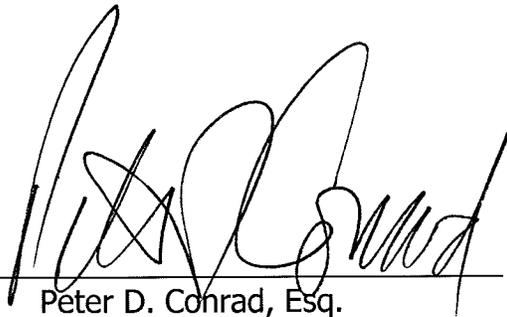
This will certify that Respondent's Brief in Opposition to Counsel for the General Counsel's Motion for Summary Judgment and Issuance of a Decision and Order was served on February 6, 2012, on the following persons by electronic mail or overnight mail, as indicated:

Jamie Rucker, Esq.
Counsel for the General Counsel
Jamie.rucker@nlrb.gov

Joseph Vitale, Esq.
Counsel for Teamsters Local 814
jvitale@cwsny.com

Jani Rachelson, Esq.
Counsel for Teamsters Local 814 Funds
jrachelson@cwsny.com

Mr. Louis Gugliotta
108-48 70th Road, Apt. 3A
Forest Hills, NY 11375
(By UPS Next Day Air)



Peter D. Conrad, Esq.
Counsel for Respondent