

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

HEARTLAND-PLYMOUTH COURT MI, LLC  
D/B/A HEARTLAND HEALTH CARE  
CENTER-PLYMOUTH COURT

and

Case 07-CA-070626

SEIU HEALTHCARE MICHIGAN

*Dynn Nick, Esq.*, for the Acting General Counsel.  
*Clifford H. Nelson, Jr., Esq. (Constangy, Brooks &  
Smith, LLC)*, for the Respondent.  
*Chelsea Ditz, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case arises out of a November 27, 2012 complaint and notice of hearing that stems from an unfair labor practice (ULP) charge that SEIU Healthcare Michigan (the Union) filed on December 13, 2011, against Heartland-Plymouth Court MI, LLC d/b/a Heartland Health Center-Plymouth Court (the Respondent).

I held a trial in Detroit, Michigan, on January 14, 2013, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issue

Notwithstanding an arbitrator's award in the Respondent's favor, did the Respondent violate Section 8(a) (5) and (1) of the National Labor Relations Act (the Act) by reducing the hours of dietary department employees in about September 2011,<sup>1</sup> without affording the Union prior notice and an opportunity to bargain over the effects of this conduct?<sup>2</sup>

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<sup>1</sup> All dates hereinafter occurred in 2011 unless otherwise indicated.

<sup>2</sup> The Acting General Counsel does not contend that the Respondent was obligated to bargain over the decision itself.

## Witnesses and Credibility

Kim Fowlkes, the union's representative at the facility at all times material, testified for the Acting General Counsel. Karen Szkutnik, the Respondent's regional human resources manager, testified on the Respondent's behalf, with her testimony limited to the circumstances surrounding the reduction in hours of the dietary department employees.

Fowlkes was only a partially reliable witness. Thus, she tended to go off track and ramble in response to questions and was often hazy when it came to providing details. She also sometimes provided conflicting testimony. Thus, Fowlkes first testified that after she heard that management was cutting hours for full-time dietary department employees, she called acting steward Brandi Malone and asked her to investigate the matter, but soon after testified that she told Malone to file a grievance.<sup>3</sup> Fowlkes first testified that at the one grievance meeting, Szkutnik did all of the talking for management but later testified that Administrator Bret Lucka did participate in substantive discussion.<sup>4</sup>

Szkutnik appeared candid, and her limited testimony was credible. In this regard, I note that she expressly disagreed with the depiction of the events in around September as "unprecedented," as described in the Respondent's September 4, 2012 position statement.<sup>5</sup>

On the other hand, to the extent that Szkutnik did not testify about what was said at the grievance meeting, or in November and December telephone conversation that Fowlkes testified they had, I draw an adverse inference from the Respondent's failure to question her thereon since, as a management representative, she reasonably would be assumed to be favorably disposed to the Respondent. See *Daikichi Corp.*, 335 NLRB 622, 622 (2001); *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977), enfd. mem. 583 F.2d 1289 (9th Cir. 1978). Similarly, I draw an adverse inference from the Respondent's failure to call Lucka as a witness to testify about what was said at that meeting or in the November conversation that Fowlkes testified they had, in the absence of an explanation of why he could not be present.<sup>6</sup> See *Champion River Co.*, 314 NLRB 1097, 1099 fn. 8 (1994); *Douglas Aircraft Co.*, 308 NLRB 1217, 1217 fn. 1(1992). Accordingly, I credit Fowlkes' unrebutted and consistent testimony on these matters. I cite the well-established trial precept that witnesses may be found partially credible. *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). In this regard, the trier of fact must consider the plausibility of a witness' testimony and appropriately weigh it with the evidence as a whole. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 797-799 (1970).

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<sup>3</sup>Tr. 26, 30.

<sup>4</sup> Tr. 34, 37.

<sup>5</sup> Tr. 76-77. See GC Exh. 4 at 3.

<sup>6</sup> The Respondent's answer states that Lucka and Director Cari Mitter no longer hold their positions as set forth in the complaint, but we do not know whether they currently encumber other management or supervisory positions with the Respondent, or any reasons why they could not have been available to testify.

## Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, as well as the thoughtful posttrial briefs that the Acting General Counsel and the Respondent filed, I find the following

The facility is a 109-bed healthcare operation that provides both long-term care and skilled nursing rehabilitation. The Respondent has admitted jurisdiction as alleged in the complaint, as amended without objection at trial, and I so find.

The Respondent and the Union are parties to a collective-bargaining agreement that is effective from July 8, 2011, to July 8, 2014, and covers all full-time and regular part-time nurses' aides, housekeeping employees, and cooks employed at the facility.<sup>7</sup> There are about 70 unit employees.

The agreement contains a broad management- rights clause in article 3 that provides, inter alia, that management has the right to determine and change starting times, quitting times and shifts; and the size and composition of the work force; to extend the manner in which departments are operated; and to determine to what extent any work will be performed by employees.<sup>8</sup> Article 25, contains a "zipper clause," providing that for the life of the agreement, the parties waive the right to bargain over any subjects or matters referred to therein, "even though such subjects or matters may not have been within the knowledge of [sic] contemplation of either or both of the parties at the time they negotiated or signed this Agreement."<sup>9</sup>

Department budgets, prepared annually in September of the previous year, are based on a census or resident count of 90, which allows all employees to work full-time hours. However, the budget for staffing is adjusted downward when the daily census is below that figure and, if staff hours need to be cut as a result, employee seniority is used as the basis.

When Cari Mitter, director of food and nutrition at times relevant, arrived in February, the patient census was at 90, but the number gradually decreased in the fall of 2011. At that time, there were issues with the state survey and either a denial or potential denial of Medicare payments, as a result of which Administrator Lucka decided to withhold admissions, and the patient census dropped.

By late September, the daily census was down to the 60's. As a result, Mitter testified at the arbitration hearing, she decided to reduce the hours of a number of dietary employees rather than resort to layoffs. Thus, starting that month, she cut the hours of Khadijah Anderson, Clondia Finley (Finley), Eartha Finley, Laura Gonzalez, Dion Luckett, Stacey Miller, John Ross, Felicia Slater, Angela Valentez, and Joanne Wood.<sup>10</sup> Finley's bi-monthly hours were reduced from 80 to between 54 and 60.

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<sup>7</sup> See Jt. Exh. 2 at 58, et seq.; GC Exh. 3.

<sup>8</sup> Id. at 62.

<sup>9</sup> Id. at 82.

<sup>10</sup> Id. at 23.

Steward Brandi Malone testified at the arbitration hearing that after the reduction in Finley's hours, she met with "management" and worked out an agreement concerning Eartha Finley, but not Finley. She could not recall the details of such agreement and offered no specifics of any of her conversations with "management." Her testimony was somewhat unclear, but agreements apparently were reached at times uncertain on at least most of the dietary department employees other than Finley.

In November, Slater informed Fowlkes that, going back to approximately September, full-time dietary workers at the facility were having their hours cut. Fowlkes said that she would investigate and, that afternoon, she called Lucka, who responded that he knew nothing about it and that this was the first he had heard about it.<sup>11</sup> Right after that, she called Szkutnik, who told her that she had "no knowledge of anything."<sup>12</sup>

A day or two later, Fowlkes called Malone. As noted earlier, Fowlkes' testimony did not make it clear whether she asked Malone to further investigate further or to file a class action grievance.<sup>13</sup>

In any event, a class action grievance was filed on November 9, 2011, alleging that the Respondent's reduction of hours for full-time employees violated several articles of the collective-bargaining agreement.<sup>14</sup>

A step 3 grievance meeting was held in December 2011 in Lucka's office. Fowlkes, Slater, and Finley represented the Union; Lucka and Szkutnik (and one other unidentified individual) the Respondent. I credit Fowlkes' unrebutted account.

Fowlkes argued that it was wrong to cut full-time workers' hours, those of Finley in particular, and not those of part-time employees, and for the Respondent to hire new employees at the same time. She complained that management had not told her that hours were being cut.

Szkutnik responded that the patient census had gone down from approximately 90 to approximately 60, that this had never previously occurred, that the facility was losing money, and that the State could shut down the facility. She offered to provide documentation. Fowlkes had never before heard management advance these justifications for the cuts in hours.

Szkutnik offered Finley a split shift to maintain her full hours; come in the morning and then return in the afternoon. Fowlkes rejected this proposal.

On December 19, Fowlkes and Szkutnik had a phone conversation. I credit Fowlkes' uncontroverted testimony that Szkutnik repeated her offer that Finley come in the morning and

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<sup>11</sup> Tr. 24. Fowlkes' uncontroverted testimony.

<sup>12</sup> Tr. 25. Fowlkes' uncontroverted testimony.

<sup>13</sup> Tr. 28, 30.

<sup>14</sup> Jt. Exh. 2 at 48. I draw no inferences from the fact that Slater signed in the steward signature box, even though Fowlkes testified that Slater never served as a steward or acting steward. Indeed, the Respondent never claimed that this invalidated the grievance.

then return in the afternoon, thus working a split shift. Fowlkes replied that Finley did not want this.

5 The next day, Szkutnik sent Fowlkes an email confirming that Fowlkes had stated that the Union rejected the Respondent's proposed solutions and would proceed with arbitration.<sup>15</sup> Later that day, Fowlkes sent Szkutnik an email response that the latter's proposed resolution made no sense and that the Union would drop all changes and settle the issue if the employees got back their full-time hours.<sup>16</sup>

10 Neither party made any further proposals as far as settling the grievance. The Union filed a charge on December 13. On January 17, 2012, the Regional Director deferred further proceedings to the grievance/arbitration process, as per *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984).<sup>17</sup> The correctness of that determination is not before me.

### 15 The Arbitration Hearing and Award

20 On June 6, 2012, Arbitrator Paul E. Glendon conducted a hearing in Livonia, Michigan. At the outset, both parties agreed that the grievance concerned contract interpretation, more specifically, whether the Respondent violated the agreement by reducing the working hours of full-time employees.<sup>18</sup> I need not detail the contract provisions at issue, other than to note that the Respondent raised the management-rights language in article 3.

25 The sole issue, as the arbitrator framed and decided it in his August 1, 2011 award, was whether the Respondent violated the collective-bargaining agreement by reducing Finley's regular hours below 8 hours per day and 80 per pay period due to a major continuing drop in the resident census.<sup>19</sup> He found for the Respondent and denied the grievance but did not address the Respondent's request that he recommend dismissal of the ULP charge alleging a unilateral change in violation of the Act.<sup>20</sup> In fact, the word "bargaining" appears only once in his decision (R. Exh. 1 at 3) in the context of the Respondent's contention that the Union was trying to get in  
30 arbitration what it had been unable to achieve in bargaining. Neither his decision nor the Respondent's and the Union's briefs mentioned anything about effects bargaining.<sup>21</sup>

35 Nothing in the record reflects that the Union ever specifically requested effects bargaining as opposed to bargaining over the decision itself.

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<sup>15</sup> GC Exh. 2.

<sup>16</sup> GC Exh. 3.

<sup>17</sup> R. Exh. 4

<sup>18</sup> Jt. Exh. 2 at 3, et seq.

<sup>19</sup> R. Exh. 1 at 1.

<sup>20</sup> See R. Exh. 3 at 35.

<sup>21</sup> R. Exh.'s 2, 3.

## Conclusions

As a starting point for analysis, an employer must notify and consult with the union representing its employees before imposing unilateral changes in wages, hours, and terms and conditions of employment. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). These are considered mandatory subjects of bargaining, provided a change is “material, substantial, and significant.” *Flambeau Arnold Corp.*, 334 NLRB 165, 165 (2001), citing *Alamo Cement Co.*, 281 NLRB 737, 738 (1986). Reducing employees’ work hours clearly meets such criteria. See *USC University Hospital*, 358 NLRB No. 132 (2012); *Best Century Buffet, Inc.*, 358 NLRB No. 23 (2012). Therefore, absent other circumstances, an employer violates Section 8(a)(5) and (1) by making unilateral changes therein.

I will now discuss the applicable law on effects bargaining. The Acting General Counsel does not allege that the Respondent had an obligation to bargain over its decision to reduce the hours of dietary department employees but was nonetheless obliged to bargain over the effects of that decision. The Acting General Counsel has correctly cited *Good Samaritan Hospital*, 335 NLRB 901 (2001), review dismissed by agreement sub nom. 2002 WL 31016553 (D.C. Cir. 2002) (not reported in F.3d), for the proposition that effects bargaining is required even where the employer has no obligation to bargain about the decision itself because of contractual management-rights language. See also *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981). In *First National Maintenance Corp.*, the Court stated (at 682):

[B]argaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy. A Union, by pursuing such bargaining rights, may achieve valuable concessions from an employer engaged in a partial closing. It also may secure in contract negotiations provisions implementing rights to notice, information, and fair bargaining . . . .

The Respondent cites *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005), for the opposite result, but “The Board has a long established policy of refusing to acquiesce in the adverse decisions of the appellate courts” that are contrary to Board law. *Provena St. Joseph Medical Center*, 350 NLRB 808, 814 (2007), and I am bound by Board precedent.

The Respondent argues that the Union waived the right to bargain over effects by express provisions in the collective-bargaining agreement, to wit, the management-rights and “zipper” clauses, as well as by its conduct in not earlier specifically requesting such.

As to the first ground, waiver of a bargaining right from contractual language is not lightly inferred, and an employer contending this bears the burden of demonstrating that the union has clearly and unmistakably relinquished such right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *American Benefit Corp.*, 354 NLRB 1 (2010) (management-rights and zipper clauses, and other contractual provisions); *Provena St. Joseph Medical Center*, above at 810–812 (management-rights clause).

Neither the management-rights nor “zipper” clauses say anything whatsoever about the effects of management’s decisions or the Union’s rights to bargain there over. Indeed, in cases

cited above, including *Good Samaritan Hospital*, the Board found that the employer had an obligation to bargain over effects even though language in the management-rights clause constituted a waiver of the union's right to bargain over the decision itself. Although the Respondent's brief is creative in attempting to distinguish this case from *Good Samaritan Hospital*, I find such arguments to be unpersuasive. Analyzing the precise language of the management-rights clause was not at the crux of the Board's decision; rather, the Board's focus was on the difference in the clause's impact on the employer's obligation to engage in effects bargaining as opposed to decisional bargaining.

With regard to the second ground, asserted waiver by the union's conduct, an employer has the same burden, of showing that the union "clearly intend[ed], express[ed], and manifest[ed] a conscious relinquishment" of its right to bargain. *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), *enfd.* 984 F.2d 1562 (10th Cir. 1993); see also *Regal Cinemas, Inc.*, 316 F.3d 300, 314 (D.C. Cir. 2003). The Union filed a grievance shortly after it learned of the Respondent's cutting the hours of dietary department employees and, at all times during the grievance-arbitration proceedings, focused on what it deemed the Respondent's obligation to bargain over the decision itself. Nothing in the arbitration proceeding, including the posthearing briefs, suggests that the Union (or the Respondent, for that matter) even considered, let alone addressed, the alternative of effects bargaining if the arbitrator denied the grievance. Although the Union never specifically requested effects bargaining per se, such a request was implicit in its grievance and its request that the status quo ante be restored. See *Rochester Gas & Electric Corp.*, 355 NLRB 507, 507 (2010), *enfd.* 2013 WL 174110 (2d Cir. 2013).

In these circumstances, I cannot find that the Respondent has met its burden of establishing that the Union "clearly intend[ed], express[ed], and manifested[ed] a conscious relinquishment" of its right to engage in effects bargaining.

The Respondent further contends that Malone's testimony at the arbitration hearing—reinforced by the Union's opening statement there—establish that the Respondent did in fact engage in effects bargaining with Malone and worked out arrangements on everyone other than Finley. The fundamental flaw with this argument is that the record is totally devoid of any foundational requirements necessary for admissible evidence in a formal proceeding. Nowhere did Malone even name the "management" representative(s) with whom she spoke, how many meetings they had, where they occurred, who was present, or who said what. In this regard, she offered no specifics of any conversations. The Respondent did not call her as a 611(c) witness or call Mitter, who the Respondent suggests was the management representative involved. Nor did the Respondent proffer any reason why it could not produce Malone or Mitter as witnesses to bolster its defense that it did engage in effects bargaining. The result was that Fowlkes was the only witness who testified, without controversy, about communications that the Union had with management over the reductions in hours.

Fowlkes did not learn of the reduction in hours until November, through unit employees, and management did not confirm this change until the parties' December grievance meeting. Accordingly, the Union was deprived of the opportunity to engage in effects bargaining at a point where it might have been able to secure ameliorating circumstances for the affected employees.

5 Finally, the Respondent contends that I should defer to the arbitrator's award, whereas the Acting General Counsel argues that deferral is inappropriate because the contractual and ULP issues were not factually parallel, the arbitrator was not presented generally with the facts relevant to resolving the ULP, and the arbitrator's decision was palpably wrong/repugnant to the Act.

10 In *Olin Corp.*, 268 NLRB 573 (1984), the Board reaffirmed its commitment to the deferral standards set forth in *Spielberg Mfg. Co.*, supra, to wit, that the proceedings appear to have been fair and regular, all parties agreed to be bound, and the decision of the arbitrator was not clearly repugnant to the purposes and policies of the Act. The Board also clarified its position with respect to the requirement under *Raytheon Corp.*, 140 NLRB 883 (1963), that the arbitrator must have considered the ULP issue, by holding that this requirement is satisfied if (1) the contractual issue is factually parallel to the ULP issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the ULP. 268 NLRB at 574.

20 The burden of proof is on the party who opposes deferral. *Martin Redi-Mix*, 274 NLRB 560, 560 (1985); *Olin Corp.*, above at 574. One way that this burden can be met is by showing that the arbitrator did not adequately consider issues relevant to the Act. *Airborne Freight Corp.*, 343 NLRB 580, 580 (2004); *Dick Gidron Cadillac*, 287 NLRB 1107, 1111 (1988), enfd. mem. 862 F.3d 304 (2d Cir. 1988). However, the arbitrator need not have specifically addressed or considered the law related to the ULP, if the evidence necessary for a determination of the merits of the ULP charge was essentially the same evidence before the arbitrator. *Andersen Sand & Gavel Co.*, 277 NLRB 1204,1205(1985). Another means, which embodies the *Andersen* caveat, is by establishing that the facts relevant to the ULP were not generally presented to the arbitrator during the proceeding. See *Turner Construction. Co.*, 339 NLRB 451, 451 fn. 2 (2003); *Martin Redi-Mix*, above at 560.

30 Here, the issue of effects bargaining was not raised either at the arbitration hearing or in the parties' posthearing briefs, and nothing whatsoever in the arbitrator's award purported to address effects bargaining, let alone any kind of bargaining. The focus of the evidence presented to him related to the Respondent's decision to reduce the hours of dietary department employees and whether the Respondent had the right to do so under the contract.

35 That the Respondent's actual bargaining with the Union was a peripheral matter at the arbitration hearing is best reflected by the extremely limited testimony that the parties presented thereon. Thus, the only witness who testified on any postchange interactions between the Respondent and the Union was Malone, whose testimony was not sufficiently developed during the arbitration hearing to constitute admissible evidence in a formal proceeding or, it follows, to establish that the parties engaged in any "bargaining." The Union did not call Fowlkes, and the Respondent did not call Luckas or Szkutnik to testify about their communications after the changes in hours were instituted. Mitter testified only about the circumstances behind the decision to reduce the hours, not on anything related to bargaining. There can be no doubt that the evidence pertinent to effects bargaining was not meaningfully or fully presented at the arbitration hearing.

I conclude, therefore, that the scope of the arbitration hearing was limited to contractual interpretation and that the evidence necessary for a resolution of the instant ULP was not the same evidence that was presented to, and considered by, the arbitrator. Therefore, the issue of whether the Respondent violated its duty to engage in effects bargaining remains litigable before the Board. See *ABF Freight System, Inc.*, 304 NLRB 585, 591 fn. 5 (1991); *Dick Gidron Cadillac*, above at 111; *Olin Corp.*, supra at 574. In light of this conclusion, I need not address the Acting General Counsel's argument that the award was repugnant to the Act.

In summary, I conclude that the Respondent's failure to provide the Union with prior notice and an opportunity to bargain over the effects of the reduction in hours violated Section 8(a)(5) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act: Failed to afford the Union prior notice and an opportunity to bargain over the effects of its decision to reduce the hours of full-time employees in the dietary department starting in about September 2011.

#### REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The standard remedy in effects bargaining cases is a *Transmarine*<sup>22</sup> remedy. *Rochester Gas & Electric Corp.*, 355 NLRB 507, 508 (2010); *AG Communications Systems Corp.*, 350 NLRB 168, 173 (2007), petition for review denied sub nom. 563 F.3d 418 (9th Cir. 2009). This includes requiring the employer to bargain over the effects of the decision and to make employees whole until the earliest of the following conditions occurs: (1) the parties bargain to agreement over the effects of the change; (2) the parties reach a bargaining impasse; (3) the union fails to request bargaining within 5 days after receipt of the Board's decision, or to begin negotiations within 5 days after receiving the employer's notice of its desire to bargain; or (4) the union fails to bargain in good faith. Further, the backpay amount paid to any employee must not be less than 2 weeks.

The rationale behind this enhanced remedy is that the respondent's ULP deprived the union of "an opportunity to bargain . . . at a time prior to [implementation of the decision] when such bargaining would have been meaningful in easing the hardship on employees. . . ." 170 NLRB at 389. Concomitantly, had the respondent engaged in timely effects bargaining, the

<sup>22</sup> *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

union may have been able to secure additional benefits for employees. See *Live Oak Skilled Care & Manor*, 300 NLRB 1040, 1042 (1990) (“[I]t is reasonable to require that ‘the employees whose statutory rights were invaded by reason of the Respondent’s unlawful . . . action, and who may have suffered losses in consequences thereof, be reimbursed for such losses until such time as the Respondent remedies its violation by doing what it should have done in the first place’” (citations omitted)). In sum, an employer should not benefit from having failed to engage in timely effects bargaining.

Effects bargaining cases typically involve an employer’s failure to bargain over the effects of closing a facility or otherwise removing bargaining work. See *Rochester Gas & Electric*, above. However, a *Transmarine* remedy may be ordered when a unilateral change does not result in a loss of jobs but otherwise causes economic losses to unit employees. Thus, in *Rochester Gas & Electric*, above, the Board found appropriate a *Transmarine*-type remedy where the employer had made a unilateral change in the vehicle benefit that it afforded employees, resulting in increased commuting costs. See also *Good Samaritan Hospital*, supra (modifying the determination of how many employees would be on a given shift).

Accordingly, I will order that employees be made whole as per the above-described *Transmarine* remedy. Backpay shall be computed as prescribed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate employees for any adverse tax consequences of receiving lump-sum backpay awards covering more than 1 calendar year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

The *Transmarine* remedy does not include restoration of the status quo ante, as the Acting General Counsel requests, and I will not include such in my order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>23</sup>

#### ORDER

The Respondent, Heartland-Plymouth Court MI, LLC, d/b/a Heartland Health Care Center-Plymouth Court, Plymouth, Michigan, shall

1. Cease and desist from

(a) Failing to provide the Union with prior notice and an opportunity to bargain over the effects of its decision to reduce the hours of full-time employees in the dietary department starting in about September 2011.

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<sup>23</sup> If no exceptions are filed 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.

(b) 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.

(a) Make the following dietary department employees whole for all losses they may have suffered, in the manner set forth in the remedy section of this decision: Khadijah Anderson, Clondia Finley, Eartha Finley, Laura Gonzalez, Dion Luckett, Stacey Miller, John Ross, Felicia Slater, Angela Valentez, and Joanne Wood

(b) On request, meet and bargain with the Union over the effects of its decision to reduce the hours of employees in the dietary department and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Within 14 days after service by the Region, post at its facility in Plymouth, Michigan copies of the attached notice marked "Appendix."<sup>24</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places at all facilities where the unlawful policy has been or is in effect, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices should 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 September 1, 2011.

(d) 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 12, 2013.

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Ira Sandron  
Administrative Law Judge

<sup>24</sup> 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**

**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.

SEIU Healthcare Michigan (the Union) represents our full-time and regular part-time nurses' aides, housekeeping employees and cooks (unit employees).

WE WILL NOT fail to provide the Union with prior notice and an opportunity to bargain over the effects of decisions that we make to reduce the hours of full-time unit employees, or otherwise exercise our right to make changes under our collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, meet and bargain with the Union over the effects of our decision to reduce the hours of full-time employees in the dietary department starting in about September 2011.

WE WILL PAY Khadijah Anderson, Clondia Finley, Eartha Finley, Laura Gonzalez, Dion Luckett, Stacey Miller, John Ross, Felicia Slater, Angela Valentez, and Joanne Wood any wages and other benefits they lost, with interest, for the period set forth in the remedy section of this decision.

HEARTLAND-PLYMOUTH COURT MI, LLC,  
D/B/A HEARTLAND HEALTH CARE  
CENTER-PLYMOUTH COURT

\_\_\_\_\_  
(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](http://www.nlr.gov).

477 Michigan Avenue, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

**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, (313) 226-3244.