

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
Nos. 15-1034 and 15-1045

HEARTLAND PLYMOUTH COURT)
MI, LLC, d/b/a HEARTLAND HEALTH)
CARE CENTER – PLYMOUTH COURT)
)
Petitioner)
)
v.)
)
)
NATIONAL LABOR RELATIONS)
BOARD,)
)
Respondent)
)

**PETITIONER’S REPLY TO NATIONAL LABOR RELATIONS BOARD’S
RESPONSE TO MOTION FOR ATTORNEY FEES**

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A. Heartland Is The Real Party In Interest.

The Board argues that Heartland is not the “real party in interest,” as the invoices for attorney fees were directed not to Heartland, but to its parent HCR ManorCare, Inc. (HCR). (Board Response at 8-10). Heartland acknowledges that it is a subsidiary of HCR and that HCR would not qualify in its own right as a “party” under the EAJA. However, as discussed below and as established in the attached affidavit of Kathryn Hoops, [Attachment A], Heartland did “incur” the attorney fees in issue and is indisputably the real party in interest.

Heartland was the sole respondent in the Board proceeding. As alleged in the General Counsel’s complaint and admitted in Heartland’s answer, Heartland is “a corporation with an office and place of business in Plymouth, Michigan, [where it] has been engaged in the operation of a nursing home” and an “employer” covered by the National Labor Relations Act. (JA 9, 14-15). The events that were the subject of the Board’s decision all occurred at the Plymouth Court facility. Similarly, Heartland is the sole petitioner and cross-respondent in this Court. The mere fact that a corporate party is a subsidiary of a larger corporation does not preclude the actual party from qualifying for fees. The EAJA does not provide for aggregation of assets and employees. *Caremore, Inc. v. NLRB*, 150 F.3d 628, 630 (6th Cir. 1998); *Texas Food Industry Assoc. v. USDA*, 81 F.3d 578, 582 (5th Cir. 1996). *Tri-State Steel Const. Co. v. Herman*, 164 F.3d 973, 979 (6th Cir. 1999).

To be sure, this Court has held that only those parties who are actually liable for fees may recover such fees. *National Ass'n of Mfrs. v. DOL*, 159 F.3d 597, 603 (D.C. Cir. 1998); *Unification Church v. INS*, 762 F.2d 1077, 1082 (D.C. Cir. 1985). Here, although HCR manages legal services for its subsidiaries, the fees are immediately charged to the financial statement of the subsidiary for whom the services were performed. Consistent with this long-standing practice, the attorney fees at issue were charged to Heartland's P&L statement as they were incurred and paid. If this Court awards fees, such fees will be credited back to Heartland's financial statements. Thus, Heartland has in fact paid the fees and is the real party in interest. Indeed, placing reliance "upon the ability of a parent corporation to advance funds . . . is inconsistent with the basic premise that a corporation is separate from its shareholders." *Tri-State Steel*, 164 F.3d at 979 (citing *Germano-Millgate Tenants Ass'n v. Cisneros*, 855 F. Supp. 233, 235 (N.D. Ill. 1993)).

B. The Board's Litigating Posture Constitutes Bad Faith Conduct.

Heartland seeks to recover its fees, not only under the EAJA, but pursuant to the "bad faith" exception to the American Rule. The Board, relying upon decisions from the Second Circuit, *Wells v. Bowen*, 855 F.2d 37, 46 (2d Cir. 1988), and Tenth Circuit, *FTC v. Kuykendall*, 466 F.3d 1149, 1152 (10th Cir. 2006), argues that a court may not award attorney fees under the "bad faith" exception to the American Rule unless it finds both that the underlying claim was "entirely without

color” and asserted for an “improper purpose” such as harassment or delay. (Board Response at 7, 16-17). The *Kuykendall* and *Wells* decisions, however, focused on a narrow subset of “bad faith” cases in which the claim of bad faith was based entirely upon the bringing of a meritless claim or defense. In such cases, courts have held that something more than lack of merit must be shown. These cases, however, do not control when the claim of bad faith is based on a party’s litigation tactics and not merely the merits of its claim or defense. Bad faith may arise as a result of the manner in which a case is litigated, regardless of the merits of the underlying claim. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991). Nothing in this Court’s jurisprudence suggests that “bad faith” can exist only when the claim itself is frivolous and intended to harass. Indeed, it suggests the opposite. *American Hospital Ass’n v. Sullivan*, 938 F.2d 216, 219 (D.C. Cir. 1991); *see also, Maritime Management, Inc. v. United States*, 242 F.3d 1326, 1333 (11th Cir. 2001).

Heartland does not dispute that the Board is entitled to adopt a position on the issue at hand (contract coverage versus waiver) that is contrary to the position of this Court. What the Board should not be permitted to do, however, is ignore the holdings of multiple courts of appeal over a twenty-plus year period, while steadfastly declining to seek certiorari, in order to impose its will on employers, not by seeking to validate its position through the judicial process, but by sheer obstinacy and because it can. Therein lies the Board’s illicit purpose. Employers

are compelled to accept the Board's position and settle cases raising the contract coverage issue, or endure the time and expense required to litigate the case up to this Court in order to obtain the result to which they clearly are entitled. The Board achieves settlement in the vast majority of cases; however, where the employer forces the Board's hand and this Court predictably denies enforcement, the Board quietly accepts the court's decision as the law of the case, but proceeds to administer the Act as if the court's decision is a nullity. This is the essence of bad faith. *American Hospital Ass'n*, 938 F.2d at 219. Until there is some meaningful penalty for the Board's obstinacy, this cycle will continue in perpetuity. Indeed, why should the Board risk Supreme Court review and possible rejection of its position when it can achieve its desired goal simply by administrative fiat?

This is not a situation where a recent dispute has arisen between the Board and a single circuit court. As far back as 1992, the Seventh Circuit had rejected the Board's waiver analysis, *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992), and this Court's rejection of the Board's position dates back at least to 1993. *NLRB v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). In 2007, the First Circuit followed suit and adopted this court's "contract coverage analysis." *Bath Marine Draftsmen's Assoc. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). Yet despite numerous opportunities to do so, the Board steadfastly has refused to seek certiorari in the Supreme Court. As the Second Circuit has observed: "Of

course, we do not expect the Board or any other litigant to rejoice in all the opinions of this Court. When it disagrees in a particular case, it should seek review in the Supreme Court.” *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980).

Nonacquiescence by the Board in a particular court’s view in order to allow an issue to percolate in the courts of appeals before seeking Supreme Court review is an acceptable practice. Nonacquiescence by the Board in the view of multiple courts of appeals over a more than twenty year period simply to force its will upon employers unless they choose to bear the expense of protracted litigation is quite another. “[T]he Board is not a court nor is it equal to this court in matters of statutory interpretation.” *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382 (D.C. Cir. 1983) (quoting *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979)). In *Yellow Taxi*, although this Court declined to sanction the Board for its continuing refusal to accept the court’s position regarding the independent contractor status of cab drivers, Judge MacKinnon observed: “Should the Board continue to act in defiance of well established decisional law of this and other courts, we may be required to secure adherence to the rule of law by measures more direct than refusing to enforce its orders.” 721 F.2d at 383.

Heartland submits that the time has come for this Court to follow up on Judge MacKinnon’s apt observation and take sterner measures in order to reestablish the proper hierarchy between the courts and the Board. If the Board wishes to continue

its recalcitrance, it should be required to compensate those parties who are forced to litigate in order to achieve compliance with the law. Failure to take sterner measures will only reinforce the Board's current modus operandi.

Although the Board's bad faith is endemic and not limited to this case, it is evident in its litigating posture in this case. In its briefs to the ALJ and the Board, Heartland cited this Court's decisions applying the contract coverage analysis, including the closely analogous decision in *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005). The Board clearly knew that its decision would not stand up in this Court; yet, at no time after Heartland filed its petition for review did the Board offer to advise this Court that while it disagreed with the court's legal decisions, it acknowledged that the petition for review should be granted based upon this Court's long-standing precedents. To the contrary, the Board filed its own cross-application for enforcement. Thus, Heartland was obligated to prepare a joint appendix and an opening brief to the court. In its responsive brief, the Board argued that it "reasonably applied its longstanding clear and unmistakable waiver standard." (Board Brief at 17). The Board, however, barely acknowledged this Court's rejection of this analysis, and it made no argument at all that this Court should reconsider the issue. Thus, this is not a case in which the Board has urged one court to follow another court's decision or to reassess a prior decision by that court; rather, it is a case in which it forced Heartland to litigate in

this Court an issue where the outcome was preordained. At the very least, the Board's litigating posture in this Court constitutes bad faith, and Heartland is entitled to recover its reasonable fees (without any cap) for the court litigation.

C. The Board's Position Was Not Substantially Justified.

As set forth in Heartland's motion, and discussed above, the Board's position is contrary to a litany of this Court's decisions. No reasonable person could view the Board's litigating position as substantially justified. The cases cited by the Board at page 14 and note 11 of its Response for the proposition that it acts with substantial justification so long as there is some authority or colorable argument for its position all involve cases where the issue in question was either novel or had not fully "percolated" in the courts. Here, however, the Board is not caught in some "real-life version of *Catch-22*," (Board Response at 14), and no one suggests it should "remain agnostic." (Board Response at 13). If the Board truly wishes to resolve the conflict, the path that lies before it is clear. File a petition for certiorari in the Supreme Court. The Board's continuing refusal to either accept this Court's position or seek review in the Supreme Court constitutes outright defiance and cannot be deemed "substantially justified." In similar circumstances, at least one court has invited an employer to seek, and has awarded, fees under the EAJA based on the Board's continuing refusal to follow that court's precedents

regarding the supervisory status of nurses. *Caremore, Inc. v. NLRB*, 129 F.3d 365, 371 (6th Cir. 1997); 150 F.3d 628 (6th Cir. 1998).

D. The Fees Claimed Are Reasonable.

Heartland agrees that the actual hours reflected by the billing records are 164.2 hours (rather than 159.4) for 2013 and 48.5 hours (rather than 60) for 2015.

The Board asserts that the hours claimed for preparing the briefs to the ALJ (55.2 hours) and to the Board (55.5) are excessive and that both briefs could have been prepared in a combined total of 40 hours. This contention is naïve and unrealistic. The record before the ALJ (transcript and exhibits) was approximately 480 pages long. (JA 21-JA 501). The issues included not only effects bargaining, but the issue of whether the Board was required to defer to the arbitrator's award. Heartland's brief to the ALJ was 41 pages long. [Attachment B]. The General Counsel's brief was 29 pages long. [Attachment C]. Far from excessive, the hours claimed are exceedingly reasonable, and no downward adjustment is warranted.

Heartland's brief to the Board was not simply a regurgitation of the brief to the ALJ. As any appellate lawyer knows, once a decision is issued by the trial court, the party's arguments must become more focused and must take into account the trial court's findings of fact and credibility resolutions. Further, the Board's procedures require that an appealing party submit an "Exceptions" document, which specifies the specific parts of the ALJ's decision being challenged. This is a

painstaking document to prepare because it requires precision, and the failure to submit proper exceptions can result in the waiver of arguments. Respondent's Exceptions totaled 6 pages and its brief to the Board totaled 24 pages.

[Attachments D, E]. The brief itself addressed all of Heartland's defenses, not merely the "contract coverage" defense. The General Counsel's Answering Brief was 19 pages long. [Attachment F]. Against this background, the hours spent on preparing and filing Heartland's Exceptions and its Brief to the Board were exceedingly reasonable. No reduction is appropriate.

The Board asserts that 3.9 hours is excessive to prepare and submit the first petition for review. Heartland will delete its request to recover fees for the 1.5 hours spent reviewing the Company's corporate structure. This reduces the hours for this task from 3.9 to 2.4 hours. The Board challenges certain miscellaneous tasks totaling 4.6 hours. While these were necessary tasks, Heartland will waive its claim for these hours.

As revised, Heartland seeks to recover:

Year	Hours	Actual Rate	Total	EAJA Rate	Total	
2012	15.2 (CHN)	\$325	\$4,940.00	\$187.50	\$2850.00	
	10.0 (LMT)	\$285	\$2,850.00	\$187.50	\$1,875.00	
2013	44.1 (CHN)	\$340	\$14,994.00	\$191.25	\$8,434.13	

	85.2 (LMT)	\$285	\$24,282	\$191.25	\$16,294.50	
	33.4 (CPR)	\$325	\$10,855.00	\$191.25	\$6,387.75	
2014	1.7 (CHN)	\$345	\$586.50	\$193.75	\$329.38	
2015	8.8 (CHN)	\$350	\$3,080.00	\$193.75	\$1,705.00	
	37.1 (CPR)	\$350	\$12,985.00	\$193.75	\$7,188.13	
2016	2.6 (CHN)	\$360	\$936.00	\$193.75	\$503.75	
	1.8 (CPR)	\$360	\$648.00	\$193.75	\$348.75	
Total	239.9		\$76,156.50		\$45,916.39	

CONCLUSION

Heartland respectfully requests that this Court grant this motion and award Heartland attorney fees in the amount of \$76,156.50 based on the Board's "bad faith." Alternatively, Heartland requests an award in the amount of \$45,916.39 under the EAJA.

Dated this 6th day of July 2016.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2016, I electronically filed the foregoing MOTION with the Clerk of Court for the United States Court of Appeals for the D.C. Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Charles P. Roberts III

ATTACHMENT A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
Nos. 15-1034 and 15-1045

HEARTLAND PLYMOUTH COURT)
MI, LLC, d/b/a HEARTLAND HEALTH)
CARE CENTER – PLYMOUTH COURT)
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Petitioner)
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NATIONAL LABOR RELATIONS)
BOARD,)
)
Respondent)
)

AFFIDAVIT OF KATHRYN HOOPS

NOW COMES Kathryn Hoops, who swears under oath as follows:

1. I am the Vice President, Controller and Director of Tax for HCR Manor Care (HCR). My office is at the Company’s headquarters located in Toledo, Ohio.
2. I have been an officer of HCR since 2003 and have been Vice President, Director of Tax during my entire tenure. I have held the additional position of Vice President Controller since 2012.
3. Heartland Plymouth Court MI, LLC (Plymouth Court) is one of many nursing homes, which are operated by indirect subsidiaries of HCR. These subsidiaries operate as separate legal entities from HCR. Like all

of these subsidiaries, Plymouth Court has its own profit and loss (P&L) statement and its own balance sheet. Another subsidiary entity, HCR Manor Care Services, LLC (HCR Services) provides certain services to HCR subsidiaries pursuant to a services agreement. One of these services is obtaining and managing third-party legal services as necessary for each subsidiary. Throughout my tenure, all outside legal services obtained for specific subsidiaries have been charged back to the subsidiary for whom the services were performed.

4. For outside legal services, HCR Services uses a software system known as Counsel Link. Whenever a new legal matter arises, that matter is entered into Counsel Link and is assigned a matter number specific to that case. For labor and employment matters, new legal matters are set up and approved by the Human Resource department. Beth Kaczor is HCR's Vice President of Human Resources.
5. As an example, for Plymouth Court, a new legal matter was created in 2011 for "Plymouth Court – Unfair Labor Practice and Potential Arbitration." The Counsel Link number assigned to that matter was 2011-RG0158.
6. The law firms who provide services submit their invoices to HCR Services electronically through Counsel Link. They are reviewed and

then approved for payment, at which time they are entered into an accounts payable software program known as Basware. The fees are then reviewed a second time, and if they are in order, they are approved for payment. Once approved, the fees are transferred to the General Ledger software known as PeopleSoft and payment is made for the services. At that time, the fees are immediately charged to the P&L statement for the subsidiary for whom the legal services have been provided. For invoices that are still in process (not yet approved) at the end of the month, appropriate accruals are made on the financial statements of the subsidiary for whom the services were provided.

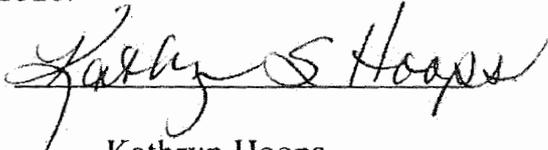
7. Throughout my tenure, all legal services for a subsidiary such as Plymouth Court have been charged to that subsidiary's financial statement. All of HCR's subsidiaries know and understand that they are responsible for all legal fees incurred on their behalf.
8. Attached hereto as Exhibit A is an internal report that is used for tracking financial performance over a five-year period. This report is created in the ordinary course of business. This particular report is for Plymouth Court and covers the time period from 2012 through May 2016. It reflects revenues and expenses for Plymouth Court for each year. Expenses are broken out into various line items, one of which is for legal

expenses. In the case of Plymouth Court, it incurred legal expenses of \$51,692 in 2012, \$82,309 in 2013, \$42,940 in 2014, \$59,523 in 2015, and \$13,956 in 2016 (through May). These expenses include (in addition to any other legal matters that may have been created for Plymouth Court) all legal fees incurred for Counsel Link matter # 2011-RG0158 – Plymouth Court – Unfair Labor Practice and Potential Arbitration.

9. In the event that Plymouth Court were to recover attorney fees previously charged to the facility, an appropriate credit would be made to Plymouth Court's financial statements to reflect such recovery.

I swear under oath that the statements made herein are true and correct and based upon my personal knowledge, except as otherwise indicated.

Dated this 5 day of July 2016.



Kathryn Hoops

EXHIBIT A

	<u>05/16 YTD</u>	<u>2015</u>	<u>2014</u>	<u>2013</u>	<u>2012</u>
Revenue					
Medicare A	1,036,431	3,293,077	3,744,267	5,112,843	4,808,254
Managed Care	435,271	1,658,357	1,943,692	1,857,453	1,959,723
Private	193,391	691,233	621,602	738,539	907,268
AL	-	-	-	-	-
Hospice & VA	58,605	255,528	362,296	187,450	532
Medicaid	2,139,987	3,417,853	2,640,477	1,862,814	1,542,742
Medicare B	58,886	80,887	44,353	39,423	51,684
Other Revenue	553	2,098	6,711	2,007	2,176
Total Revenue	3,923,123	9,399,033	9,363,397	9,800,529	9,272,380
Expenses					
Nursing	1,732,425	3,593,607	3,548,644	3,209,469	3,146,720
Ancillary	567,874	1,651,320	1,856,450	2,115,121	1,971,759
Dietary	282,732	614,632	597,387	584,968	598,852
Utilities	72,461	160,741	179,280	177,260	160,033
Maintenance	54,618	159,355	140,536	154,918	201,532
Laundry/Hskpg	165,080	295,288	352,956	382,059	310,361
Activities	36,421	90,499	84,735	88,996	80,120
Admin-Legal	13,956	59,523	42,940	82,309	51,692
Admin-Provider Tax	153,369	328,751	343,899	360,398	377,522
Admin-Bad Debt	141,050	278,602	182,571	309,626	95,041
Administration	324,754	774,814	790,029	714,032	713,998
Other Expenses	71,315	142,645	145,861	164,889	198,184
Total CM Expense	3,616,054	8,149,777	8,265,288	8,344,044	7,905,813
Contribution Margin	307,069	1,249,255	1,098,109	1,456,484	1,366,567
Operating Income	191,943	965,943	844,691	1,275,801	1,057,450

ATTACHMENT B

NATIONAL LABOR RELATIONS BOARD
REGION 7

HEARTLAND-PLYMOUTH COURT MI,)
LLC, d/b/a HEARTLAND HEALTH CARE)
CENTER-PLYMOUTH COURT,)
)
Respondent,)
)
and)
)
SEIU HEALTHCARE MICHIGAN,)
)
Charging Union.)

Case No. 07-CA-070626

RESPONDENT'S POST-HEARING BRIEF

COMES NOW, Heartland-Plymouth Court MI, LLC, d/b/a Heartland Health Care Center-Plymouth Court (hereafter referred to as "Respondent" or "Plymouth Court") and files this Post-Hearing Brief.¹

STATEMENT OF THE CASE

This case is based on events that began in September 2011. As explained more fully below, during this time, Respondent was forced to institute a temporary reduction in hours for dietary employees based on a significant decline in patient census. In response to this action, on November 9, 2011, the Union – which represents a unit of employees at Respondent's Plymouth Court facility² – filed a grievance, alleging that the collective bargaining agreement did not

¹ Citations to the official transcript will be designated as "Tr.," indicating thereafter the page number. Respondent's exhibits will be designated as "R. Exh.," indicating page number when appropriate. Exhibits tendered by the General Counsel will be designated as "G.C. Exh.," and the Union's exhibits will be designated as "U. Exh." Joint Exhibits are referenced as "Jt. Exh."

² The unit represented by the Union is defined as follows: "All full-time and regular part-time nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and cooks employed by Respondent at its facility located at 105 Haggerty Road, Plymouth, Michigan; but excluding registered nurses, licensed practical nurses, administrators, office clerical employees, guards and supervisors as defined by the Act, and all other employees."

permit Respondent to change employee hours, and demanding that Respondent restore those hours in full. Subsequently, on December 13, 2011, the Union also filed an unfair labor practice charge, Charge No. 07-CA-070626, with the National Labor Relations Board, claiming that the Employer made unilateral changes in its staffing policies. As the issue was not resolved during the grievance process, the case was referred to arbitration; meanwhile, Region 7 deferred the unfair labor practice charge, pending the outcome of the arbitration. R. Exh. 4.

An arbitration hearing was held before Arbitrator Paul Glendon on June 6, 2012, in Livonia, Michigan. Both parties filed post-arbitration briefs on July 3, 2012, and Arbitrator Glendon issued his decision on August 1. In this decision, Arbitrator Glendon concluded that the Respondent was correct, and that it had not violated the terms of the collective bargaining agreement by reducing hours within the dietary department.

Despite this outcome, on August 28, 2012, the Region requested that Respondent provide additional information regarding the deferred unfair labor practice charge, as well as its obligations relating to effects bargaining; in response, on September 4, 2012, counsel for Respondent provided a letter to Field Examiner Elizabeth Kerwin, explaining why the Region should follow well-established law by deferring to the arbitration decision, and denying that the Respondent had violated the Act with respect to effects bargaining. GC Exh. 4.

But the Region disagreed on both points, and on November 27, 2012, the Regional Director issued a Complaint alleging that Respondent had committed certain violations of the National Labor Relations Act. GC Ex. 1. Specifically, the Complaint alleges that Respondent violated the Act by “reduc[ing] the work hours of several unit employees[.]” and that it did so “without affording the Charging Union a meaningful opportunity to bargain with Respondent with respect to the effects of this conduct.” G.C. Exh. 1. Respondent filed a timely answer to

the Complaint, denying the material allegations. GC Ex. 1. A hearing on the matter was held before Administrative Law Judge Ira Sandron on January 15, 2013, in Detroit, Michigan. Respondent now files this Post-Hearing Brief.

STATEMENT OF FACTS AND DETERMINATIONS OF CREDIBILITY

While mostly uncontested, there was some confusion relating to the critical facts involved in this case. Furthermore, the record created during the original arbitration was considerably more voluminous than that generated in the unfair labor practice hearing; as the underlying facts are explained in greater detail in both parties' post-arbitration briefs and Arbitrator Glendon's award, the Respondent incorporates each into this brief by reference. R. Exh. 2, pp. 4-5; R. Exh. 3, pp. 5-23; R. Exh. 1, p. 2-4. Additionally, Respondent incorporates those documents introduced into the record by Joint Stipulation of the parties, including the arbitration transcript and the hearing exhibits. Jt. Exh. 1; Jt. Exh. 2. As the factual history of this case is already set forth therein, Respondent will present only a brief summary of the relevant facts here, and will demonstrate – and attempt to reconcile – the critical disparity that exists between the two versions of events.

First, however, by way of background, Respondent submits that in September 2011, Heartland Healthcare Center–Plymouth Court faced a serious problem. R. Exh. 3, p. 1. As a result of federal regulations that significantly curtailed Medicare funding, as well as a state inspection that temporarily halted new admissions, the facility's patient census was severely reduced. R. Exh. 3, p. 10-11. Given that employee staffing levels are entirely dependent on the patient census (typically, the census is predicted at 90; during September, the census dropped to 60), Plymouth Court – and specifically, Dietary Director Cari Mitter – was forced to act quickly

to remain within budget; this was accomplished by implementing a reduction of hours for many of the dietary department employees. R. Exh. 3, p. 7; 10-11.

A unit of employees at Respondent's Plymouth Court facility is represented by SEIU Healthcare Michigan. A collective bargaining agreement between the Respondent and the Union is currently in place, with an effective date of July 8, 2011, through July 8, 2014. Jt. Exh. 2. The agreement contains the traditional contractual provisions, including the following Management Rights clause:

ARTICLE 3: Management Rights

Section 1. The Employer shall retain all rights and authority it had prior to entering into this Agreement, including, but not limited to, the unrestricted right to: manage the Center and to direct the work force [...] to determine and change the size and composition of the work force; to determine the extent to which and the manner and means the Center and its various departments shall be operated or shut down; to determine whether and to what extent any work shall be performed by employees [...] to determine and change starting times, quitting times, and shifts [...] The exercise of the foregoing powers and rights, together with the adoption of policies, rules, and regulations in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific terms and conditions of this Agreement.

The Agreement also contains the following provision relating to the average work week:

ARTICLE 4: Hours of Work and Overtime

Section 1. For the purposes of this Article, eight (8) consecutive hours of service, excluding an unpaid thirty (30) minute lunch period, shall constitute a normal working day for all departments, except Nursing. For employees in Nursing, the normal workday shall consist of seven and one-half (7 ½) hours of service, excluding an unpaid lunch period. The normal work/pay period for a full-time employee shall be ten (10) workdays within a consecutive fourteen (14) day work period. The normal week for all shifts shall be those hours which commence at 12:01 on Wednesday and ends two weeks later at 12:00:59 a.m. on Wednesday. Nothing contained herein shall guarantee to any employee any number of hours of work per day or week.

Jt. Exh. 2; p. 58, *et. seq.*

Following the reduction in hours, representatives of the Union drafted a class action grievance on November 9, 2011, alleging that the Respondent did not have the authority to reduce the hours of dietary employees under the contract, and arguing that the word "normal" in Article 4 constituted a guarantee of 80 hours of work for full-time employees per two-week pay period. The Respondent denied the grievance, noting that the reduction was made in a manner consistent with the unambiguous terms of the collective bargaining agreement; Respondent also pointed out that the reduction was undertaken in response to an immediate problem, and was the only possible way to prevent the lay-off of unit members. Approximately one month later, on December 13, 2011, the Union also filed an unfair labor practice charge, Charge No. 07-CA-070626, with the National Labor Relations Board, claiming that the Employer had made unilateral changes to its staffing policies. G.C. Exh. 1.

Following the exhaustion of the grievance procedure, the parties were referred to arbitration; meanwhile, investigation of the unfair labor practice charge was deferred by the Region, pending that outcome. On June 6, 2012, an arbitration hearing was held in Livonia, Michigan, before Arbitrator Paul E. Glendon. At that hearing, and in its post-arbitration brief, Respondent phrased the issues presented as follows:

1. Under the collective bargaining agreement, does the Employer have the right to schedule full-time employees at less than 80 hours per pay period?
2. If so, then has the scheduling of Clondia Finley and other dietary employees been in violation of the Contract?
3. Have the Employer's actions violated the National Labor Relations Act, as alleged by the Union in Charge No. 7-CA-070626?³

R. Exh. 3, p. 3.

³ In its post-arbitration brief, the Union phrased the issues as "1. Did the employer violate the agreement by reducing working hours of full time employees to less than eight (8) hours per day or eighty (80) hours per pay period, contrary to Article 4 of the CBA? 2. Did the employer violate the agreement by reducing working hours of full time seniority employees while allowing less senior employees to continue working, contrary to Article 8 of the CBA?" R. Exh. 2.

The central question in the arbitration was one of contract interpretation, with the most critical issue being whether the CBA gave Respondent the authority to modify the hours of the dietary employees. After presenting a summary of the facts, Respondent submitted the following argument in its post-arbitration brief:

In light of the facts presented above, the Employer submits that the questions initially presented to the Arbitrator – whether the Employer has the right to schedule full-time employees at less than 80 hours; whether the Employer’s scheduling of Clondia Finley and other dietary employees violated the contract, and whether the Employer’s actions constituted a violation of the National Labor Relations Act – are all easily answered. In short, the unambiguous language of the CBA guarantees the Employer the right to modify schedules without restriction. Despite the Union’s arguments to the contrary, the reference to “normal” is no more than a descriptive term; any other interpretation would render the remaining language meaningless, and would be wholly inconsistent with both the management rights clause and past practice at Plymouth Court. As for whether the changes to Finley’s schedule violated the CBA, the answer is no; the Employer was entitled to make modifications to her scheduled hours, and the evidence demonstrates that it did so in conformity with the contract provisions; moreover, the record reflects that, by the time of the hearing, Finley’s hours had been largely restored to their previous level, and she had numerous opportunities to make up the relatively minimal difference. Nor can the Union establish that the hiring of Kenneth Brosch resulted in a loss of Finley’s hours, because contrary to the Union’s assertions, Brosch was not hired as an 80-hour employee, nor did his wages impact the staffing of the dietary department. Moreover, given that Finley was not laid off, the CBA’s seniority rules are not applicable to the situation. And, finally, as to whether the actions of Plymouth Court – in attempting to avoid a layoff – violated the National Labor Relations Act, the answer is again no, as the Employer had no obligation to bargain over a matter that was, by the contract’s own terms, within its authority to control. As such, given the facts described above – as well as the legal precedent outlined below – it is apparent that the Union’s arguments in this case are without merit, and that the grievance should be denied in its entirety.

R. Exh. 3, p. 23 [Respondent also incorporates by reference the remaining argument contained in the post-arbitration brief, to the extent that it demonstrates the contractual basis for Respondent’s actions].

During the arbitration hearing, and in its post-arbitration brief, the Union argued that the word “normal” – as used in Article 4 of the CBA to describe pay periods – created an inalienable right for all employees to work 80 hour schedules, regardless of the circumstances, and without

exception, as a matter of the contract. R. Exh. 2, p. 5-11. The Union advanced this claim despite the Respondent's assertion that the overwhelming language in the CBA clearly defines both the management's right to control scheduling, as well as the definition of a full-time employee. The Union also failed to reconcile the fact that language contained within the same Article of the CBA – in fact, within the same paragraph – specifically precludes its interpretation, and declares it to be invalid. Indeed, as the Respondent pointed out, the contract expressly states that, “Nothing contained herein shall guarantee to any employee any number of hours of work per day or week.” Meanwhile, equally notable was the fact that, by the time of the arbitration hearing, the Union's class action grievance had dwindled to include only one employee – Clondia Finley. R. Exh. 3, p. 2.

On August 1, 2012, Arbitrator Glendon issued his decision. R. Exh. 1. After summarizing the facts, as well as the positions of both the Employer and the Union, the Arbitrator concluded that “[t]he Employer is correct on all counts.” Specifically, Arbitrator Glendon found that Respondent's interpretation of the disputed contract language was proper, and that the word “normal” did not create a guarantee of 80 hours of work per pay period for unit employees. Moreover, the Arbitrator noted that, “[given] the clarity of that language, it is almost unnecessary to consider or discuss the facts underlying Finley's claim, but when they are examined, if anything they make this picture even clearer to further detriment of the Union's position.” R. Exh. 1; p. 4. After also finding that nothing in Respondent's actions violated the seniority provisions in the collective bargaining agreement, Arbitrator Glendon ultimately concluded that the Respondent's “reduction of Finley's regularly scheduled work hours below eight per day and/or eighty per pay period did not violate any provision in the agreement, and the grievance must be denied.” R. Exh. 1, p. 5.

Upon receiving notice of Arbitrator Glendon's decision, the Region reopened its investigation of the deferred unfair labor practice charge. A Field Examiner contacted counsel for the Respondent, requesting information about whether the Region should defer to the Arbitrator's decision; additionally, for the first time during the proceedings, the Region also asked for Respondent's position regarding effects bargaining. Counsel for Respondent replied with a letter, explaining the manner in which the arbitration satisfied each requirement for deferral; with regard to the effects bargaining, counsel disagreed that such an obligation existed in this case, citing *Enloe Medical Center*, 433 F.3d 834 (D.C. Cir. 2005) in support of its position. G.C. Exh. 4.

But – as described above – the Region disagreed with Respondent's position, and, on November 27, 2012, issued a Complaint and Notice of Hearing. G.C. Exh. 1. The crux of the Complaint was Respondent's failure to engage in "effects bargaining" regarding the reduction of dietary employee hours. *Id.* Meanwhile, it is undisputed that the Union has never requested effects bargaining relating to the reduction in hours. To this end, at the unfair labor practice hearing, the parties stipulated that – although Respondent issued a subpoena requesting any such record in existence – no document has been submitted to demonstrate that the Union has requested effects bargaining at any point either before or after the hours were reduced. Tr. 67-68; R. Exh. 5.

A hearing regarding the Region's complaint occurred on January 15, 2013, before Administrative Law Judge Ira Sandron. Once again, witnesses were presented to describe the events relating to the September reduction in hours; it was here, however, that the facts began to collide.

Karen Szkutnik, the Regional Human Resources Manager for HCR ManorCare, testified on behalf of Respondent. Tr. 69. Szkutnik explained that she was involved with Plymouth Court in 2011, during the time of the reduction, and that she was familiar with the cuts that were made; she also testified that hours are regularly reduced or increased depending on a facility's census. Tr. 69-70. Szkutnik further explained that an hours-per-patient day ratio is used for staffing, and that department managers choose how to allocate hours based on that ratio. Tr. 70.

Szkutnik confirmed that, in September 2011, Dietary Manager Cari Mitter would have been the one to determine whether hours needed to be cut to correspond with the census. Tr. 70. She also noted that, when the decision to cut hours was made, it would need to be implemented "immediately." Tr. 70. To this end, Szkutnik testified that, "the patient census varies from day to day, so [department managers] need to be flexible enough to address their labor hours from day to day to reflect the census." Tr. 70.⁴

With regard to the decline in September, Szkutnik explained that in that instance, an unusual situation arose, because the facility faced two issues at the same time; one involved reduced funding, and the other related to the outcome of a state survey. Tr. 72; 75. As a result, the facility temporarily stopped allowing new admissions, and thus, the number of patients decreased. Tr. 72. Szkutnik acknowledged that, as a result of this drop, the available dietary hours fell, as well; however, she further noted that the decrease was not "exceptionally large," and that it varied. Tr. 73. Finally, Szkutnik explained that Mitter added hours back when she could. Tr. 73.

⁴ Szkutnik further explained that every department manager is given the hours-per-patient daily rate, and that the manager knows to then take the rate and to multiply it by the number of patients in the building in order to determine the working hours available for the day. Tr. 70-71. Szkutnik explained that the managers would then adjust the schedules accordingly. Tr. 71.

While Szkutnik testified at the unfair labor practice hearing in January, 2013, it was then-Dietary Manager Cari Mitter who testified on behalf of Plymouth Court at the arbitration hearing in June, 2012. Jt. Exh. 1. With a few minor exceptions (mostly relating to the severity of the census decline on the facility – which Mitter, in her role as Dietary Manager, characterized as being more pronounced), their testimony was consistent, and the basic facts each presented are largely undisputed. Unfortunately, the same is not true for the witnesses called by the Union and the General Counsel, and it is here that the conflict appears.

At the unfair labor practice hearing, the General Counsel called only one witness – Kim Fowlkes. Fowlkes testified that she works for the SEIU, and serves as the Director of Representation in the Nursing Homes division; prior to that, she explained that from 2010 through March 2012, she acted as the member representative for bargaining unit members at the Plymouth Court facility. Tr. 17-18. During this time, Fowlkes noted that she was responsible for bargaining on behalf of the unit employees, and that she was involved in the negotiations for the current contract at Plymouth Court. Tr. 18-19; 20-21.

Significantly, Fowlkes testified that she only became aware of the reduction in hours for dietary employees when she was conducting a routine site visit at the facility in November 2011. Tr. 21. Fowlkes stated that during that visit, a dietary employee named Felicia Slater approached her and complained that full-time workers in the dietary department were having their hours cut, and that this had been ongoing since September. Tr. 21. Specifically, Fowlkes described the encounter as follows:

I was at the facility on a routine site visit, and as I recall an employee, Felicia Slater, approached me. Actually she ran up to me, and she said that there were full-time workers in her department whose hours were being cut, and she said that it had been happening for a while. I know she mentioned that it started happening like back in September, and we were like early in November sometime or

whatever when she told me, and I told her that what I would do was investigate the situation, which I did[.]

Tr. 21.

Fowlkes testified that at this point, she contacted both Szkutnik and the facility administrator, Bret Lucka, to inquire about the reduced hours; she stated that both claimed to be unaware of the reductions in the Dietary department. Tr. 25. Fowlkes then contacted an employee named Brandi Malone; according to Fowlkes, Malone confirmed that Slater had also complained to her about the reduction in hours. Tr. 27-28. Following the conversation with Malone, Fowlkes testified that she instructed Malone to file the class action grievance about the reduction. Tr. 30; Jt. Exh. 2; p. 48.

During the unfair labor practice hearing, Fowlkes repeatedly asserted that Malone was simply the acting steward at the facility, and as such, she was not serving in any official Union capacity at the time Slater related her complaints to her. To this end, Fowlkes testified that after speaking with Szkutnik and Lucka, the following occurred:

Q. BY MR. NICK: And what, if anything, did you do next?

A: What I did next was there was an employee named Brandi Malone who had –

Q: Can you spell that?

JUDGE SANDRON: Spell it? Yes.

THE WITNESS: Okay, B-r-a-n-d-i M-a-l-o-n-e. Who had stepped up to basically take charge while the two union stewards were on FMLA leave. I had no one in the building, so she had become the active union steward. [sic]

Tr. 25-26.

When describing the point at which Malone became the acting Union steward, Fowlkes testified that “[s]he stepped up actually right away when they were out, and she was elected

steward.” Tr. 26. Asked to be more specific, Fowlkes reiterated that Malone assumed the acting role “right away when the regular stewards were on [FMLA] leave.” Tr. 26. Fowlkes further maintained that when she had the conversation with Malone about Slater’s complaints, she had not yet been placed in the official steward role:

JUDGE SANDRON: When you had this conversation with her, was she acting or was she already elected?

THE WITNESS: She was already – she was, yeah. Yeah, she had stepped up and she had took charge; she was the acting steward.

JUDGE SANDRON: Right.

THE WITNESS: And then shortly after we had an election and made her steward.

JUDGE SANDRON: So at the time you spoke to her though, she was still acting?

THE WITNESS: Uh-huh.

JUDGE SANDRON: And you’ve got to say yes.

THE WITNESS: Yes.

JUDGE SANDRON: So she was acting at the time you had the conversation with her, this first conversation?

THE WITNESS: The first conversation I had with her, she was an acting steward, yes.

Tr. 27.

Fowlkes even testified that she and Malone discussed her “acting” role during their phone conversation: “I told her that, you know, I wanted her to investigate the situation too or whatever, and then we discussed her being the normal steward, and she agreed to take charge and be the normal steward, and so this is when the process took place, and she became the normal steward because we had no acting steward, and all she had to do was get like signatures, and she did that for me.” Tr. 28. Fowlkes then went on to explain that Malone subsequently obtained

the required signatures, and at that time, she became the regular Union steward at Plymouth Court. Tr. 28.

The problem with Fowlkes' testimony is that it is directly contradicted by the testimony of Brandi Malone. Malone served as the Union's first witness during the arbitration hearing, and her testimony appears in the arbitration transcript. According to Malone, she was not an acting steward; she was actually one of the two regular Union stewards at the time of the reduction in hours. Moreover, at that hearing, she also explained that *she* was the one who went out on leave, and that *she* was the one who was replaced by an acting Union steward – Felicia Slater. To this end, Malone's testimony was as follows:

Q: Do you hold any position with the Union?

A: Yes, steward.

Q: What's that?

A: Steward.

Q: Steward?

A: Yes.

Q: How long have you been a steward[?]

A: A year, almost a year and a half.⁵

Q: And as a steward, are you familiar with the case that's before the arbitrator today?

A: Yes.

Jt. Exh. 2; Arb. Tr. 15.

Further contradiction between the testimony of Malone and Fowlkes arises with respect to the filing of the grievance itself. At both hearings, the matter of Felicia Slater's signature on the grievance form – she signed her name in the box reserved for steward signatures – was discussed; however, the explanations given for why Slater would sign as a steward were once again in conflict.

⁵ As the arbitration hearing was held on June 6, 2012, it is apparent that Malone was serving as a regular steward during September 2011.

When questioned regarding this oddity, Fowlkes provided the following answer:

A: Well, I can explain this. She came down to the Union hall, and she came down and she spoke to Ms. Johnnie Jolliffi, and she informed her of the hours being cut at Plymouth Court, and Johnnie Jolliffi gave her permission to write the grievance.⁶

Tr. 48.

Fowlkes went on to explain that she was present when the grievance form was completed, even verifying Slater's handwriting:

Q. BY MR. NELSON: And this signature then that appears here, this is --

A: That's Felicia Slater.

Q: -- that's Felicia Slater?

A: It sure is.

Q: And this is her handwriting?

A: It is.

Q: When did you first get to see --

A: I saw firsthand because I was called into Ms. Jolliffi's office, and I actually during that moment when I was called into Ms. Jolliffi's office, to be honest with you I was humiliated.

Tr. 49.

On cross-examination, when asked to clarify whether Slater was a steward, Fowlkes responded that "No, she was not." Tr. 47. When asked if Fowlkes ever held Slater out as being a Union steward, Fowlkes replied that she had not; she also stated that if Slater had ever acted in that capacity, then "what she did was she came to me with the issues of the hours being cut while the two stewards were out. Now, if she's ever like stepped up, she's never been the steward. If she took the lead role, she took it upon herself to take the lead role." Tr. 47.

Fowlkes' testimony was further fleshed out during her redirect; when asked whether she had any prior knowledge that Slater could sign grievances, Fowlkes replied that "We cannot stop any member from filling out their own grievance[;]" she also claimed that "I don't know why, you know, she would sign by a union steward because she was not elected a union steward." Tr.

⁶Fowlkes testified that Jolliffi was "over the representation department" at the time. Tr. 48.

59. Moreover, while earlier, she claimed to have witnessed Slater completing the grievance form “firsthand,” Fowlkes now stated that “at this time she came down to the Union hall without my knowledge. She spoke to my boss at the time.” Tr. 60. Finally, Fowlkes denied that Respondent was ever informed of Slater’s role as a representative of the Union. Tr. 60.

But, once again, Fowlkes’ testimony is wholly contradicted by that of Brandi Malone. When asked about the grievance during the arbitration hearing, Malone explained that she was the one who filled it out, but that Slater had signed it:

Q: [...]Were you involved in filing of this grievance?

A: Yes.

Q: And is your name on this grievance?

A: No, but that’s my handwriting. I wrote it up.

Q: And who did sign the grievance?

A: Felicia Slater.

Q: And is she also a steward?

A: She stepped in because both myself and the other steward were going out on medicals.

Jt. Exh. 2; Arb. Tr. 16.

Malone’s testimony was corroborated by counsel for the Union, who also referred to Slater as a steward during the arbitration hearing (Jt. Exh. 2; Arb. Tr. 6; 7), as well as within the Union’s post-arbitration brief (R. Exh. 2, p. 5). Furthermore, the fact that Slater was serving as the acting steward at the time of the grievance – preparing to take over for Malone, who was about to go out on medical leave – is underscored by the fact that, by the time the grievance was filed, Slater’s reduced hours in the dietary department had already been restored. Tr. 41. The only logical explanation is that Slater was filing the grievance on behalf of other employees, in her newly appointed role. Tr. 41. Indeed, in comparing the two versions of events, Malone’s explanation is simply the only one that makes sense, and as such, hers is the only testimony that

should be given weight.⁷ Furthermore, the evidence presented by Malone also serves to solve another major inconsistency in this case – the matter of the diminishing class action.

Throughout the unfair labor practice hearing, several witnesses referred to the fact that while many employees' hours had been cut, the majority of the dietary workers subsequently had their hours restored. While this was not explored in any detail, Fowlkes testified that she knew of an employee named "Belle" having her hours reduced; later, according to Fowlkes, "they took care of Belle's problem." Tr. 40. Fowlkes further noted that, "I know that Felicia Slater had a problems [sic] but she fixed hers." Tr. 40. In all, Fowlkes maintained that, to her knowledge, Belle, Slater, and Finley were the only dietary employees whose hours had been cut as a result of the census, and that only Finley's hours remained a problem when the grievance was filed; still, she offered no explanation for who had restored the other employees' hours, or why this was done. Tr. 41.

Nevertheless, even in the absence of additional facts, testimony by both parties suggested that some sort of ongoing dialogue had occurred, and that by November 2011, the majority of employees had returned to their normal working hours as a result. Szkutnik testified that Cari Mitter "added hours back when they could." Tr. 73. At the arbitration, Mitter explained that initially, an even larger number of employees had seen their hours reduced; in addition to Clondia Finley, Mitter named "Khadijah Anderson, Eartha Finley, Dion Luckett, Stacey Miller, Felicia Slater, Laura Gonzales, Joann Wood, John Ross, [and] Angela Vasquez" as other employees who were affected by the reduction. Jt. Exh. 2; Arb. Tr. 85. All of these employees

⁷By pointing out these inconsistencies, Respondent is not accusing Fowlkes of intentional dishonesty; rather, it seems more likely that she simply confused Malone with Slater. In all likelihood, the conversation regarding the need for signatures in order to become a regular steward took place between Fowlkes and Slater as Malone was preparing to go on leave; the fact that Slater would then be the only steward at the facility, as well as the fact that she was repeatedly identified as a regular steward (as opposed to an acting steward) at the arbitration, further supports this interpretation.

had their hours restored. And, once again, the answer of how and why this occurred lies in the testimony of Malone, as well as the Union's argument at arbitration.

During that hearing, the Union repeatedly emphasized the number of meetings that were held between Malone and unnamed Plymouth Court management, prior to the filing of the grievance. In the Union's post-arbitration brief, it notes that, "Per the testimony of Steward Brandi Malone, the Union complained to Management, and meetings were held with Management, to discuss the issue. Some areas of concern were worked out and in some cases, hours were restored, however, Ms. Clondia Finley testified that she remained at the reduced level of hours. (p. 17-18 transcript)." R. Exh. 2; p. 4. The Union's opening statement, which appears in the arbitration transcript, is equally on point:

On or around September of last year, 2011, the employer reduced the working hours of several full-time employees, including Clondia Finley and others, from 80 hours to approximately 60 to 64 hours per pay period. The union complained to management, and in fact, they had a number of meetings to discuss what the union believed to be a contract violation as it was related to the reduction of the work hours. Many of – the employer restored many of the hours of the workers, but not all, and in the case of some of the cooks [...] their hours were not restored. And it's the position of the Union that this reduction of hours is a violation of the contract, and as a result, Steward Felicia Slater, along with Brandi Malone, filed a class action grievance to protest the violation.⁸

Jt. Exh. 2; Arb. Tr. 7.

The testimony of Malone further demonstrates that meetings between herself (in her official role as Union steward) and members of management occurred at the time the reductions were made, and prior to the filing of the grievance – to this end, Malone explained as follows:

Q: During the time you had reductions, did you have meetings with management?

A: Yes, because we couldn't understand why Ms. Finley was still going home and Rickie Barkoff was coming in and getting 80 hours.

⁸ Ultimately, despite this opening statement, the Union was unable to state a claim regarding any other employee's hours, and only Finley's schedule was mentioned in its post-arbitration brief. R. Exh. 2.

Q: As a result of some of your meetings, were there some employees who had been reduced that were returned to full-time hours?

A: Yes, they asked Ms. Finley – they worked out an agreement with Ms. Eartha Finley to keep her hours, but Clondia was the only one in the kitchen that didn't return to her normal hours.

Q: You said Clondia. Is that Clondia Finley?

A: Yes.

Q: And it was Ms. Finley's continued reduction in hours that prompted the grievance before us today?

A: Yes.

Jt. Exh. 2; Arb. Tr. p. 17-18.

With this background in mind, and by crediting Malone's version of events, the situation surrounding the return of hours becomes clear. In short, it appears that either before, or at the outset of the reduction, Mitter and Malone began meeting to discuss ways to alleviate the effects of the cuts. The two met on multiple occasions, and as a result of their corroboration, every employee – with the possible exception of Clondia Finley – was returned to their full schedule. Once again, this is simply the only explanation that makes sense, and the only explanation that is consistent with the overwhelming bulk of the evidence in the two cases. And, with this factual background in mind, the cause of Fowlkes' hostility toward Plymouth Court management, as well as the tensions that arose during the grievance meeting held on December 5, 2011, becomes considerably clearer.

Fowlkes testified that she was angry because she felt that Lucka and Szkutnik had been dishonest with her when she questioned them about the reduction in hours; on two occasions during her testimony, she referred to them lying to her. Tr. 37; 24. However, taking Malone's testimony into account, the more reasonable explanation is that by the time acting steward Slater

informed Fowlkes of the reductions in November, the majority of the dietary employees had already had their hours restored as a result of the meetings between Malone and Cari Mitter. In all likelihood, Lucka and Szkutnik were not involved with the day-to-day scheduling of the Dietary Department. As such, they likely did not know about the ongoing negotiations between Malone and Mitter; they did not know that Malone and Mitter were attempting to reverse the cuts; and they did not know that the two, working together, had successfully restored all but one dietary employee to their previous hours by November.⁹

But Fowlkes didn't know that, either. From all indications, before she left on leave, steward Brandi Malone acted as the official Union representative in addressing the hours issue within the facility, and the record suggests that she did it alone. This was the reason that Malone was called as a witness for the Union during the arbitration; Fowlkes' name, on the other hand, does not appear anywhere in the transcript of the arbitration hearing. She was simply never mentioned, and it appears that Fowlkes was not involved in the issue at all – she only became involved when Malone was preparing to go on medical leave, and Slater transitioned into the steward's role.

And so, there is no question why the tensions at the December 5 grievance meeting ran high. Malone was out on medical leave; instead (according to Fowlkes), in addition to representatives of the Respondent (whom she identified as Lucka and Szkutnik, as well as another person she did not remember), she was joined by Clondia Finley and Felicia Slater – and they would not have had knowledge of the ongoing efforts of Malone and Mitter to remedy the reductions. Tr. 31.

⁹This interpretation is bolstered by Szkutnik, who credibly testified that she only learned of the reduction at the point the grievance was filed. Tr. 76.

Given this backdrop, Fowlkes testified that during the grievance meeting, she presented her case, stating her position that the reductions in full-time employee hours violated the contract. Tr. 31; 33; 54. Fowlkes also complained about that fact that “when I did my investigation, no one told me that this was happening.” Tr. 33. In discussing this, she admitted that she told Lucka and Szkutnik that they lied to her. Tr. 38.

Fowlkes stated that in response to her argument, Szkutnik explained that the census had dropped significantly, and that this had never happened before. Tr. 34-35; 54. She also described Szkutnik’s comments regarding the threat of closure to the facility. Tr. 54-55. Fowlkes admitted that other issues were discussed, but that she did not recall what they were; Tr. 54.

With respect to Fowlkes’ claim that Respondent did not have the right to reduce employee hours, Szkutnik informed Fowlkes that the employer did, in fact, have the right to reduce hours pursuant to the contract. Tr. 58. Nevertheless, at the same time, Szkutnik also offered Finley an opportunity to make up lost hours by working different shifts; Finley, however, refused this solution. Tr. 54; 44. Fowlkes admitted that during this meeting, she did not propose any solution to the problem other than reinstating all employees’ hours, and she acknowledged that she left the meeting angry. Tr. 55-56; 37.

Following the grievance meeting, Fowlkes testified that on December 19, 2011, she spoke with Szkutnik by telephone, and Szkutnik again proposed a solution by which Finley could make up any lost hours if she worked a double shift; Fowlkes testified, however, that this was not something that Finley wanted to do, so the solution would not work. Tr. 44. Fowlkes explained that “[Respondents] were trying to resolve the issue, but it was the same thing.” Tr. 41. Following this conversation, on December 20, 2011, Szkutnik sent Fowlkes an email,

constituting the Respondent's third step response to the Union's grievance; this email provided only that "Per our phone conversation yesterday you have notified me that despite our proposed solutions to this issue you will proceed with the arbitration. Please consider this our response to the grievance." Tr. 44-45; GC Exh. 2. Fowlkes responded with her own email, which reads as follows:

Karen, I don't know how you figure that you are right, as I stated before. The issue has not been resolved. If it were resolved, a grievance would not have been filed, along with a charge. Your resolution makes no sense at all. I'm not going through this anymore with yourself or Bret. Stop cutting the hours of full time employees, and this issue will be resolved. I was lied to for two months concerning this issue, by [B]ret. If you were right, a charge would not have been filed. The union would be more than willing to drop all charges, and settle this issue, if you give the employees their full time hours back. I have nothing else to say concerning this matter. I'm on vacation, have a great Christmas, and a happy new years. [sic]

G.C. Exh. 3.

At this point, discussions regarding the reduction in Finley's hours ceased, and the parties proceeded to Arbitration, and ultimately, to where they are today.

ARGUMENT

In the instant case, the Union has already attempted to gain through arbitration what it could not achieve through bargaining; now, the Region attempts to obtain the same result by overturning precedent and expanding the realm of Board law. To this end, the General Counsel seeks to apply a heightened waiver standard – one that is incapable of surviving appellate review – to a case in which the decision and effects are inexorably intertwined. At the same time, it also attempts to overturn well-established Board precedent relating to the deferral doctrine, despite the fact that the principle is both Congressionally-mandated, and a basic foundation of labor law. In all, it appears that the Region envisions this matter as a test case, and an opportunity to undermine an arbitration decision with which it disagrees.

Nevertheless, regardless of motive, the General Counsel cannot escape the fact that it is not the Respondent who bears the majority of the burdens in this case. Nor can it avoid the reality that, under the facts described above, the General Counsel's case fails at every step. It cannot meet its own burdens, and it cannot avoid the effect of the appellate courts; indeed, with little more on the record than the erroneous testimony of its sole witness, it cannot even conclusively establish a prima facie case. Accordingly, Respondent submits that this case is simply not the appropriate vehicle by which the Region can change the law, and that the Complaint should be dismissed in its entirety.

I. The General Counsel Failed To Meets Its Burden Of Proving That The Respondent Violated The Act By Refusing To Bargain Over The Effects Of The Reduction In Hours.

As defined by the National Labor Relations Board, an employer's bargaining obligation "includes a duty to bargain about the effects on unit employees of management decisions, which are not subject to bargaining obligations." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981). Although a collective bargaining agreement may waive a particular bargaining right, thereby permitting the employer to take unilateral action, the Board has held that it "does not automatically follow that the same contract clause waives a party's right to bargain over the effects of the matter in issue." *Allison Corp.*, 330 NLRB 1363, 1365 (2000). Accordingly, an employer has an obligation to give a union notice and an opportunity to bargain about the effects on unit employees of a managerial decision, even if it has no obligation to bargain about the decision itself. *Id.*, citing *Kiro, Inc.*, 317 NLRB 1325, 1327 (1995); *First National Maintenance Corp. v. NLRB*, 452 U.S. at 681-682 ; *Champion International Corp.*, 339 NLRB 672 (2003).

Generally speaking, the Board has held that an employer is required to bargain over the effects on unit employees of any decisions involving mandatory subjects of bargaining, or of non-mandatory subjects, whenever these effects cause “material, substantial, and significant” changes to unit working conditions. *The Bohemian Club*, 351 NLRB 1065, 1066-67 (2007). To this end, the Board has traditionally found that the obligation to engage in effects bargaining arises when employers institute sweeping changes, from which various consequences may flow; the types of managerial decisions which trigger the obligation “can include such topics as layoffs, severance pay, health insurance coverage and conversion rights, preferential hiring at other of the employer’s operations, and reference letters for jobs with other employers.” *Dodge of Naperville Inc.*, 357 NLRB No. 183, *6 (2012); see also *Los Angeles Soap Co.*, 300 NLRB 289, 295 (1990).

That the obligation of effects bargaining is usually applied in situations where an employer’s lawful unilateral action results in significant consequences to an employee’s terms and conditions of employment can be justified by the Board’s desire to soften the blow of the change, and to assure that employees do not have to absorb all its harsh effects. *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990). It provides the employees with bargaining power in the face of lay-offs, plant closures, and operational transfers. And, indeed, when such significant events do occur, it is easy to see how a multitude of other changes would result – for example, when a company shuts down operations, the issues of how lay-offs will be handled, whether severance will be paid, how pensions will be handled, and so on, will all flow from the original managerial decision.

An effects bargaining obligation is based on the provisions of Section 8(a)(5) of the Act. Section 8(a)(5) provides that it is an unfair labor practice for an employer “to refuse to bargain

collectively with the representatives of its employees.” 29 U.S.C. § 158(a)(5). Also relevant to the analysis is Section 8(d), which defines “bargain[ing] collectively” as “meet[ing] and confer[ring] in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder.” 29 U.S.C. § 158(d). As with traditional bargaining, effects bargaining must meet these requirements. *NLRB v. Katz*, 369 U.S. 736 (1962). And, also as with traditional bargaining, lawful effects bargaining “must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy.” *First National Maintenance Corp. V. NLRB*, 452 U.S. at 681-82. Finally, the Board has also consistently held that it is critical that effects bargaining occur before a unilateral decision is implemented; while there is no obligation that the employer agree to any particular union proposals, it is required to discuss all issues in good faith, rather than presenting its actions without recourse, as a *fait accompli*.

In light of these principles, a *prima facie* case for failure to engage in effects bargaining must, at a minimum, include evidence that the employer (1) failed to timely inform the union of a lawful unilateral change; and (2) refused to bargain in good faith with the Union over the effects of that change. Once this showing is made, the employer can still provide defenses for its failure to act – most notably, by demonstrating that the union waived its right to bargain over effects, or that no distinction can be made between the unilateral act and its direct effects. Nevertheless, if the General Counsel cannot prove the existence of the two threshold elements, no *prima facie* case can be established, and the inquiry must end.

Applying this framework to the instant case, the General Counsel bore the burden to present evidence that would meet this threshold, thereby establishing its *prima facie* case that Respondent violated the Act by failing to bargain with the Union over the effects of its reduction

in the hours of dietary employees. If the General Counsel can meet this burden, the focus shifts to the Respondent to present a defense; given the record evidence in this matter, however, this shift should not occur, because the General Counsel's prima facie case fails as a matter of law.

A. The General Counsel Cannot Establish A Prima Facie Case That Respondent Violated The Act.

In *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013, 1016 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983), the Board held that the most important factor in finding that the employer's announced change was a fait accompli was that it was made without notice in advance to the union. In the present case, the General Counsel cannot show that the reduction of hours was presented as a fait accompli; indeed, it cannot even prove if the Union was informed about the reduction in hours before or after implementation. On this point, the record is silent.

At the hearing, the General Counsel relied entirely on the testimony of Kim Fowlkes to establish that the Union only received notice of the reduction in hours two months after implementation. To this end, Fowlkes related that she first learned of the issue in November, and only after she was alerted to the fact by Felicia Slater. The record reflects, however, that while the reduction may have come as a surprise to Fowlkes, the reality of the situation is that Union steward Brandi Malone knew about the change long before that time. And, while the record reveals that Malone had met repeatedly with Mitter in an attempt to mitigate the effects of the reduction, it offers no insight whatsoever as to when Malone was made aware of the change. On the basis of the full record, there is simply no way of determining whether Malone, in her capacity as Union steward, knew of the reduction before it happened, or whether she was informed after the fact; the General Counsel has not offered any evidence relating to that timeline. Indeed, to its detriment, the Region has neglected to consider the evidence from the arbitration, which clearly indicated that – contrary to Fowlkes' testimony – Malone was a

steward who had known about the reduction in hours for an indeterminate period. It was the General Counsel's burden to show that the unilateral change was presented as an unannounced fait accompli that eliminated the Union's ability to bargain, and it was the General Counsel's burden to show when Malone learned of the reduction in her official capacity as Union steward; the General Counsel failed to present evidence of either of these critical facts, and as such, no prima facie case can be established here.

Moreover, it is equally true that, in order to demonstrate that Respondent violated the Act by failing to engage in effects bargaining, the General Counsel was also required to show that the Respondent did, in fact, refuse to bargain with the Union over the effects of the reduction in dietary hours. Once more, the General Counsel attempted to meet this burden through Fowlkes' testimony, but once more, the record comes up short. To the contrary, Malone's undisputed testimony at the arbitration, coupled with the Union's statements in this regard, demonstrated that ongoing meetings had taken place for some time prior to the filing of the grievance, with Malone acting in her capacity as Union steward. (For whatever reason, Malone simply never communicated this fact to Fowlkes; regardless, Respondent cannot be held responsible for the communication failures between Union representatives.) As such, in light of the overwhelming (and undisputed) evidence that those meetings did, in fact, occur, the General Counsel cannot rely on the bald claim that the Respondent refused to bargain. Indeed, the best available evidence shows just the opposite to have been true here. The plainest reading of the record is that Mitter and Malone did, in fact, bargain about the effects of the reduction, and that they did so in a meaningful manner that resulted in essentially all employees seeing their hours restored. Fowlkes' inconsistent and confused testimony cannot overcome that evidence, and she simply cannot be credited over the multiple consistent statements of the other witnesses. As such, for

this reason as well, the General Counsel has failed to state a prima facie case; consequently, Respondent submits that, as a matter of law, the Complaint must be dismissed.

B. Respondent Had No Legal Obligation To Bargain Over The Effects Of Reduced Hours.

Even if the General Counsel could somehow establish a prima facie case showing that the Union did not receive adequate notice of the proposed change, or that Respondent refused to engage in effects bargaining, its Complaint would still be properly dismissed. This is because even when the General Counsel's threshold burden is met, an employer can still avoid the obligation by demonstrating that the union waived its right to engage in effects bargaining.

According to the standard historically imposed by the Board, a waiver occurs when a union "knowingly and voluntarily relinquishes its right to bargain about a matter ... When a union waives its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require 'clear and unmistakable' evidence of waiver and have tended to construe waivers narrowly." *Department of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992). Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been "fully discussed" and "consciously explored" during negotiations. *Davies Medical Center*, 303 NLRB 195, 204 (1991). Failure to mention a mandatory subject of bargaining does not constitute a waiver of the right to bargain; rather, the Board requires "a conscious relinquishment by the union, clearly intended and expressed." *Elizabethtown Water Co.*, 234 NLRB 318, 320 (1978).

The Board has relied upon several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective-bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history, and (4) other bilateral changes that may shed light on the parties'

intent. See *Johnson-Bateman*, 295 NLRB 180, 184-187 (1989); *American Diamond Tool*, 306 NLRB 570 (1992). The party asserting the waiver bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810 (1984).

1. The *Natomi Hospital* Waiver Standard

As described above, historically, cases involving an obligation to engage in effects bargaining involved significant changes to terms and conditions of employment, and implicated consequences that would result indirectly from a lawful unilateral change. In 2001, however, the Board deviated from its usual approach in two ways – first, it applied its analysis regarding effects bargaining to a very different situation, and second, it actually heightened the standard by which an employer was required to prove the existence of a waiver. To this end, in *Natomi Hospitals*, 335 NLRB 901 (2001) (more commonly referred to as *Good Samaritan Hospital*), the Board considered whether an employer could act unilaterally in modifying a “staffing matrix,” which determined how many employees would be assigned to work on a particular shift. The Board concluded that the union, by agreeing to certain language in a management rights clause, had given the employer the authority to act unilaterally, and had therefore waived its right to bargain over the change; it further held, however, that the employer was required to bargain over the effect of the new matrix, and that it had violated the Act by its refusal to do so.

The controversy surrounding *Natomi Hospitals* was two-fold; first, it was unusual that the Board required the employer to treat a scheduling change in the same manner it would a lay-off or plant closure. While the incidental effects of such massive events can be distinguished from the lawful unilateral action, finding distinctions on such a smaller scale – where the lawful action and its effects are so closely intertwined – is significantly more difficult. Moreover, trying to establish that the union has unequivocally waived its right to bargain about such effects presents

an even greater burden, particularly in cases where the employer reasonably believes that the effects in question are merely the direct and avoidable consequences of the lawful act.

More critical, however, was the heightened standard that the Board applied. In *Natomi Hospitals*, the Board concluded that even if a collective bargaining agreement gives an employer the right to make a decision on a particular issue, if the agreement is silent as to the *effects* of that decision, the employer is obligated to bargain over effects. *Id.*, 902. Moreover, the Board specified that in order for a waiver to be valid, the Union must have waived its rights to effects bargaining “in the same clear and unmistakable terms” required for a waiver to bargain over the decision itself.

As described in more detail below, the *Natomi Hospital* theory has not been endorsed by the D.C. Circuit – in fact, the Court has held that the rule “imposes an artificially high burden on an employer,” and refuses to defer to the Board’s contract interpretations under that analysis. *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005). As a result, the D.C. Circuit likens the Board’s continued application of *Natomi* to a stalemate, as respondents are free to seek review in the District of Columbia, thereby vacating the Board’s decisions. Nevertheless, despite this practical reality, the Board continues to apply *Natomi* – and, not surprisingly, the General Counsel urges its application in the instant case, as well.

Here, however, the evidence of waiver is significantly stronger than it was in *Natomi*. In accordance with the Management Rights provisions contained in Article 3, Plymouth Court retains “the unrestricted right to: manage the Center and to direct the work force;” the right “to determine and change the size and composition of the work force; to determine the extent to which and the manner and means the Center and its various departments shall be operated or shut down; to determine whether and to what extent any work shall be performed by employees;” and

to “determine and change starting times, quitting times, and shifts.” The Article further provides that the “exercise of the foregoing powers and rights, together with the adoption of policies, rules, and regulations in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific terms and conditions of this Agreement.”

Similarly, the parties’ waiver provision is equally inclusive:

ARTICLE 25: WAIVER

The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement and attached Memoranda of Understanding. Therefore, the Employer and the Union for the life of this Agreement each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to, bargain collectively with respect to any subjects or matters referred to in this Agreement, even though such subjects or matters may not have been within the knowledge or [sic] contemplation of either or both of the parties at the time they negotiated this Agreement.

Jt. Ex. 2.

Considering these two provisions in conjunction, it is apparent that every effect that resulted from the Respondent’s reduction of hours was contemplated within the collective bargaining agreement. Moreover, it is equally apparent that the waivers were made in clear and unmistakable terms – Respondent has the ability to change shifts and quitting times; to determine what work and the extent of work performed; and is unrestricted in its right to direct the work force. Moreover, in the Waiver provision, both parties explicitly agree to an unqualified waiver of the right to bargain over any subject referred to in the Agreement, regardless of whether they were within the knowledge or contemplation of the parties at the time. In sum, these terms are

clear and unmistakable, and should properly constitute a waiver of the Union's right to engage in effects bargaining in this case.

Similarly, it should be noted that, because the matrix in *Natomi Hospitals* was based on patient census levels, General Counsel has argued that the facts of that case are comparable to the issue at Plymouth Court; this, however, is also inaccurate. To begin with, the union in *Natomi* responded to the employer's unilateral action by sending multiple requests to engage in both decision and effects bargaining. In addition, the record reflected that the unilateral action in *Natomi* resulted in significant changes, including, evidence of "an actual adverse impact on rehabilitation nurses' workloads and on their ability to meet mandatory performance standards." *Id.* at 903. Finally, as a final distinction, the Board in *Natomi* pointed out that in its defense, the employer failed to put forth any argument that the changes that resulted from the modified matrices were naturally inherent to that modification, and therefore, incapable of being separated from the lawful unilateral action. In the same vein, the Board also acknowledged that the obligation to engage in effects bargaining does not apply if alternatives do not exist: to this end, it specifically noted that "[t]he Respondent had an obligation to bargain about effects, on the Union's request, as long as there were alternatives that the parties could explore without calling into question the Respondent's underlying, nonbargainable decision." See, e.g., *Bridon Cordage, Inc.*, 329 NLRB 258 (1999).

Despite the General Counsel's assertion, it is apparent that the facts of the instant case are easily distinguished from those in *Natomi*, and that the waiver in this case is clear and unmistakable. Here, the record is silent as to when, how, or even whether the Union sought bargaining over the effects of the scheduling reductions; to this end, as the parties stipulated on the record, no documents have been presented to memorialize any request. Similarly, while the

record shows that the reduction in hours had an effect on employees – namely, that they worked less hours, were paid for less hours, and (in some cases), had different starting and stopping times, there is simply no way to separate these consequences from the original action. By virtue of the fact that the hours were cut in an attempt to comply with budgetary restraints, it automatically results that employees will work less, be paid less, and that their normal daily schedules would change. These are simply the natural consequences of the Respondent's lawful action, and as such, there were no alternatives that would not call into question the Respondent's underlying, nonbargainable decision. Indeed, as the record actually reflects, the solution that was ultimately reached to ameliorate the effects of the reduction not only called the Respondent's lawful reduction into question – it completely reversed it. And, while not dispositive under *Natomi*, the lack of choice is bolstered by the fact that throughout the proceedings, neither the Union, nor the General Counsel, have pointed to a single alternative that might be available to the Respondent.¹⁰ Indeed, even when Respondent proposed alternatives that would seemingly restore Finley's hours, it was the Union – through Fowlkes – who refused to entertain the compromise, and who refused to discuss the matter further, emailing Szkutnik that "Your resolution makes no sense at all. I'm not going through this anymore with yourself or Bret [...] I have nothing else to say concerning this matter. I'm on vacation, have a great Christmas, and a happy new years. [sic]" G.C. Exh. 3. Taking these facts together, it is apparent that, at least with respect to Fowlkes' conduct, the Union certainly never sought effects bargaining; rather, the Union viewed the decision and the effect of the unilateral change as being

¹⁰ During the Hearing, General Counsel stated that "under current Board law, Respondent was required to bargain over the effects of its decision to lay off or reduce the hours of dietary employees." Tr. 10. This does not specify what "effects" the General Counsel is talking about, but to the extent that the General Counsel was arguing that the Respondent was required to bargain over its decision to reduce hours rather than engage in a lay-off, this interpretation is incorrect; lay-offs, as with the reduction in hours, are controlled by contract language that allows the Respondent to take unilateral action, so long as that action is consistent with the seniority provisions. The General Counsel describes two distinct alternatives – Respondent could have reduced hours, or Respondent could have laid-off employees – but they are unconnected. A lay-off would not flow as a result from the reduction.

inexorably linked. And when considered in light of the provisions contained within the collective bargaining agreement, Respondent submits that it can meet the burden described in *Natomi*.

2. The *Enloe Medical Center* Waiver standard

On the other hand, however, again assuming *arguendo* that Respondent's combined evidence might not satisfy the Board's "artificially high" burden, this case would still be the perfect candidate for review in the appellate court. To this end, and as described above, in the D.C. Circuit's decision in *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005). There, the Court soundly voiced its disapproval of *Natomi*, and announced its intention to review all contracts *de novo*, and without regard to the Board's burdensome standard.

In *Enloe*, the D.C. Circuit considered an employer's institution of a mandatory on-call policy, as well as a new recordkeeping method. The union challenged the adoption of the policies and filed a charge; the Board found merit to the union's allegations, and held that, while the hospital had the right to institute the policy changes, it was required to bargain over the effects of the new rules. In response to the Board's decision, the employer appealed to the Court.

At the outset of its analysis, the D.C. Circuit recognized that "[t]he National Labor Relations Board and this court have a fundamental and long-running disagreement as to the appropriate approach with which to determine whether an employer has violated section 8(a)(5) of the National Labor Relations Act when it refuses to bargain with its union over a subject allegedly contained in a collective bargaining agreement." Noting that it explicitly rejected the Board's *Natomi* doctrine, the Court explained that it finds that "questions of 'waiver' normally do not come into play with respect to subjects already covered by a collective bargaining agreement." Rather, the D.C. Circuit applies a different inquiry, asking "simply whether the

subject that is the focus of the dispute is ‘covered by’ the agreement.” *Enloe* at 836. The Court justified this approach in practical terms, pointing out the peculiar disconnect that comes from trying to separate cause and effect:

Whether the parties contemplated that the collective bargaining agreement would treat the effects of a decision separately from the decision itself is just as much a matter of ordinary contract interpretation as is the initial determination of whether the agreement covers the matter altogether. It would be rather unusual, moreover, to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving a union's right to bargain over the effects of that decision. This is not to say that such an interpretation is inconceivable, but it would seem that there would have to be some language or bargaining history to support the proposition that the parties intended to treat the issues separately.

Id. at 838-839.

As a result of this approach, the Court explained that the ultimate question should be about intent – specifically, whether the parties intended for a dichotomy to exist between the right to make new policies, and the right to implement them? Considering the facts presented in *Enloe*, the Court easily concluded that this was not the parties’ intention, and accordingly, it vacated the Board’s decision.

Turning to the application of *Enloe* to the instant case, there can be no question that the parties to the collective bargaining agreement at Plymouth Court had no intention of distinguishing between the right to schedule employee hours – a right that the Arbitrator and the Board confirmed to exist – and the right to actually implement those changes. Moreover, as with *Enloe*, in its response to the unilateral change, the Union here never noted any distinction between the cause and the effect of the hours reduction; indeed, in the grievance document, the Charge, and Fowlkes’ emails and discussions with Respondent, effects bargaining was never mentioned. The Union has only challenged the Respondent’s right to reduce the schedules in the

first place. Under these circumstances, no intended dichotomy can be found to exist, and consequently, for this reason as well, the Complaint should not be sustained.

II. The Region Erred In Refusing To Defer To The Arbitrator's Decision In This Matter.

Finally, putting aside the issue of effects bargaining, Respondent submits that this should have been a simple case of deferral. It is a well-settled principle of Board law that national labor policy "strongly favors deferring to arbitral decisions." *Smurfit-Stone Container*, 344 NLRB 658 (2005); *see also*, *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). Furthermore, the policy is not one that can be modified by the Board; rather, its foundation comes from Congressional demand. *Gateway Coal Co. v. UMW*, 414 U.S. 368, 377 (1974).

Due to the importance of this overriding principle, the standard for challenging deferral is correspondingly high. Indeed, "because the Board strongly favors deferral as a means of promoting industrial peace and the parties' autonomy, the Board puts the burden on the party seeking to avoid deferral to prove that the arbitrator's decision is not even *susceptible* to an interpretation consistent with the Act." *Smurfit-Stone Corp.*, 661. As a result, the party seeking deferral "can prevail only if the Board were to find that the General Counsel has proven that every reasonable interpretation of the arbitrator's decision is repugnant to the Act."

Turning to the standard itself, the deferral test comes from the *Spielberg* doctrine. Under *Spielberg*, the Board will defer to an arbitration award where "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitrator is not

clearly repugnant to the purposes and policies of the Act.” See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

Subsequently, in *Olin Corp.*, 268 NLRB 573 (1985), the Board added additional requirements to the *Spielberg* analysis: (1) that the contractual issue be factually parallel to the unfair labor practice issue; and (2) that the arbitrator needed to have been presented generally with the facts relevant to resolve the unfair labor practice charge. In interpreting this second prong, the Board has concluded that an arbitrator need not have been presented with the relevant law relating to the unfair labor practice in question, and his or her decision need not have contained a rationale showing consideration of the unfair labor practice allegation; rather, the test is whether the evidence before the arbitrator was “essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge.” *Andersen Sand & Gravel Co.*, 277 NLRB 1204, 1205 (1985). If the evidence was, indeed, largely the same, then the arbitrator’s failure to directly address the unfair labor practice will not result in the Board’s refusal to defer. Finally, *Olin* imposes the requirement that the arbitrator’s decision be consistent with an interpretation of the Act; this requirement is closely tied to the “repugnant” standard contained in *Spielberg*, and the two prongs are often considered in conjunction. To this end, the Board will not find an award to be clearly repugnant if it is not totally consistent with Board precedent. *Martin Redi-Mix*, 274 NLRB 559, 559 (1984). Instead, the Board will defer unless the award is “palpably wrong,” and the arbitrator’s decision is not susceptible to *any* interpretation consistent with the Act. In so finding, the Board acknowledges the fact that “the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board.” *Andersen Sand & Gravel Co.*, *supra*, at 1204 fn. 6. And, as such, the mere fact that the Board may disagree with an arbitrator’s conclusion – or the fact that

the Board itself would have arrived at a different result – is an insufficient basis for the Board to decline to defer to the arbitrator's award. *Kaverner Philadelphia Shipyard*, 347 NLRB 390 (2006).

It was within this framework that the Board considered *Smurf-It Stone Container Corporation*, 344 NLRB 658, 658 (2005), a case largely similar to the instant matter. There, the employer instituted a new attendance policy, and the union responded by filing a grievance, as well as an unfair labor practice charge alleging unlawful unilateral change. The matter went to arbitration, and the unfair labor practice charge was deferred pending that outcome; ultimately, the arbitrator issued a decision denying the union's grievance, and finding that the employer had the right to unilaterally implement the new policy. Despite the arbitrator's decision, the Region issued a complaint, and the Administrative Law Judge sustained the allegations, declining to defer.

The employer excepted to the Judge's findings, arguing that deferral was appropriate in the case. Specifically, the employer argued that the arbitrator's award met the Board's standards for deferral because it was based on the management rights clause of the parties' agreement, and "because the arbitrator considered virtually the same facts as were presented at the unfair labor practice hearing." *Id.* at 658. Finally, the employer argued that even though the result was not what the Board would have chosen, the award was still not repugnant to the Act.

In reviewing the employer's exceptions, the Board described the appropriate standard, noting that:

The Board will defer to an arbitration award when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Additionally, the arbitrator must have considered the unfair labor practice issue which is before the Board. In *Olin Corp.*, 268 NLRB 573 (1984), the Board clarified that an arbitrator has adequately

considered the unfair labor practice issue if (1) the contractual issue is factually parallel to the unfair labor practice issue, (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (3) the decision is susceptible to an interpretation consistent with the Act. *Id.* at 574. The party seeking to have the Board reject deferral bears the burden of proof. *Id.*

Finding that the proceedings were fair and regular, and that the parties had agreed to be bound, the Board turned to the question of whether the arbitrator adequately considered the unfair labor practice issue. To this end, the Board turned to the precedent contained in *Dennison National Co.*, 296 NLRB 169 (1989). In that case, the Board held that the arbitration over an employer's elimination of a job category was factually parallel to an unfair labor practice charge regarding unilateral change, because the arbitrator found that the management rights clause gave the employer the ability to act unilaterally. In concluding that the issues were parallel, the Board noted that "[i]n an unfair labor practice proceeding on the merits of the statutory issue, the Board must consider whether the [employer]'s action constituted a unilateral change in violation of its bargaining obligation under Section 8(a)(5) of the Act. The presence of contractual authorization for the Respondent's action is determinative of the unfair labor practice allegation." *Id.* at 170-171.

Applying *Dennison National* in the *Smurfit-Stone* case, the Board concluded that the arbitrator "adequately addressed the statutory issue by determining the contractual issue." Specifically, the Board explained that the statutory question was "whether the Respondent's adoption of the new absence control policy constituted a unilateral change." And, as a corollary, the "question of whether or not the management-rights clause of the parties' collective-bargaining agreement authorized the Respondent's implementation of the new policy is determinative of the unfair labor practice allegation[.]" Accordingly, this prong was satisfied. Similarly, turning to the facts considered, the Board noted that the General Counsel failed to

allege that the arbitrator “lacked an adequate factual basis to decide the relevant issues[;]” as such, it found this element satisfied, as well.

Finally, the Board addressed the question of whether the award was clearly repugnant to the purposes and policies of the Act. Contrary to the judge, the Board held that it was not. From the outset, the Board reaffirmed that the appropriate “standard for determining whether an arbitral decision is clearly repugnant is whether it is ‘susceptible’ to an interpretation consistent with the Act.” *Smurfit-Stone*, 344 NLRB 658; citing *Olin*, 268 NLRB at 574; see *Motor Convoy*, 303 NLRB 135 (1991). By way of further explanation, the Board reasoned that the phrase ‘susceptible to an interpretation consistent with the Act’ “means precisely what it says. Even if there is one interpretation that would be inconsistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act.” Additionally, the Board again acknowledged that the notion of an outcome “consistent with the Act does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act.” Thus, the Board concluded, its own “mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award.” See *Anderson Sand & Gravel*, 277 NLRB 1204, 1205 (1985).

In arriving at this decision, the Board also commented on the adequacy of the award itself, finding that it would not refuse deferral based on an “imperfectly drafted arbitral decision[.]” *Smurfit-Stone*, 344 NLRB 658; citing *Yellow Freight System*, 337 NLRB 568, 572 (2002) (Board deferred to arbitral award where wording of award was somewhat ambiguous, but could be reasonably interpreted to support a finding consistent with the Act); see also *Specialized Distribution Management*, 318 NLRB 158, 163 (1995) (deferral not repugnant to the Act even where arbitrator's ‘approach and style are at variance from the standards the General Counsel

would like to see’).” Nor will deferral be withheld because the arbitrator failed to make an explicit finding with respect to a clear and unmistakable waiver of the Union's right to bargain; to this end, it noted that “the Board has consistently found that an arbitral award ‘can be susceptible to the interpretation that the arbitrator found a waiver even if the arbitral award does not speak in [terms of clear and unmistakable waiver].’ *Southern California Edison*, 310 NLRB 1229, 1231 (1993); see also *Olin*, 268 NLRB at 576 (arbitral decision not clearly repugnant where decision was reasonable, even though arbitrator did not apply statutory waiver standard).” As a final note, the Board acknowledged that its own waiver test is “not the only reasonable interpretation of the Act.” See *NLRB v. Postal Service*, 8 F.3d 832, 837-838 (D.C. Cir. 1993); *Enloe, supra*. Accordingly, the Board concluded that deferral in *Smurfit-Stone* was proper, and dismissed the complaint.

Applying the framework of *Smurfit-Stone* to the instant matter, Respondent submits that the General Counsel has failed to meet the heavy burden required to oppose deferral. Turning to the first factors, there is no question that the proceedings were fair and regular, or that the parties agreed to be bound; similarly, the requirement of factual parallelism is clearly fulfilled, as the General Counsel made no claim that the unfair labor practice hearing contained facts that were not considered during the arbitration (indeed, the arbitration exhibits were included in the later hearing, and the majority of the testimony was redundant).

Turning to the question of whether the unfair labor practice was adequately addressed in the arbitration, under *Dennison National*, it is apparent that the allegations raised within the 8(a)(5) charge were fully addressed in the course of the Arbitrator’s contract interpretation, which determined if the management rights provisions and Article 4 of the contract allowed the Employer to reduce employee hours. Indeed, Arbitrator Glendon completely addressed the

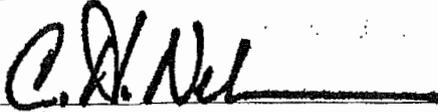
statutory issue by determining the contractual issue, and as such, he found that the parties' collective bargaining agreement authorized the Respondent to modify employee schedules. Because that modification is the basis of the unfair labor practice charge, and because the Arbitrator concluded that it was within the Respondent's power to effectuate that change, this prong must be satisfied, as well. And, even though Arbitrator Glendon did not specify the manner in which the Union waived its right to bargain over the effects of the scheduling decision, the Board in *Smurfit-Stone* has clearly established that this is an insufficient basis on which to refuse deferral; as demonstrated by the *Enloe* decision, refusing to search for a dichotomy where none exists is still a reasonable interpretation of the Act – even if it isn't the one the Board would want.

Accordingly, in light of this analysis, and consistent with long-standing labor policy, the Respondent submits that this charge should have been deferred to arbitration, and that the Complaint should be dismissed accordingly.

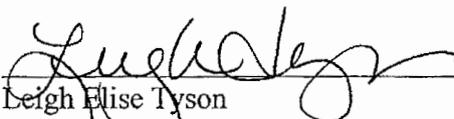
III. Conclusion

For all of the above reasons, the Respondent respectfully requests that the Judge dismiss the General Counsel's Complaint in its entirety, either by deferring to the existing arbitration award, or by determining that Plymouth Court did not violate the Act in any way

Respectfully submitted this 21st day of February, 2013.



Clifford H. Nelson, Jr.
Attorney for the Employer



Leigh Elise Tyson
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CERTIFICATE OF SERVICE

This is to certify that the undersigned filed the foregoing EMPLOYER'S POST HEARING BRIEF via the National Labor Relations Board's E-Filing Service, and have also provided copies to the following parties via electronic delivery:

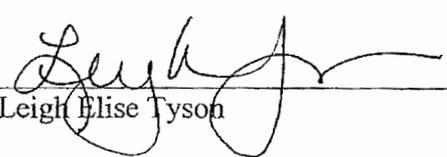
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Ira Sandron
Administrative Law Judge
National Labor Relations Board, Region 7
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This 21st day of February, 2013.



Leigh Elise Tyson

ATTACHMENT C

**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,¹

Respondent

and

LOCAL 459, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-
CIO,

Case 07-CA-070626

Charging Union.

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE
ADMINISTRATIVE LAW JUDGE**

Counsel for the General Counsel, Dynn Nick, respectfully submits this brief to Administrative Law Judge Ira Sandron, who heard the above-captioned case on January 15, 2013, in Detroit, Michigan.²

Questions to be Decided

- 1) Is deferral to an arbitral award inappropriate under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984)?
- 2) Did Respondent, in about September 2011, in response to low patient census, reduce the work hours of certain Unit employees, without affording the Charging Union a

¹ At trial, Respondent's name was amended as indicated in the above caption. (Tr. p. 8)

² References to the record are hereinafter abbreviated as follows: Tr. = Transcript; GC = General Counsel's Exhibit; R = Respondent's Exhibit; JT = Joint Exhibit. All page numbers cited to in the Joint Exhibit refer to the handwritten numbers placed in consecutive order as directed by Judge Sandron for the purposes of the trial.

meaningful opportunity to bargain with Respondent with respect to the effects of the conduct?

Counsel for the General Counsel respectfully asks that the above questions be answered in the affirmative.

Procedural History

The charge in this case was filed on December 13, 2011, alleging that Respondent “[M]ade unilateral changes to the working terms and conditions of the employees. These members are part of the [Charging Union’s] bargaining unit.” (GC 1(a)) On January 17, 2012, by letter to the parties, the Acting Regional Director deferred the charge under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), pursuant to a class action grievance filed on November 9, 2011. (JT 2, pp. 48, 51-54) As explained in the January 17 letter, the Board retained the right to review the arbitrator’s award upon the Charging Union’s request. (JT 2, p. 52) On June 6, 2012, an arbitration hearing before Arbitrator Paul E. Glendon was conducted over the underlying grievance in the charge. (JT 2, pp. 2-31) On August 1, 2012, Arbitrator Glendon issued his award, denying the Charging Union’s grievance by finding that Respondent acted within the terms of the parties’ collective bargaining agreement when it reduced the hours of dietary employees beginning in September 2011. (R 1)

On August 28, 2012, upon review of the arbitrator’s decision, Region Seven of the NLRB requested that Respondent provide a response as to whether the Region should defer to the decision in the case. (GC 4) On September 4, 2012, by letter, Respondent replied to the August 28 inquiry, asserting that the Region should defer under *Spielberg*

Mfg. Co., 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1985), contending that in his decision, the arbitrator "...completely addressed the statutory issue by determining the contractual issue." (GC 4) Respondent, in its September 4 letter, specifically discussed whether effects bargaining had taken place between the parties over the reduced hours, asserting that effects bargaining "was never requested by the Union, nor would had it been required had it been requested." (GC 4 p. 3)

After review of Respondent's September 4 response, on November 27, 2012, the Regional Director issued the instant complaint alleging as unlawful Respondent's failure to bargain with the Charging Union over the effects in the reduction of hours of dietary employees. (GC 1 (c)) After an initial hearing date of January 14, 2013, by agreement of all parties, the hearing was rescheduled for and commenced on January 15, 2013. (GC 1 (f))

STATEMENT OF THE CASE

Background

Respondent operates a 109-bed healthcare facility in Plymouth, Michigan, where it provides both long-term care and skilled nursing rehabilitation. (JT 2 p. 19)

The Charging Union represents approximately 60 employees, consisting of full-time and regular part-time nurses' aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and cooks. (Tr. 19; JT 2 p. 60.) At all material times, the parties have been operating under a collective bargaining agreement effective by its terms from July 8, 2011 through July 8, 2014. (JT 2 pp. 58-87)

At all material times, Kim Fowlkes was the Charging Union's servicing representative for the bargaining unit.³ Fowlkes was solely responsible for bargaining with Respondent and was the only person with authority to agree to any changes in bargaining unit employees' terms and conditions of employment.⁴ (Tr. 18-19)

At all material times, Cari Mitter, an admitted statutory supervisor, was the Director of Food and Nutrition for Respondent.⁵ (Tr. 9; JT 2 p. 16) Mitter was responsible for, among other things, scheduling the six full-time and the "several" part-time bargaining unit employees working in the dietary department. (JT 2, p. 16, R. 3, p. 5)

In September 2011, Respondent faced a "perfect storm" of two separate and serious budgetary and census related issues. (Tr. 76; JT 2 p. 19; R 3, p. 1) First, Medicare reduced funding to Respondent and other facilities by 11.1 percent, which when coupled with Medicaid cuts made at the State level, "resulted in the most difficult economic environment [nursing facilities such as Respondent] have experienced in more than a decade."⁶ (JT 2, p. 334) Second, as a result of survey findings by the State of Michigan, Respondent was temporarily unable to admit new patients. (JT 2, p. 19) In the underlying arbitration hearing, Mitter testified that the severity and the extraordinary

³ Ms. Fowlkes worked as the Servicing Representative with respect to the bargaining unit in question from 2010 until around March 2012. (Tr. 18) Subsequently, she was promoted to Director of Representation for the Charging Union. (Tr. 17)

⁴ Respondent did not dispute point at trial.

⁵ Mitter is no longer employed by Respondent.

⁶ The Medicare funding reductions of approximately \$127 billion over a ten-year period caused an immediate and severe issue for nursing and rehabilitation facilities over the entire country. (JT 2, p. 334, R 3, p. 10)

nature of these two events, which, coupled together, caused patient census levels to drop to unprecedented levels and put an incredible budgetary strain on Respondent. (JT 2, pp. 19-21, 23) At trial, Respondent's Human Resources Manager Karen Szkutnik, attempted to minimize the effects of the reduction of Medicare funding and the State survey. (Tr. 76) Szkutnik strongly implied that these events were run-of-the-mill events that Respondent faces on a regular basis, belying not only Mitter's testimony at the arbitration hearing, but Respondent's contention in numerous supporting documents admitted into evidence that these events were something wholly out of the ordinary. (Tr. 76; JT 2, p. 334; R 3, pp. 1, 10-12) As Mitter testified at arbitration, the two almost simultaneous events caused patient census, which is normally around 90 patients, to fall into the 60's. She characterized this resulting census as "rock bottom," adding that she had never seen census numbers drop to such a low level. (JT 2, p. 19)

Facing an unprecedented reduction in the census, Mitter initially eliminated a position and reallocated that position's job duties amongst the employees in the dietary department. (JT 2, p. 19) However, the reallocation of job duties was inadequate to address the crisis and Mitter subsequently reduced the hours for nearly every dietary employee. (JT 2, pp. 19-21; R 3, p. 11) Employees Khadijah Anderson, Eartha Bell, Clondia Finley, Dion Luckett, Stacey Miller, Felicia Slater, Laura Gonzales, Joanne Wood, John Ross and Angela Valentez all had their hours reduced as a result of the drop in patient census. (JT 2, p. 23; R 3, p. 11) If hours had not been reduced across the board, Mitter's only alternative would have been to lay off employees. (JT 2, p. 23; R 3, p. 12) At no time during Knowles' tenure as the Charging Union's Representative of

Respondent's bargaining unit employees had any dietary employees previously been laid off or suffered a Respondent-ordered mandatory reduction in hours because of a low patient census. (Tr. 39) Respondent presented no evidence at trial that it had considered laying off dietary employees prior to the September 2011 "perfect storm" of events, described above. Furthermore, at trial, Respondent put no records into evidence previous to September 2011 that would show that Respondent's census had, in fact, ever dropped into the "rock bottom" range previously.

While patient census had fluctuated previously, it had never fluctuated downward to this extent. Respondent itself alternately described the September 2011 census reduction with such terms as "unprecedented," a "perfect storm," (R 3, p. 1, 3), a "significant hardship," (JT 2, p. 334), and that it hit "rock bottom." (JT 2, p. 19) With less significant reductions in census, bargaining unit employees in the dietary department were offered "voluntary reductions," based on seniority, although it is not clear as to when these voluntary reductions took place. (JT 2, pp. 7, 15-17) Respondent did not provide any evidence at trial that any reduction similar to the wholesale, across-the-board mandatory reductions in employee hours for the entire dietary department imposed in September 2011 had previously been implemented. With respect to the decision and implementation of the across-the-board reductions in the dietary department, Respondent made its decision and fully implemented the reduction without any notice to the Charging Union or any offer to bargain over the effects of such a reduction. (Tr. 39, 49-50; GC 4, p. 3)

In November 2011, during Knowles' routine site visit to Respondent's facility, she was approached by dietary department employee Felicia Slater, who told her that there were full-time bargaining unit employees in her department whose hours were being cut and the it had been going on since September 2011. (Tr. 21) Knowles told Slater that she would investigate the situation. (Tr. 21) Knowles immediately called Respondent's Administrator Bret Lucka to inquire as to whether dietary employees' hours had, in fact, been cut. (Tr. 23-24) Lucka said he knew nothing about any reduction in hours. (Tr. 24) To further inquire as to whether a reduction in hours had taken place, Knowles then phoned Respondent Human Resources Manager Szkutnik. (Tr. 25) Szkutnik parroted Lucka, telling Knowles she had no knowledge of a reduction in hours within the dietary department. (Tr. 25) Despite Lucka's and Szkutnik's assurances, approximately two days later, Knowles took the further step of contacting acting steward Brandi Malone regarding Slater's claim that the Employer implemented a reduction in employee hours.⁷ (Tr. 26, 28) Malone informed Knowles that Slater had also told her about the reduction in hours for dietary employees. (Tr. 28) Knowles instructed Slater to file a class action grievance.⁸ (Tr. 30, JT 2, p. 48) A grievance was filed shortly after Knowles spoke to Malone. (Tr. 51, JT 2, p. 48)

⁷ The two regular stewards were out pursuant to the Family Medical Leave Act (FMLA) and at the time, Malone was the only Charging Union representative at the facility. (Tr. 26)

⁸ The grievance was actually filed by Felicia Slater, who is not a Charging Union official. (JT 2, p. 48, Tr. 59) The Charging Union allows members to file grievances without a signature from a steward. (Tr. 59) At no point during the grievance process up to and including the arbitration of the grievance, did Respondent raise any procedural issue or contend that the grievance was somehow invalid as a result of Slater filing it. (JT 2, pp. 2-334) Nor did Respondent raise the issue with the Board subsequent to the arbitration. (GC 4)

In early December 2011, a grievance meeting between the Charging Union and Respondent was held at Respondent's facility over the class action grievance regarding the reduction of hours in the dietary department. (Tr. 31-32) The meeting was attended by Knowles, dietary department employee Clondia Finley, Mitter, Szkutnik and Lucka, among others. (Tr. 31-32) At the meeting, Knowles presented the Charging Union's case, asserting that full-time employees' hours should not be cut, considering part-time employees in the dietary department had not been cut and that Respondent had hired new employees while at the same time cutting the hours of seasoned employees. (Tr. 36, 39) Knowles then referred back to her phone calls to Szkutnik and Lucka on the issue, telling them "When I did my investigation, no one told me that this was happening." (Tr. 33-34) Lucka had no response to Knowles, but Szkutnik, contrary to her denial of any reduction of hours in her November 2011 phone call with Knowles, acknowledged the reduction of hours, stating that the census had gone from 90 to 60, that such fall had never previously occurred and, apparently referring to the State audit discussed above, claimed that the State could close the facility down. (Tr. 34-35) Given its earlier denials, this is the first time Respondent itself actually confirmed to the Charging Union that it had reduced the hours of dietary department employees. (Tr. 25, 54) Respondent offered to settle the grievance by allowing Clondia Finley, who had been most affected by the reduction of hours, an opportunity to work a double shift. (Tr. 36) The Charging Union rejected the offer as inadequate. (Tr. 36)

Subsequent to the grievance meeting, on December 19, 2011, Szkutnik telephoned Knowles and again offered to settle the grievance by allowing Finley to work a double

shift. (Tr. 44) Knowles again declined the offer. (Tr. 44) At no time did Respondent make any other offer to settle the grievance other than one involving Finley working a double shift. (Tr. 46) On December 20, Szkutnik emailed Fowlkes, acknowledging that the Charging Union would proceed to arbitration over the grievance. (Tr. 45; GC 2) Later on December 20, Fowlkes responded to Szkutnik's email, telling her that Respondent's resolution to the grievance "makes no sense. . ." and stated that if Respondent would, "Stop cutting the hours of full-time employees. . .the issue will be resolved." In exchange, Fowlkes assured Szkutnik that the Union would withdraw the then pending unfair labor practice charge. (GC 3; GC 1(a)) At no time since Respondent's implementation of the reduced hours in the dietary department did it offer to bargain over the effects with the Charging Union. (Tr. 46; GC 4, p. 3)

ARGUMENT

I. Deferral to the Arbitral Award is Inappropriate Under Spielberg Mfg. Co., 112 NLRB 1080 (1955), and Olin Corp., 268 NLRB 573 (1984).

As part of its affirmative defenses to the instant complaint, Respondent, citing *Spielberg Mfg. Co.*, and *Olin Corp.*, supra, contends that this case should be deferred to an arbitral award, in which the arbitrator concluded Respondent's actions did not violate any provision of the collective bargaining agreement.⁹ (GC 1(e), p. 5) In *Spielberg Mfg. Co.*, the Board held that it will defer to an arbitration award where: (1) the arbitration

⁹ At the conclusion of Counsel for General Counsel's case in chief, Respondent moved for dismissal of the case because the arbitrator's award in the underlying case had not been put into evidence. (Tr. 61-62) While the parties seeking to have the Board reject deferral bear the burden of proof, in this case Counsel for General Counsel and the Charging Union, there does not appear to be any case law requiring the arbitrator's award be entered into evidence during their case in chief. *Olin*, supra, at 574.

proceedings appeared to be fair and regular; (2) all parties to the arbitration had agreed to be bound; and (3) the arbitrator's decision was not clearly repugnant to the purposes and policies of the Act. The Board will not find an arbitrator's award "clearly repugnant" unless it is shown to be "palpably wrong," i.e., not susceptible to an interpretation consistent with the Act. *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1085-1087 (2003), *enfd.* 99 Fed. Appx. 223 (D.C. Cir., 2004).

In *Olin Corp.*, *supra*, the Board redefined its deferral standards, announcing that deferral is owed to arbitral awards as long as: (1) the contractual issue is factually parallel to the unfair labor practice issue; (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and (3) the award is not "palpably wrong," that is, the decision is "susceptible to an interpretation consistent with the Act." The Board will not find an arbitrator's award "clearly repugnant" unless it is shown to be "palpably wrong." *Bell-Atlantic-Pennsylvania*, 339 NLRB at 1085-1087; *Olin Corp.*, 268 NLRB at 574.

In analyzing the instant case under a *Spielberg/Olin* analysis, the arbitration proceedings appear to have been fair and regular and the parties agreed to be bound, so the inquiries that remain are whether the contractual issue is factually parallel to the unfair labor practice issue, whether the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and whether the arbitrator's decision is palpably wrong/repugnant to the Act.

1. The contractual issue is not factually parallel to the unfair labor practice issue.

Deferral is not appropriate in the instant case because the issue considered by the arbitrator is not factually parallel to the unfair labor practice issue presented here. The issue before the arbitrator was whether Respondent violated the parties' collective bargaining agreement by reducing the regular work hours of Finley below eight per day and eight per pay period due to a major continuing drop in resident census. (JT 2, pp. 2-46, R 1, pp. 1-5) On the other hand, the issue now before this honorable Court is extra-contractual, e.g., did Respondent bargain with the Charging Union over the effects of employees' reduction in hours. (GC 1(c)) Indeed, the question of whether Respondent failed to bargain over the effects of its decision to reduce hours is one that could not be decided on a determination of the meaning and interpretation of the collective-bargaining agreement as no such language exists. (JT 2, pp. 58-87)

In this regard, the circumstances of this case are remarkably similar to those where the Board found that the arbitrator did not adequately consider the unfair labor practice issue. In *Kohler Mix Specialties*, 332 NLRB 630, 631-632 (2000), an employer sought deferral to an arbitrator's award in which the arbitrator declined to resolve any dispute arising out of the Act and instead limited his analysis to the parties' collective bargaining agreement. *Id.* at 630. The unfair labor practice issue before the Board was whether an employer, by failing and refusing to bargain with the union about its decision to unilaterally subcontract its over-the-road delivery operation, violated its statutory obligation to bargain under Section 8(d) and 8(a)(5) of the Act. *Id.* The Board noted that in order to make such a determination, it was necessary to determine whether the decision was a mandatory subject of bargaining, whether the union waived its right to bargain over

the decision or effects, and whether the employer satisfied its statutory obligation to bargain. *Id.* (emphasis added.) The arbitrator however, limited his analysis to whether any provision of the parties' contract prohibited the employer's unilateral decision to subcontract the over-the-road delivery operation. *Id.* Based on the arbitrator's failure to address the unfair labor practice issue, the Board found that deferral was inappropriate. *Id.* at 631.

Likewise, in *Armour & Co.*, 280 NLRB 824 fn. 2 (1986), the Board declined to defer to an arbitrator's award where the unfair labor practice was not addressed. The arbitrator in *Armour* found that the parties' contract did not prohibit a challenged unilateral change by the employer, but the arbitrator did not consider whether the respondent had fulfilled, or the union had agreed to waive, any statutory duty to bargain. In declining to defer, the Board noted that the absence of a "contractual prohibition" of the employer's action was "neither conclusive of the statutory issue ... nor inconsistent with a finding that the Respondent had breached its statutory duty to bargain." *Id.* See also *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790 fn. 5 (1990).

As in *Kohler* and *Armour*, because the unfair labor practice issue in the instant case is not parallel to the contractual issue, the arbitrator did not make the necessary determination as to whether the Charging Union waived its right to bargain over the effects of Respondent's implementation of a reduction in hours and whether the Respondent satisfied its obligation to bargain, instead constraining his analysis to a few contractual provisions. (R 2) Given the arbitrator's failure to address the unfair labor

practice issue, i.e., whether Respondent was required to engage in effects bargaining with the Union, deferral to the arbitration award is inappropriate.

2. The Arbitrator was not presented generally with the facts relevant to resolving the unfair labor practice.

With respect to the arbitrator being generally presented with the facts relevant to resolving the unfair labor practice, there is no question that the arbitrator was not presented with *any* facts regarding the unfair labor practice. The instant complaint alleges that Respondent did not bargain over the effects of its decision to reduce the hours of dietary department employees. There is not a single word in the entire arbitration transcript or award that deals with effects bargaining--or lack thereof. (JT 2, pp. 2-31; R 3)

Respondent may argue that *Spielberg/Olin* is satisfied because the arbitrator was presented with facts surrounding the reduction in hours. This argument misses the point in that the evidence presented at the arbitration hearing went directly to the contractual issue of whether Articles 3 and 4, among others, permitted such reductions in work hours. There was no evidence put forth regarding the unfair labor practice issue at hand. (JT 2, pp. 2-334)

Under *Olin*, the arbitrator need not have been presented with the relevant law relating to the unfair labor practice in question, and his decision need not have contained a rationale showing consideration of the unfair labor practice allegation; rather, the test is whether the evidence before the arbitrator was “essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge.” *Andersen Sand &*

Gravel Co., 277 NLRB 1204, 1205 (1985); see also *Laborers Local 294*, 331 NLRB 259, 261 (2000). Clearly, the evidence before the arbitrator is not the same evidence necessary to determine the merits of the unfair labor practice charge. In fact, as not one scintilla of evidence regarding Respondent's actions related to its obligation to bargain with the Charging Union over the effects of the reduction of hours was presented at the arbitration hearing, it would have been nigh impossible for the arbitrator to have resolved the unfair labor practice. Accordingly, deferral to the arbitrator's award should not be granted.

3. The arbitrator's decision is palpably wrong/repugnant to the Act under the *Spielberg/Olin* analysis.

The Board does not require an arbitrator's award to be totally consistent with Board precedent. Rather, the inquiry is whether the award is "palpably wrong." *Bell-Atlantic-Pennsylvania*, supra, at 1085. The standard for determining whether an arbitral decision is clearly repugnant or palpably wrong is whether it is "susceptible" to an interpretation consistent with the Act. *Olin*, 268 NLRB at 574. "Susceptible to an interpretation consistent with the Act" means precisely what it says. Even if there is one interpretation that would be inconsistent with Board precedent, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act. In the instant case, no matter how you analyze it, there is no interpretation of the arbitrator's decision that would be consistent with the Act. Bargaining over the effects of its decision to reduce employees' hours is Respondent's *statutory* obligation, regardless of whether it was privileged to reduce employees' hours in the parties' collective bargaining

agreement. *Allison Corp.*, 330 NLRB 1363, 1365 (2000). There is no Board case in existence that holds otherwise. Thus, the arbitrator's award is palpably wrong and repugnant to the Act.

Moreover, because the unfair labor practice at issue in the instant case was not considered by the arbitrator in any way, the award is repugnant to the Act. In *Laborers Local 380 (Mautz & Oren, Inc.)*, 275 NLRB 1049, 1053 (1985), the Board affirmed the decision of an administrative law judge who found that although the arbitrator's interpretation of the contract and decision on the facts was not necessarily inconsistent with the Act, the fact that the residual unfair labor practice issue was not addressed and resolved left the award not susceptible to an interpretation consistent with the Act and thus palpably wrong. *Id.* Thus, the administrative law judge rejected deferral to the award. *Id.* As with *Laborers Local 380*, the arbitrator in the instant case did not address the unfair labor practice issue and consequently the award is palpably wrong, making any deferral to the award wholly inappropriate.

Finally, although the Board in *Olin* found that it would "not require an arbitrator's award to be totally consistent with Board precedent" the Board subsequently ruled that it would not defer where the arbitrator's decision was totally inconsistent with case law. See *Olin*, supra, at 574 and *Federated Answering Service*, 288 NLRB 341 (1988) (arbitrator's opinion that union waived right to financial data held repugnant to Act where Board found no clear and unmistakable waiver). Any deferral to the award in the case at hand would leave the Charging Union without any right to bargain over the effects of Respondent's implemented reduction of hours for bargaining unit employees, which is

completely contrary to Board law. See *Natomi Hospitals of California, Inc.*, 335 NLRB 901, 902 (2001).

Based on the above, with respect to the arbitrator's award, it is clear that the contractual issue is not factually parallel to the unfair labor practice issue and the arbitrator was not presented generally with the facts relevant to resolving the unfair labor practice. Moreover, the award is not susceptible to an interpretation consistent with the Act, and thus it is palpably wrong and repugnant to the Act. Deferral is therefore inappropriate, and any argument for deferral should be rejected.

II. Respondent was Required to Bargain with the Charging Union over the Effects of its Reduction of Hours for Bargaining Unit Employees Working in the Dietary Department and Failed to do so.

Section 8(d) of the Act provides, in part, that the obligation to bargain collectively means: “[T]he mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” See e.g. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The Supreme Court and the Board have long held that an employer violates its duty to bargain pursuant to Section 8(a)(1) and (5) of the Act by, during the term of a collective-bargaining agreement, without affording notice to its employees' bargaining representative and affording it an opportunity to bargain over the decision and the effects, implementing changes in its bargaining unit employees' terms and conditions of employment absent the agreement of the bargaining representative, an

impasse in negotiations, or a waiver by the bargaining representative. *NLRB v. Katz*, 369 U.S. 736 (1962); *Daily News of Los Angeles*, 315 NLRB 1236, 1238 (1994).

Absent waiver or impasse, Respondent's decision to reduce the hours of bargaining unit employees within the dietary department represented a term and condition of employment that required it to bargain with the Charging Union over such a change.¹⁰ Arguably, under Articles 3 and 4 of the parties' collective bargaining agreement, the Charging Union waived its right to bargain over Respondent's *decision* to reduce bargaining unit employees' hours. (JT 2, pp. 62-63) Thus, the complaint does not allege, nor is Counsel for the General Counsel contending, that Respondent's decision to reduce bargaining unit employees' hours without bargaining with the Charging Union is a violation of the Act.

However, Board law is clear that even if Articles 3 and 4 operated as a waiver of the Charging Union's right to bargain over the Respondent's decision to make wholesale reductions to the work hours of unit employees in the dietary department, Respondent's failure to bargain about the effects of those reductions was unlawful. *Natomi Hospitals of California, Inc.*, 335 NLRB 901, 902 (2001). Indeed, the Board held that an employer has an obligation to give a union notice and an opportunity to bargain about the effects on unit employees of a managerial decision even if it has no obligation to bargain about the decision itself.¹¹ Contractual language waiving a Union's bargaining rights as to a certain

¹⁰ Respondent never asserted it was at impasse with the Charging Union in regard to the reduction of hours of dietary employees.

¹¹ *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981). Although in the present case Respondent was not obligated to bargain over its decision to reduce

decision does not constitute a waiver of the right to bargain over that decision's effects.

Id.¹²

While language in the collective bargaining agreement operated as a waiver with respect to Respondent's decision to reduce hours, no such waiver exists with respect to effects bargaining. In *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-813 (2007), the Board reaffirmed its long-held position that a purported contractual waiver of a union's right to bargain is effective only if the relinquishment was "clear and unmistakable." In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), the Supreme Court held that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" Absent specific contractual language, an employer claiming a waiver must show that "the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter." *Airo Die Casting, Inc.*, 354 NLRB 92, 93 (2009), citing *Trojan Yacht*, 319 NLRB 741, 742 (1995). See also *Allison Corp.*, 330 NLRB 1363, 1365 (2000).

In the instant case, no such "clear and unmistakable" waiver existed with respect to effects bargaining. Nothing in the parties' collective bargaining agreement even mentions effects bargaining. At trial, Respondent failed to provide any evidence that

hours based on contractual waiver, rather than because the decision does not fall within the statutory scope of bargaining, the principle remains the same.

¹² At trial, Respondent relies on *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir 2005), for the proposition that when a union contractually waives its right to bargain over the implementation of a mandatory subject, it also waives its right to bargain over the effects of the implementation, notwithstanding the fact there was no language in the contract where the union specifically waived its right to effects bargaining. However, an administrative law judge is obligated to follow and apply established Board precedent rather than contrary court authority. See *Ford Motor Company (Chicago Stamping Plant)*, 230 NLRB 716 (1977).

effects bargaining was “fully discussed and consciously explored” and that the Charging Union “consciously yielded its interest in the matter.” *Airo Die Casting*, supra, at 93. The contractual language waiving the Charging Union's bargaining rights as to Respondent's decision to reduce dietary employees' hours does not constitute a waiver of the right to bargain over that decision's effects. *Natomi*, supra, at 902.

There can be no debate that Respondent did not offer to bargain over the effects of its September 2011 decision to reduce hours of dietary employees, given Fowlkes' credible and un rebutted testimony at hearing as well as Respondent's own admission that, “As for effects bargaining, this was never requested by the [Charging] Union, nor would it have been required had it been requested.” (Tr. 39, GC 4, p. 3)

1. The Charging Union was not required to request effects bargaining.

Under the facts presented in the instant case, in contending that the Charging Union never requested effects bargaining, Respondent makes a distinction without a difference. The Board has repeatedly held that a union's failure to request effects bargaining does not constitute a waiver of the right to bargain over effects if an employer fails to give timely notice to the union, presents a decision to the employees as a fait accompli, or otherwise indicates that requests for effects bargaining would be futile. See *Seaport Printing*, 351 NLRB 1269, 1270 (2007) (finding that respondent violated Section 8(a)(5) because any request for bargaining over effects would have been futile (citing *Smith & Johnson Construction Co.*, 324 NLRB 970 (1991)(no obligation to request bargaining where such a request would be futile)); and *Gannett Co.*, 333 NLRB 355, 359 (2001) (A union does not waive its right to bargain over effects when presented

with a fait accompli). The issues of “fait accompli,” “request to bargain,” and “waiver” are related in the sense that a finding of fait accompli will prevent a finding that a failure to request bargaining is a waiver. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-1024 (2001).

At trial, Knowles credibly testified that Respondent presented the Charging Union with a fait accompli by failing to provide any advanced notice regarding the across-the-board reduction of hours in the dietary department. (Tr. 25, 54) Szkutnik testified at the hearing and did not deny Knowles testimony on this point. In light of Szkutnik’s presence in the witness box and her failure to contest Knowles’ account of the events surrounding Respondent’s apparently inaccurate denial that employee hours had been reduced, an adverse inference should be drawn. *L.D. Brinkman Southeast*, 261 NLRB 204, fn. 1 (1982)(citing *NLRB v. Laredo Coca-Coal Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980), cert. denied 449 U.S. 889). In fact, in Knowles’ unrebutted testimony, she confirmed that Respondent, whether intentionally or unintentionally, misled her as to any reduction in hours, with Lucka and Szkutnik incorrectly asserting that no such reduction had taken place. (Tr. 25, 54) Given Respondent’s untimely notice as to the September 2011 reduction in hours, any demand by the Charging Union for bargaining would have been futile and thus, it was not obligated to request effects bargaining. *Seaport Printing*, supra, at 1270.

2. Neither the reduction in Medicare funding nor the State survey relieved Respondent from its obligation to bargain over effects.

While Respondent does not specifically assert that exigent circumstances surrounding the low census, e.g., the reduction in Federal Medicare funding and the State survey, made bargaining with the Charging Union impossible at the time, it certainly appears to be implied. However, Respondent did not provide any evidence as to when it learned of the reduced Medicare funding, or when it became apparent that the State survey would curtail the admission of patients into the facility. Thus, Respondent failed to meet its “heavy burden” with respect to showing that the issues it faced in September 2011 were so “compelling and unforeseen” so as to relieve it from its obligation to bargain with the Charging Union. See *Seaport Printing*, supra at 1269 (the Board found that an impending hurricane was an economic exigency that necessitated the closing of a facility and resulted in the forced layoff of employees and excused the employer from bargaining over the layoff decision, but did not excuse the employer from bargaining over the effects of its layoff decision). See also *Our Lady of Lourdes Health Center*, 306 NLRB 337, 340 fn. 6 (1992); *RBE Electronics of S.D.*, 320 NLRB 80 at 81 and 82 (1995); *Winn-Dixie Stores*, 243 NLRB 972, 974 fn. 9 (1979). Furthermore, even if Respondent had shown that the issues it faced were compelling and unforeseen, it nonetheless would be required to bargain over the effects of its decision to reduce the hours of bargaining unit employees. *Seaport Printing* supra. Given the relevant Board law as it relates to the evidence presented at trial, Respondent was not excused from effects bargaining with the Charging Union.

3. There was no established past practice with respect to across the board reductions in hours within the dietary department.

At trial, through the testimony of Szkutnik, as well as in the underlying arbitration hearing, Respondent attempts to raise a past practice defense with respect to the September 2011 reduction in hours. (Tr. 76; JT 2, p. 15-17) The Board in *Eugene Iovine, Inc.*, 353 NLRB 400, 400 (2008), enfd. No. 09-0217-ag (2d Cir. 2010), noted the evidentiary standard for determining the sufficiency of the pattern or frequency of occurrence of the past practice:

The party asserting the existence of a past practice bears the burden of proof on the issue and the evidence must show that the practice occurred “with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed. Appx. 65 (D.C. Cir. 2004).

As discussed above, there was some testimony in the underlying arbitration hearing that employees were, at an unspecified time, offered “voluntary reductions,” based on seniority. (JT 2, p. 15-17) Respondent provided no evidence at trial as to the regularity and frequency of such voluntary reductions. Moreover, these voluntary reductions appear to be quite different than the wholesale, across-the-board mandatory reductions in employee hours implemented in September 2011 for the entire dietary department. Respondent provided no example of these across the board mandatory reductions other than the reduction of hours at issue in the instant case. Given the lack of evidence presented at trial as to previously implemented reductions in hours of employees, it is clear that Respondent has not met its burden.

4. The reduction in hours was a material and substantial change.

Respondent, as part of its affirmative defenses, contends that the across-the-board reduction of hours in the dietary department was de minimus and insufficient to trigger an obligation to engage in effects bargaining. (GC 1(e), p. 5) However, one need only review the dietary department schedule before and after the September 2011 reduction in to ascertain that its actions were more than merely de minimus. Indeed, the reductions were material and substantial. (JT 2, 320-326; R 3, pp. 8, 11) Of the four full-time bargaining unit positions in the dietary, employees in two positions had their hours reduced by 2.5 hours a day and of the employees employed in the four part-time positions, two were eliminated and had their hours reduced by one hour per day. (R 3, pp. 8, 11) Mitter testified at the arbitration hearing that she implemented the schedule in September 2011, in response to the extremely low census. (JT 2, pp. 17, 23) Mitter further testified that, as of June 6, 2012, the date of the arbitration hearing, Respondent had not yet been unable to attain its pre-September 2011 resident levels and as a result, the reduced staffing levels remain largely in effect. (JT 2, pp. 17, 23)

The Board has consistently found an employer's unilateral implementation over items with much less economic impact to be material and substantial. *Exxel-Atmos*, 323 NLRB 884, 885-886 (1997)(\$100 Christmas bonus); *Bell Atlantic Corp.*, 332 NLRB 1592, 1595 (2000) (employer unilaterally instituted a surcharge of \$1 to \$5 per pay period on employees' salaries subject to garnishment); *Rangaire Co.*, 309 NLRB 1043 (1992) (unilateral change by eliminating 15-minute paid Thanksgiving lunch break); *Xidex Corp.*, 297 NLRB 110, 115 (1989), enfd. 924 F.2d 245, 253 (D.C. Cir. 1991)

(change from a 30-minute unpaid lunch break to a 15-minute paid lunch break, which lasted only two days); *Litton Microwave Cooking Products*, 300 NLRB 324, 426 (1990), enfd. 949 F.2d 249, 251-252 (8th Cir. 1991) (employer discontinued practice of granting extra paid half hour lunch period before Christmas); *NLRB v. Beverly Enterprises-Massachusetts*, 174 F.3d 13, 28-30 (implementation of \$5 fee for lost timecard not de minimus); *Millard Processing Services*, 310 NLRB 421, 424-425 (1993) (unilateral implementation of \$15 fee for replacement of lost paychecks found to be a material, substantial, and significant change in employment terms); *Owens-Corning Fiberglass*, 282 NLRB 609, 612-613 (1987) (unilateral modification of employee purchase program, calculated by administrative law judge to average \$112.85 per employee per year).

Given that under the terms of the parties' collective bargaining agreement, the minimum wage rate is \$8.25 per hour, and given that Respondent contends that reduced staffing levels remained in effect at least through June 6, 2012, the economic loss of the affected dietary employees is material and substantial, particularly in light of relevant case law, cited above. As such, Respondent cannot realistically claim that the reduction of hours it implemented was de minimus and that it had no obligation to bargain with the Charging Union. See, e.g., *Exxel-Atmos*, 323 NLRB 884, 885-886 (1997); *Bell Atlantic Corp.*, 332 NLRB 1592, 1595 (2000); *Rangaire Co.*, 309 NLRB 1043 (1992); see also, *Natomi Hospitals of California, Inc.*, 335 NLRB 901, 902 (2001).

III. CONCLUSION, REMEDY SOUGHT, AND PROPOSED ORDER

Counsel for the General Counsel respectfully submits that the evidence herein conclusively demonstrates that Respondent violated Sections 8(a)(1) and (5) of the Act as alleged in the Complaint and as fully discussed in this brief. To remedy Respondent's violations, Counsel for the General Counsel requests an appropriate Order and Remedy, including a make whole remedy providing Khadijah Anderson, Eartha Bell, Clondia Finley, Dion Lockett, Stacey Miller, Felicia Slater, Laura Gonzales, Joanne Wood, John Ross and Angela Valentez full backpay, with interest as directed under *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) and any other remedies deemed appropriate. In addition, the Administrative Law Judge is respectfully requested to direct Respondent to post an appropriate Notice to Employees.¹³

Furthermore, as part of the remedy for the unfair labor practices alleged herein, Counsel for the General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no violation of the Act and that Respondent be required to submit the appropriate documentation to the Social Security Administration as set forth in IRS Publication 975 so that when backpay is paid, it will be allocated to the appropriate calendar quarters.

The requested remedy regarding the reporting the Social Security Administration (SSA) is necessary to make the discriminatees whole. This is because the SSA credits backpay awarded to an individual's earnings record in the year reported by the employer.

¹³ Counsel for the General Counsel has submitted a Proposed Notice to Employees which is attached hereto.

Accordingly, backpay is not credited to the proper year in which it would have been earned in the absence of a violation of the Act. This could easily result in dramatically lower social security benefits or, worse yet, a failure to meet the requirements for benefits at all. For this reason, Respondent should be required to complete the appropriate paperwork as set forth in IRS Publication 975 to notify the SSA what periods to which the backpay for Khadijah Anderson, Eartha Bell, Clondia Finley, Dion Lockett, Stacey Miller, Felicia Slater, Laura Gonzales, Joanne Wood, John Ross and Angela Valentez should be allocated.

Based on the entire record in this case and for the reasons advanced above, it is respectfully submitted that Respondent has committed the unfair labor practices charged and litigated and that the remedy prayed for in the complaint and any other relief deemed appropriate be granted in full.

Respectfully submitted this 21ST day of February 2013.



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PROPOSED NOTICE

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to meet and bargain in good faith with SEIU Healthcare Michigan (the Union), as the employees' representative in dealing with us regarding wages, hours, and other working conditions of the employees in the following unit (the Unit):

All full-time and regular part-time nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees and cooks employed by us at our facility located at 105 N. Haggerty Road, Plymouth, Michigan, but excluding registered nurses, licensed practical nurses, administrators, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT fail or refuse to meet and discuss in good faith with your Union the effects of our decision to reduce the hours of certain Unit employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL NOT in any like or related manner fail or refuse to bargain collectively and in good faith with the Union as the exclusive collective bargaining representative of Unit employees.

WE WILL restore Unit employees' work hours to what they were before we changed them in September 2011.

WE WILL, upon request, meet and bargain collectively and in good faith with the Union regarding the effects of our decision to reduce the hours of certain Unit employees.

WE WILL recognize and bargain in good faith with the Union as the exclusive collective bargaining representative of our employees in the Unit with respect to wages, hours and other terms and conditions of employment.

WE WILL pay Unit employees Khadijah Anderson, Eartha Bell, Clondia Finley, Dion Luckett, Stacey Miller, Felicia Slater, Laura Gonzales, Joanne Wood, John Ross and Angela Valentez for the wages and other benefits they lost because we reduced their work hours.

**HCR ManorCare, Inc., 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. We conduct secret-ballot elections to determine

whether employees want union representation and we investigate and remedy 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 or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

Telephone:

Hours of Operation:

CERTIFICATE OF SERVICE

I certify that on the 21st day of February 2013, I electronically served copies of Counsel for the General Counsel's Brief to the Administrative Law Judge on the following parties of record:

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Counsel for the General Counsel

ATTACHMENT D

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

HEARTLAND-PLYMOUTH COURT MI,)
LLC, d/b/a HEARTLAND HEALTH CARE)
CENTER-PLYMOUTH COURT,)
)
Respondent,)
)
and)
)
SEIU HEALTHCARE MICHIGAN,)
)
Charging Union.)
_____)

Case No. 07-CA-070626

RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

NOW COMES Heartland-Plymouth Court MI, LLC, d/b/a Heartland Health Care Center-Plymouth Court, Respondent herein, and files the following exceptions to the Administrative Law Judge's (ALJ's) Decision, which issued on March 12, 2013:

1. Respondent excepts to the ALJ's drawing of an adverse inference from Respondent's failure to question witness Karen Szkutnik regarding statements made during a telephone conversation, on the grounds that Fowlkes' testimony on this issue was simply not controverted by Respondent and drawing an "adverse inference" was inappropriate and unnecessary. (JD 2: 21-26).

2. Respondent excepts to the ALJ's drawing of an adverse inference from Respondent's failure to call former Administrator Bret Lucka as a witness, on the grounds that Fowlkes' testimony was simply not controverted by Respondent and drawing an "adverse inference" was inappropriate and unnecessary. (JD 2: 27-33).

3. Respondent excepts to the ALJ's improper conclusion that "Finley's bi-monthly hours were reduced from 80 to between 54 and 60," on the grounds that this finding is not supported by the record evidence and is clearly erroneous. (JD 3: 40-41).
4. Respondent excepts to the ALJ's reliance on *Good Samaritan Hospital*, 335 NLRB 901 (2001), and his characterization of that decision as standing for "the proposition that effects bargaining is required even when the employer has no obligation to bargain about the decision itself because of contractual management-rights language," on the grounds that such reliance is erroneous as a matter of law . (JD 6: 12-20).
5. Respondent excepts to the ALJ's refusal to consider or follow the decision of the D.C. Circuit Court of Appeals in *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005), on the grounds that ignoring controlling precedent is erroneous as a matter of law. (JD 6: 30-34).
6. Respondent excepts to the ALJ's finding/conclusion that neither the management-rights article nor the zipper clause address effects bargaining, on the grounds that this finding/conclusion is not supported by the record and is erroneous as a matter of law. (JD 6: 45-47)
7. Respondent excepts to the ALJ's reliance on *Good Samaritan Hospital*, 335 NLRB 901 (2001), and his conclusion that Respondent did not adequately distinguish that decision, on the grounds that this conclusion is unsupported by the record and is erroneous as a matter of law. (JD 7: 1-9).

8. Respondent excepts to the ALJ's finding/conclusion that, while "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," on the grounds that this finding/conclusion is not supported by the record evidence and is erroneous as a matter of law. (JD 7: 20-23).
9. Respondent excepts to the ALJ's refusal to "find that Respondent has met its burden of establishing that the union 'clearly intend[ed], express[ed], and manifest[ed] a conscious relinquishment' of its right to engage in effects bargaining," on the grounds that a finding of waiver is established by the record and is required as a matter of law. (JD 7: 25-28).
10. Respondent excepts to the ALJ's refusal to consider the record evidence from the underlying Arbitration hearing and his findings/conclusions that the "record is totally devoid of any foundational requirement necessary for admissible evidence in a formal proceeding;" that the testimony of Malone at the Arbitration hearing was "not sufficiently developed ... to constitute admissible evidence in a formal proceeding," and that "Fowlkes was the only witness who testified, without controversion, about communications that the union had with management over the reduction in hours," on the grounds that these findings and/or conclusions are not supported by the record evidence and are erroneous as a matter of law. (JD 7: 29-42).).
11. Respondent excepts to the ALJ's findings and/or conclusions that "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," on the

grounds that these findings and/or conclusions are not supported by the record evidence and are erroneous as a matter of law. (JD 7: 45-48).

12. Respondent excepts to the ALJ's improper application of *Olin Corp*, 268 NLRB 573 (1984) and his improper finding that the General Counsel met its burden of proof in opposing deferral, on the grounds that these findings and/or conclusions are not supported by record evidence and are erroneous as a matter of law. (JD 8: 7-45).
13. Respondent excepts to the ALJ's finding that "there can be no doubt that the evidence pertinent to effects bargaining was not meaningfully or fully presented at the arbitration hearing," on the grounds that this finding is not supported by the record evidence and is erroneous as a matter of law. (JD 8: 43-45).
14. Respondent excepts to the ALJ's findings/conclusions 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" and that "the issue of whether the Respondent violated its duty to engage in effects bargaining remains litigable before the Board," on the grounds that these findings/conclusions are not supported by the record evidence and are erroneous as a matter of law. (JD 9: 1-7).
15. Respondent excepts to the ALJ's conclusion 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," on the grounds that these findings and/or conclusions are not supported by the record evidence and are erroneous as a matter of law. (JD 9: 8-12).

16. Respondent excepts to the ALJ's Conclusion of Law Number 3, on the grounds that it is not supported by the record evidence and is erroneous as a matter of law. (JD 9: 18-23).
17. Respondent excepts to the ALJ's proposed *Transmarine* remedy, on the grounds that the Remedy is inconsistent with the record evidence, erroneous as a matter of law, and does not effectuate the purposes of the Act.¹ (JD 9: 24-50; 10: 1-28).
18. Respondent excepts to the ALJ's proposed Order on the grounds that the Order is inconsistent with the record evidence, erroneous as a matter of law, punitive in nature, and does not effectuate the purposes of the Act. (JD 10: 33-50; 11: 1-40).
19. Respondent excepts to paragraph 2 (a) of the ALJ's Order to make employees whole, on the grounds that this remedy is inconsistent with the record evidence, erroneous as a matter of law, punitive in nature, and does not effectuate the purposes of the Act. (JD 11: 5-10).
20. Respondent excepts to the ALJ's failure to apply a "contract coverage" analysis, on the grounds that this is the proper standard under the Act.
21. Respondent excepts to the ALJ's refusal to defer to Arbitrator Glendon's decision, on the grounds that deferral is required as a matter of law.
22. Respondent excepts to the ALJ's failure to dismiss the complaint in its entirety, on the grounds dismissal is required by the record and established law.

¹ *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

23. Respondent excepts to the ALJ's proposed Notice To Employees, on the grounds that the record fails to support any unfair labor practice findings and a make-whole remedy is inappropriate.

Respectfully submitted this 16th day of April, 2013.

/s/ Clifford H. Nelson, Jr.

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CERTIFICATE OF SERVICE

I, Charles P. Roberts III, do hereby certify that the foregoing Exceptions has this day been served by electronic filing to the Executive Secretary, National Labor Relations Board, and that the following persons have been served via electronic copy:

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Dated this 16th day of April, 2013

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ATTACHMENT E

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

HEARTLAND-PLYMOUTH COURT MI,)
LLC, d/b/a HEARTLAND HEALTH CARE)
CENTER-PLYMOUTH COURT,)

Respondent,)

and)

SEIU HEALTHCARE MICHIGAN,)

Charging Union.)

Case No. 07-CA-070626

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

HEARTLAND-PLYMOUTH COURT MI,)
LLC, d/b/a HEARTLAND HEALTH CARE)
CENTER-PLYMOUTH COURT,)
)
Respondent,)
)
and)
)
SEIU HEALTHCARE MICHIGAN,)
)
Charging Union.)

Case No. 07-CA-070626

**RESPONDENT’S BRIEF IN SUPPORT OF EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE’S DECISION**

COMES NOW, Heartland-Plymouth Court MI, LLC, d/b/a Heartland Health Care Center-Plymouth Court (hereafter referred to as “Respondent” or “Plymouth Court”) and files its Brief In Support of Exceptions to Administrative Law Judge’s Decision, as follows:

STATEMENT OF CASE

In September 2011, Respondent, reacting to a sudden decline in its patent census, implemented a reduction of hours within the dietary department. SEIU Healthcare Michigan (“the Union”) responded by filing a class action grievance on November 9, 2011. On December 13, 2011, the Union filed an unfair labor practice charge alleging Respondent had “made unilateral changes to the working terms and conditions of the employees, in violation of section 8(a)(5) of the Act.”

Following the exhaustion of the grievance procedure, the dispute proceeded to arbitration, and the charge was held in abeyance pending the outcome of the arbitration hearing, which was held on June 6, 2012, in Detroit, Michigan, before Arbitrator Paul E. Glendon.

Arbitrator Glendon issued his decision on August 1, 2012, in which he denied the grievance in its entirety. The Regional Director, however, refused to defer to the arbitral award, and on November 27, 2012, the Regional Director issued a Complaint alleging that Respondent had violated the Act by reducing the work hours of several unit employee “without affording the Charging Union a meaningful opportunity to bargain with Respondent with respect to the effects of this conduct.” Respondent filed a timely Answer to the Complaint, denying the material allegations.

A hearing on the unfair labor practice charge was held before Administrative Law Judge Ira Sandron (“ALJ” or “judge”) on January 14, 2013 in Detroit, Michigan. On March 12, 2013, ALJ Sandron issued his Decision, finding that Respondent violated the Act by failing to bargain with the Union over the effects of the reduction in hours. Respondent now files Exceptions to the ALJ’s Decision and this Brief In Support Of Exceptions.

STATEMENT OF FACTS

A. The Reduction In Hours

Plymouth Court is a 109-bed facility providing long-term care, as well as skilled nursing rehabilitation, for patients in Plymouth, Michigan. (Jt. Exh. 2 --Arb. Tr. 72). The Union represents a unit of “all full-time and regular part-time nurses’ aides, housekeeping employees, laundry employees, maintenance employees and cooks employed by the employer at its facility at 105 Haggerty Road, Plymouth, Michigan.” (Jt. Exh. 2 -- Arb. Tr. 6-7). The terms and conditions of employment for the unit employees are set forth in a written collective bargaining agreement, effective by its terms from July 8, 2011 through July 8, 2014. (Jt. Exh. 2). This agreement contains a management rights clause, (Article 3), which grants management a wide array of rights, including the right to determine the extent to which departments would be operated and work would be performed, as wells the right “to determine and change starting

times, quitting times, and shifts.” Article 4 of the agreement addresses the subject of “hours of work and overtime,” and provides that although a normal work day is 8 hours, “[n]othing contained herein shall guarantee to any employee any number of hours of work per day or week.”

In September 2011, Respondent experienced a serious decline in patient census as a result of federal regulations that significantly curtailed Medicare funding, as well as a state inspection that temporarily halted new admissions. (Tr. 71-72; Jt. Exh. 2 – Empl. Exh. 8). Employee staffing levels are entirely dependent on the patient census (typically, the census is predicted at 90; during September, the census dropped to 60); accordingly, in order to remain within budget, it became necessary to implement a reduction of hours for many of the dietary department employees. In response to this drop in census, Cari Mitter, Director of Food and Nutrition at Plymouth Court, cut employee hours according to seniority. Mitter, however, provided employees the opportunity make up their lost hours by posting open shifts. (Tr. 70-73; Jt. Exh. 2 -- Arb. Tr. 72-77, 82-83).

B. Meetings And Discussions Between Union And Respondent

The only witness for the Acting General Counsel (AGC) was the Director of Representation for the Union’s nursing home division, Kim Fowlkes. According to Fowlkes, she only became aware of the reduction in hours for dietary employees when she was conducting a routine site visit at the facility in November 2011:

I was at the facility on a routine site visit, and as I recall an employee, Felicia Slater, approached me. Actually she ran up to me, and she said that there were full-time workers in her department whose hours were being cut, and she said that it had been happening for a while. I know she mentioned that it started happening like back in September, and we were like early in November sometime or whatever when she told me, and I told her that what I would do was investigate the situation, which I did.

(Tr. 21.).

Fowlkes testified that she then contacted both Karen Szkutnik and the facility administrator, Bret Lucka, to inquire about the reduced hours and that both claimed to be unaware of the reductions in the dietary department. (Tr. 25). Fowlkes then contacted Brandi Malone, whom Fowlkes identified as the Acting Union Steward, and Malone confirmed that Slater had also complained to her about the reduction in hours. (Tr. 27-28). Following the conversation with Malone, Fowlkes testified that she instructed Malone to file the class action grievance about the reduction. (Tr. 30; Jt. Exh. 2 -- p. 48). The grievance was actually filed on November 9, 2011.

Malone, however, testified at the arbitration hearing that she was a Union Steward and that following the reduction in hours, she had multiple meetings with management in which an agreement was reached to restore the hours of all dietary employees except for Clondia Finley. (Jt. Exh. 2 – Arb. Tr. 17-19). Malone testified that she actually drafted the Union's grievance, but that Felicia Slater signed it because Malone and the other Union Steward were going out on a medical leave. (Jt. Exh. 2 – Arb. Tr. 16).

Throughout the unfair labor practice hearing, several witnesses referred to the fact that while many employees' hours had been cut, the majority of the dietary workers subsequently had their hours restored. Fowlkes testified that she knew of an employee named "Belle" having her hours reduced; later, according to Fowlkes, "they took care of Belle's problem." (Tr. 40). Fowlkes further noted that, "I know that Felicia Slater had a problems [sic] but she fixed hers." (Tr. 40). By November 2011, the majority of employees had returned to their normal working hours as a result. Karen Szkutnik, Respondent's Regional Human Resources Manager, testified at the unfair labor practice hearing that Cari Mitter "added hours back when they could." (Tr.

73). At the arbitration, Mitter explained that initially, an even larger number of employees had seen their hours reduced; in addition to Clondia Finley, Mitter named “Khadijah Anderson, Eartha Finley, Dion Luckett, Stacey Miller, Felicia Slater, Laura Gonzales, Joann Wood, John Ross, [and] Angela Vasquez” as other employees who were affected by the reduction. (Jt. Exh. 2 -- Arb. Tr. 85). During the arbitration hearing, the Union repeatedly emphasized the number of meetings that were held between Malone and management *prior* to the filing of the grievance. In the Union’s post-arbitration brief, it notes that, “Per the testimony of Steward Brandi Malone, the Union complained to Management, and meetings were held with Management, to discuss the issue. Some areas of concern were worked out and in some cases, hours were restored, however, Ms. Clondia Finley testified that she remained at the reduced level of hours. (p. 17-18 transcript).” (R. Exh. 2; p. 4). The Union’s opening statement, which appears in the arbitration transcript, is equally on point:

On or around September of last year, 2011, the employer reduced the working hours of several full-time employees, including Clondia Finley and others, from 80 hours to approximately 60 to 64 hours per pay period. The union complained to management, and in fact, they had a number of meetings to discuss what the union believed to be a contract violation as it was related to the reduction of the work hours. Many of – the employer restored many of the hours of the workers, but not all, and in the case of some of the cooks [...] their hours were not restored. And it’s the position of the Union that this reduction of hours is a violation of the contract, and as a result, Steward Felicia Slater, along with Brandi Malone, filed a class action grievance to protest the violation.

(Jt. Exh. 2 -- Arb. Tr. 7).

The testimony of Malone further demonstrates that meetings between herself (in her official role as Union steward) and members of management occurred at the time the reductions were made, and prior to the filing of the grievance:

Q: During the time you had reductions, did you have meetings with management?

A: Yes, because we couldn't understand why Ms. Finley was still going home and Rickie Barkoff was coming in and getting 80 hours.

Q: As a result of some of your meetings, were there some employees who had been reduced that were returned to full-time hours?

A: Yes, they asked Ms. Finley – they worked out an agreement with Ms. Eartha Finley to keep her hours, but Clondia was the only one in the kitchen that didn't return to her normal hours.

Q: You said Clondia. Is that Clondia Finley?

A: Yes.

Q: And it was Ms. Finley's continued reduction in hours that prompted the grievance before us today?

A: Yes.

(Jt. Exh. 2; Arb. Tr. p. 17-18).

In short, it appears that either before, or at the outset of the reduction, Mitter and Malone began meeting to discuss ways to alleviate the effects of the cuts. As a result of their discussions, the Union's concerns were fully addressed, except with respect to Clondia Finley, whose circumstances were discussed during the grievance procedure. On December 5, 2011, a grievance meeting was attended by Fowlkes, Slater, Finley, Lucka, Szkutnik, and another management representative. During this meeting, Fowlkes argued that Respondent did not have the right to reduce hours; Szkutnik disagreed. (Tr. 58). Szkutnik again offered Finley an opportunity to make up lost hours by working different shifts, and Finley again refused this offer. (Tr. 54; 44). Fowlkes did not propose any solution to the problem other than reinstating all employees' hours. (Tr. 55-56; 37). Subsequently, on December 19, 2011, Fowlkes and Szkutnik spoke by telephone, and Szkutnik again proposed a solution by which Finley could make up any lost hours if she worked a double shift; Fowlkes refused this option. (Tr. 44). On December 20,

2011, Szkutnik sent Fowlkes an email, constituting the Respondent's third step response to the Union's grievance, which stated: "Per our phone conversation yesterday you have notified me that despite our proposed solutions to this issue you will proceed with the arbitration. Please consider this our response to the grievance." (Tr. 44-45; GC Exh. 2). Fowlkes responded with her own email, which reads as follows:

Karen, I don't know how you figure that you are right, as I stated before. The issue has not been resolved. If it were resolved, a grievance would not have been filed, along with a charge. Your resolution makes no sense at all. I'm not going through this anymore with yourself or Bret. Stop cutting the hours of full time employees, and this issue will be resolved. I was lied to for two months concerning this issue, by [B]ret. If you were right, a charge would not have been filed. The union would be more than willing to drop all charges, and settle this issue, if you give the employees their full time hours back. I have nothing else to say concerning this matter. I'm on vacation, have a great Christmas, and a happy new years.

G.C. Exh. 3.

At this point, the parties proceeded to arbitration; meanwhile, the Region deferred investigation of the unfair labor practice charge, pending that outcome.

C. The Arbitration

On June 6, 2012, an arbitration hearing was held in Livonia, Michigan, before Arbitrator Paul E. Glendon. The record of that proceeding was introduced at the unfair labor practice hearing as Joint Exhibit 2. On August 1, 2012, Arbitrator Glendon issued his decision. (R. Exh. 1). After summarizing the facts, as well as the positions of both the Employer and the Union, the Arbitrator concluded that "[t]he Employer is correct on all counts." Specifically, Arbitrator Glendon found that Respondent's interpretation of the disputed contract language was proper, and that the word "normal" did not create a guarantee of 80 hours of work per pay period for unit employees. After further finding that nothing in Respondent's actions violated the seniority provisions in the collective bargaining agreement, Arbitrator Glendon ultimately concluded that

the Respondent's "reduction of Finley's regularly scheduled work hours below eight per day and/or eighty per pay period did not violate any provision in the agreement, and the grievance must be denied." (R. Exh. 1, p. 5).

ISSUES PRESENTED

1. Whether the Union waived any right it may otherwise have had to bargain over the effects of Respondent's decision to temporarily reduce employee hours? [Exceptions 6, 7, 8, 9, 11, 15, 16, 18, 22, 23]
2. Whether under a "contract coverage" analysis, the Respondent had any further obligation to bargain over the effects of Respondent's decision to temporarily reduce employee hours? [Exceptions 5, 11, 15, 16, 18, 20, 22, 23]
3. Whether the arbitrator's decision is determinative and should be deferred to by the Board? [Exceptions 11, 12, 13, 14, 16, 18, 22, 23]
4. Whether the Union made any request to bargain over effects, or alternatively, whether Respondent satisfied any effects bargaining obligation it may have had? [Exceptions 1, 2, 3, 8, 10, 11, 18, 22, 23]
5. Whether there was any "effects bargaining" obligation with respect to Respondent's decision to temporarily reduce employee hours? [Exceptions 11, 15, 18, 22, 23]
6. Whether, if an effects bargaining violation is found, a *Transmarine Navigation* remedy is appropriate? [Exceptions 17, 18, 19]

ARGUMENT

A. **The Union Waived Any Right To Bargain Over The "Effects" Of Respondent's Decision To Temporarily Reduce Employee Hours.**

Although Respondent contends that a "contract coverage" rather than a "waiver" analysis is appropriate when the issue involves the proper interpretation of contractual language, it is

clear that the collective bargaining agreement did “waive” any right the Union may have had to bargain over the “effects” (if any) of Respondent’s decision to reduce employee hours. This waiver flows ineluctably from Articles 3, 4, and 25 of the collective bargaining agreement, which must be read in harmony:

ARTICLE 3
Management Rights

Section 1. The Employer shall retain all rights and authority it had prior to entering into this Agreement, including, but not limited to, the unrestricted right to: manage the Center and to direct the work force; to determine and change the methods and manner of patient care; to determine and change the size and composition of the work force; to determine the extent to which and the manner and means the Center and its various departments shall be operated or shut down; to determine whether and to what extent any work shall be performed by employees; to maintain order and efficiency in the convalescent center and its operations, including the right to select, hire, promote, lay off, assign and train employees; to select and determine supervisory employees, to determine and change starting times, quitting times and shifts; to determine and change methods and means by which Center operations are to be carried on; to establish, change and abolish its policies, rules, regulations, practices and standard of conduct and to adopt new policies, rules, regulations, practices and standard of conduct; and to assign duties to employees in accordance with the needs and requirements as determined by the Employer. The exercise of the foregoing powers and rights, together with the adoption of policies, rules, and regulations in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific terms and conditions of this Agreement.

ARTICLE 4
Hours of Work and Overtime

Section 1. For purposes of this Article, eight (8) consecutive hours of service, excluding an unpaid thirty (30) minute lunch period, shall constitute a normal working day for all departments, except Nursing. For employees in Nursing, the normal workday shall consist of seven and one-half (7 ½) hours of service, excluding an unpaid lunch period. The normal work/pay period for a full-time employee shall be ten (10) workdays within a consecutive fourteen (14) day period. The normal work week for all shifts shall be those hours which commence at

12:01 am Wednesday and ends two weeks later at 12:00:59 am on Wednesday. Nothing herein shall guarantee to any employee any number of hours of work per day or week.

ARTICLE 25
Waiver

The parties acknowledge that during the negotiation which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement and attached Memorandum of Understanding. Therefore, the Employer and the Union for the life of this Agreement each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to, bargain collectively with respect to any subjects or matters referred to in this Agreement, 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.

Under a waiver analysis, the waiver must be “clear and unmistakable” and will not be “infer[red] from a general contractual provision . . . unless the undertaking is ‘explicitly stated.’” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983). Here, there is nothing “general” about these articles and the waiver is explicitly stated. We start with what the AGC concedes in his complaint: Respondent acted “pursuant to Articles 3 and 4 of the collective-bargaining agreement” in reducing the work hours of certain employees. Thus, the subject of “hours of work” and Respondent’s rights and obligations regarding this subject are explicitly addressed in Articles 3 and 4. This is important because Article 25, the “Waiver” article, “voluntarily and unqualifiedly waives the right, and each [party] agrees that the other shall not be obligated to, bargain collectively *with respect to any subjects or matters referred to in this Agreement*, 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.” [Emphasis

supplied]. Inasmuch as the subject of work hours is addressed in Articles 3 and 4, the undeniable effect of Article 25 is to waive the right to bargain further on this subject during the term of the agreement. This waiver unambiguously encompasses not only the decision to reduce work hours, but the effects of such decision. There is no requirement that the agreement specifically mention “effects bargaining.”

Explicit waiver or “zipper” clauses are binding, are not repugnant to the Act, and “will be given meaning and effect.” *Radioear Corp.*, 214 NLRB 362, 364 (1974). The Board has long distinguished between using a zipper/waiver clause as a “sword” and using it as a “shield.” *CBS Corp.*, 326 NLRB 861, 861-862 (1998); *GTE Automatic Electric, Inc.*, 261 NLRB 1491, 1491-92 (1982). Such a clause may not be used by either party to justify a unilateral change or to force the other party to engage in mid-term bargaining, but it may be used as a shield to refuse to engage in mid-term bargaining.

The zipper clause in *CBS* was identical to the zipper clause here insofar as the parties “voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement,” but was broader in that it also waived bargaining with regard to non-included subjects or matters “which were discussed during the negotiation of this Agreement.” The Board agreed that the union could use the zipper clause as a shield to refuse to bargain over mid-term subcontracting decisions inasmuch as subcontracting had been discussed during the negotiations. The zipper clause in *GTE* waived the right to bargain mid-term on all subjects and matters, included or non-included, known or unknown. The Board held that the employer could use the clause as a shield to refuse to bargain over a new benefit not provided for in the collective

bargaining agreement and “to maintain the status quo regarding the terms and conditions of employment of unit employees:”

We are of the opinion that, by permitting Respondent to invoke the zipper clause as a shield against the Union’s midterm demand for bargaining over a new benefit, and by giving literal effect to the parties’ waiver of their bargaining rights, industrial peace and collective-bargaining stability will be promoted.

261 NLRB at 1491-92.

The ALJ’s heavy reliance on the Board’s decision in *Good Samaritan Hospital*, 335 NLRB 901 (2001), is misplaced. The Board did not in that case determine that language waiving a right to bargain over a particular management decision would never be sufficient to also waive the right to bargain over the effects of that same decision. Rather, it found that while the agreement language in that case waived the right to bargain over a new staffing matrix, the language was not sufficiently explicit to find a waiver of the right to bargain over the effects of the decision. Notably, in *Good Samaritan*, the only pertinent contractual language was the management rights provision. There was nothing in the collective bargaining agreement that spoke to the effects of changes in the staffing matrix and no zipper clause from which the Board could conclude that there had been an explicit waiver of the right to bargain over the effects of the new staffing matrix. Thus, *Good Samaritan* is clearly distinguishable and does not control the specific waiver issue presented in this case.

Here, none of the three cited articles is determinative by itself; rather, it is the combined effect of the substantive provision regarding “hours of work,” the management rights article, and the waiver/zipper article that demonstrates the clear and unmistakable waiver. A contrary conclusion would effectively nullify the agreement made between the parties. Because the Union

clearly and unmistakably waived the right to bargain over the effects of the decision to reduce employee hours, the Board should dismiss the complaint.

B. Under A “Contract Coverage” Analysis, Respondent Had No Obligation To Bargain Further Over The “Effects” Of The Decision.

Respondent recognizes that the Board has steadfastly refused to follow the “contract coverage” analysis applied by the D.C. Circuit, *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005), the First Circuit, *Bath Marine Draftsmen’s Assoc. v. NLRB*, 475 F.3d 14 (1st Cir. 2007), and the Seventh Circuit, *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); or the two-step hybrid test applied by the Second Circuit. *Local Union 36, IBEW v. NLRB*, 706 F.3d 73 (2d Cir. 2013). Suffice it to say, however, that the ALJ’s decision is effectively doomed to failure by the D.C. Circuit’s *Enloe Medical Center* decision. In *Enloe*, the court refused to enforce a Board order finding that the employer had unlawfully refused to bargain over the effects of a mandatory on-call policy adopted by the employer pursuant to its rights under a collective-bargaining agreement. The court explained:

Whether the parties contemplated that the collective bargaining agreement would treat the effects of a decision separately from the decision itself is just as much a matter of ordinary contract interpretation as is the initial determination of whether the agreement covers the matter altogether. It would be rather unusual, moreover, to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving a union's right to bargain over the effects of that decision. This is not to say that such an interpretation is inconceivable, but it would seem that there would have to be some language or bargaining history to support the proposition that the parties intended to treat the issues separately.

433 F.3d at 838-839.

Here, it is conceded that the collective bargaining agreement gave management the right to reduce employee hours without bargaining with the Union. Further, neither the AGC nor the Union offered any contract language or bargaining history to show that the parties intended to

treat the effects differently than the decision itself. Indeed, unlike *Enloe*, the collective bargaining agreement here contains a zipper clause, which clearly demonstrates that the parties intended the agreement to be the complete resolution of all “subjects” addressed in the agreement and that neither party would be obligated to bargain further with respect to such subjects. Thus, there is no need here to rely on a presumption; the agreement language is dispositive.

The court in *Enloe* further relied upon the union’s own conduct to support its conclusion:

The fact that the parties to the collective bargaining agreement in this case never contemplated a dichotomy between the management rights granted *Enloe* and the effects of those rights is amply demonstrated by the Union's behavior when *Enloe* announced the new mandatory on-call policy. The Union never identified any particular discrete effect about which it was seeking bargaining. Instead, the May 9 e-mail from Union representative Baker asserted that the contract “[did] not give *Enloe* the right to unilaterally change [a registered nurse's] working conditions.” This suggests that the Union was objecting to the on-call policy change itself, and the concluding sentence of the May 9 e-mail-stating that “*Enloe* does not have the ‘right’ to change one's working conditions without first bargaining the impacts with the union”—merges the effects with the policy change. (Indeed, the Union had already filed an unfair labor practices charge on May 5.) Even if a contract distinguished a policy decision from its effects, it would unlikely be interpreted to require the employer to delay the decision while it bargained over effects.

Id. at 839.

The *Enloe* court’s observations are equally applicable here. As the ALJ acknowledged, the Union never requested to bargain over the effects of the decision. Indeed, it made no request to bargain at all. Further, neither the Union, the AGC, nor the ALJ has identified any specific “effects” of Respondent’s decision to temporarily reduce employee hours other than those that are inherent in the decision, i.e., reduced work hours. The Union’s position throughout the grievance process was that the collective bargaining agreement precluded Respondent from reducing employee hours. There was no contention that the reduction in work hours triggered

any other adverse consequences such as layoffs, increased work loads, or expanded job duties (and any such effects would also be covered by the contract). It is readily apparent that there are no effects that fall outside the scope of the decision itself. Inasmuch as the collective bargaining agreement covers both the decision and its effects, dismissal of the complaint is required.

C. The Arbitrator's Decision Is Determinative Of This Contractual Dispute. Deferral Is Required.

The Board's deferral policy is defined by its decisions in *Spielberg Manufacturing Corp.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984). In *Spielberg*, the Board stated that in order to facilitate "the desirable objective of encouraging the voluntary settlement of labor disputes," it would defer to arbitral awards when "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." 112 NLRB at 1082. Following some meandering back and forth regarding the necessity for the arbitrator to have explicitly considered the statutory issue and the proper assignment of the burden of proof, the Board announced in *Olin* that:

We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of

affirmatively demonstrating the defects in the arbitral process or award.

268 NLRB at 574.

“The Board strongly favors deferral to arbitration as a means of encouraging parties to voluntarily resolve unfair labor practice issues such as that involved here.” *Kvaerner Philadelphia Shipyard, Inc.*, 347 NLRB No. 36 (2006). Thus, the burden of a party opposing deferral has been characterized as a “heavy” one. *Aramark Services, Inc.*, 344 NLRB 549, 550 (2005).

Despite the AGC’s complaint allegations, the dispute between the Respondent and the Union has always been contractual in nature and not a dispute over bargaining rights. The Union filed a grievance alleging a contract violation, followed by an unfair labor practice charge alleging that Respondent made an unlawful unilateral change in terms and conditions of employment. Thereafter, the Regional Director deferred the charge to arbitration, explaining his basis for *Collyer* deferral as follows:

1. The Employer and SEIU Healthcare Michigan have a collective-bargaining agreement currently in effect that provides for final and binding arbitration.
2. The Employer’s alleged unlawful unilateral change in work hours of certain employees as alleged in the charge is encompassed by the terms of the collective-bargaining agreement.
3. The Employer is willing to process a grievance concerning the issues in the charge, and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.
4. Since the issues in the charge appear to be covered by provisions of the collective-bargaining agreement, it is likely that the issues may be resolved through the grievance/arbitration procedure.

(Jt. Exh. 2).

At the arbitration hearing, the Respondent argued that the collective-bargaining agreement explicitly authorized it to reduce employee hours. It relied upon articles 2, 3, and 4 of the agreement. The Union argued that the agreement, particularly articles 4 and 8, precluded the Respondent from changing employee hours. Based on his review of the agreement and the evidence presented, Arbitrator Glendon concluded that Respondent was “correct on all counts.” Thus, he denied the grievance.

All of the criteria for deferral have been satisfied. The arbitrator was presented with a contractual dispute that was factually parallel to the alleged unlawful unilateral change. The parties presented the evidence generally relevant to that issue and the arbitrator determined that Respondent had not violated the collective bargaining agreement in any respect. There is no contention that the proceedings were not fair and regular. Finally, the arbitrator’s decision is not repugnant to the Act.

The ALJ declined to defer based on his conclusions that “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” and “the evidence pertinent to effects bargaining was not meaningfully or fully presented at the arbitration hearing” by either party. (JD 8: 29-31, 43-45). But this analysis is inconsistent with Board law. When section 8(a)(5) unilateral change allegations—which is what the charge alleges without any reference to decision or effects bargaining—are deferred to arbitration, the parties and the arbitrator rarely focus on whether actual bargaining occurred, much less whether a good-faith impasse was reached. Instead, the evidence and the decision almost invariably focus on whether the employer’s actions were in accordance with its contractual rights. The contract interpretation issue is parallel to the statutory issue because “[t]he

presence of contractual authorization for the respondent's action is determinative of the unfair labor practice allegation." *Dennison National Co.*, 296 NLRB 169, 170 (1989). In *Dennison*, the arbitrator declined to address the union's waiver argument because it was "a statutory issue that must be decided by the NLRB." Nevertheless, the Board deferred to the arbitrator's award. The Board rejected the contention (similar to that adopted here by the ALJ) that the arbitrator was not presented with the facts relevant to the statutory issue:

[T]he record shows that the arbitrator received ample evidence, i.e., the parties contract and evidence of past practice. The Board would necessarily consider the same facts in reaching a decision on the Union's unilateral change allegation.

Id. See also, *Bay Shipbuilding Corp.*, 251 NLRB 809 (1980).

Similarly, in *Smurfit-Stone Container Corp.*, 344 NLRB 658 (2005), the Board declined to find an unlawful unilateral change and deferred to an arbitrator's decision finding that the employer acted within its contractual rights by instituting a new attendance policy. The Board concluded that the arbitrator "adequately addressed the statutory issue by determining the contractual issue." *Id.* at 659. Although the arbitrator may have been influenced by the concept of "inherent management rights," that was not the sole basis for the decision, and "a reasonable interpretation of the arbitrator's decision is that the management rights clause authorized the implementation of the absence control policy." *Id.* The Board further concluded that the award was not repugnant to the Act. The Board reaffirmed that the appropriate "standard for determining whether an arbitral decision is clearly repugnant is whether it is 'susceptible' to an interpretation consistent with the Act." *Id.* at 660. The decision need not be the same one that the Board would reach; thus, "mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award." *Id.* It also is not necessary that the award use any magic phrases such as a "clear and unmistakable waiver." *Id.* at

n. 4 (citing *Southern California Edison*, 310 NLRB 1229, 1231 (1993) and *Olin*, 268 NLRB at 576).

Clearly, the ALJ's reliance on the arbitrator's failure to specifically discuss "effects bargaining" (JD 8: 29-34) is misguided. The arbitrator also did not discuss whether any bargaining occurred with respect to the decision itself; yet, the AGC effectively deferred to the arbitrator's decision by choosing not to allege a decision bargaining violation. The effects bargaining issue was encompassed in the grievance every bit as much as the decision bargaining issue.

In these circumstances, the Board's deferral policy requires that the complaint allegations be dismissed.

D. The Union Never Made A Request To Bargain Over The Effects Of The Decision. Alternatively, The Respondent Satisfied Its Effects Bargaining Obligation.

The ALJ conceded that "the Union never specifically requested effects bargaining per se," but found that "such a request was implicit in its grievance and its request that the status quo ante be restored." (JD 7: 20-24). This was error. Although the Board found in *Rochester Gas & Electric Corp.*, 355 NLRB 507 (2010) that a grievance was sufficient in that case to constitute a request to engage in effects bargaining, the Board found otherwise in *Noblit Bros.*, 305 NLRB 329 (1992). Thus, each case must be addressed on its own merits.

Here, at the unfair labor practice hearing, the parties stipulated that although Respondent issued a subpoena requesting any such record in existence, no document has been submitted to demonstrate that the Union has requested effects bargaining at any point either before or after the hours were reduced. (Tr. 67-68; R. Exh. 5.) At no time did the Union or the AGC contend that the grievance was an adequate substitute for a specific request to engage in effects bargaining. In

these circumstances, the Union's failure to request effects bargaining requires dismissal of the complaint.

But if we accept that the grievance was a request to engage in effects bargaining, it surely follows that the grievance/arbitration process itself constituted effects bargaining. After all, the "grievance/arbitration process is part and parcel of the collective bargaining process itself." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The inquiry is not whether the grievance process meets the Board's assessment of adequate effects bargaining. Instead, the inquiry is whether the grievance process actually functioned as designed to its agreed-upon conclusion. It clearly did, and the arbitrator's decision represented the final and binding culmination of the bargaining process.

Contrary to the ALJ's conclusions, it is also clear that the parties engaged in substantive effects bargaining prior to the grievance process being invoked. The ALJ discounted this evidence from the arbitration hearing, finding that "the record is totally devoid of any foundational requirements necessary for admissible evidence in a formal proceeding," as Union Steward Malone did not identify the management representatives with whom she met or describe who was present or what was said. (JD 7: 29-48). This conclusion is clearly erroneous. The evidence relied upon by Respondent was solicited by the Union's representative at the arbitration hearing through the Union's Steward, Malone, who testified from personal knowledge. Further, the Union representative relied upon this evidence in his opening statement. "Counsel can make admissions during trial that will bind the client" and "such admissions can be derived from the contents of opening statements or closing arguments." *Butynsky v. Springfield Terminal Railway Co.*, 592 F.3d 272, 277 (1st Cir. 2010); accord, *Performance Friction Corp.*, 335 NLRB 1117, 1149 (2001); *Packaging Techniques, Inc.*, 317 NLRB 1252, 1254-55 (1995). Armed with the

admissions of the Union steward and the Union representative at the arbitration hearing that meetings were held between the Union and the Company and that all issues were resolved except for the single employee whose grievance was the subject of the arbitration, Respondent was under no burden to provide any further foundational or explanatory evidence. These facts were established, and it was the burden of the AGC or the Union to attempt to explain them away. They failed to do so, and the complaint should be dismissed.

E. The Board Should Limit The Effects Bargaining Obligation To Significant Management Decisions Involving Loss Of Employment And To Other Management Decisions Where The Union Adequately Identifies Specific Effects Warranting Bargaining.

The whole concept of effects bargaining is premised on the notion that the effects of a management decision are distinct from the decision itself. It was not until 1962 that the Board first adopted the concept of “decision bargaining.” Overruling prior decisions finding no duty to bargain over a subcontracting decision, the Board held that subcontracting *decisions*, as well as their effects, were mandatory subjects of bargaining. *Town & Country Manufacturing Co.*, 136 NLRB 1022 (1962); Thereafter, during the 1960s, the Board reached similar conclusions regarding managerial decisions to sell, close, relocate, and transfer work. Member Leedom frequently concurred, and in his view the bargaining obligation did not extend to management decisions of this nature, but only to the “effects” of the decisions. *E.g., Pepsi-Cola Bottling Co.*, 145 NLRB 785 (1964) (plant shutdown); *Adams Dairy Co.*, 147 NLRB 1410 (1964) (subcontracting); *Royal Plating & Polishing Co.*, 148 NLRB 545 (1965) (plant sale); *Ozark Trailers, Inc.*, 161 NLRB 561 (1966) (plant shutdown)

Although the Supreme Court approved the Board’s position regarding subcontracting decisions, *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the majority of the circuit courts took a narrower view with other significant management decisions to sell, close, relocate, and

transfer work, concluding (in agreement with Member Leedom's view) that the bargaining obligation was limited to the effects of such decisions. *E.g.*, *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); *NLRB v. Transmarine Navigation Co.*, 380 F.2d 933 (9th Cir. 1967); *NLRB v. Thompson Transport Co.*, 406 F.2d 698 (10th Cir. 1969). In *First National Maintenance Corp. v. NLRB*, 452 U.S. 66, the Court concluded that partial closing decisions were not subject to bargaining. But it acknowledged that the effects of such decisions were a mandatory subject of bargaining. *Id.* at 677, n. 15. The Court expressed "no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." *Id.* at 686, n. 22.

There is thus an established demarcation line between decision and effects bargaining. This line of demarcation, however, makes sense only when the decision is one that yields visibly identifiable effects that can be distinguished from the underlying decision. The most common decisions of this nature are those that tend to lead to a complete loss of employment; i.e., partial and complete plant closings, relocations and transfers of work, and sale decisions, as well as other decisions affecting the scope of the employer's operations. This is not to say that an effects bargaining obligation can never arise when the decision causes no loss of jobs, but when there is no loss of jobs, the Board should at a minimum be able to identify specific effects of the decision before it will find an effects bargaining obligation.

In many managerial decisions that do not create job losses, the decision and its effects are inextricably intertwined. For example, a decision to change a shift schedule from a 7 to 3 schedule to an 8 to 4 schedule would clearly be a mandatory subject of bargaining, but if the contract authorized management to make the change in hours, there are no readily visible effects that are separate and distinct from the change in hours that would warrant finding an effects

bargaining obligation. If there are specific effects, it is not asking too much for the Union to identify at least one such effect.

Here, neither the Union, the AGC, nor the ALJ has identified any specific “effects” that Respondent’s decision to temporarily reduce employee hours had on employees other than those that are inherent in the decision, i.e., reduced work hours. There is no contention that the reduction in work hours triggered any other adverse consequences such as layoffs, increased work loads, or expanded job duties. In these circumstances, there was no effects bargaining obligation at all, and the complaint should be dismissed.

F. The ALJ Erred In Recommending A Transmarine Navigation Remedy.

Assuming, *arguendo*, that the Board finds an effects bargaining violation, the remedy should not include the limited backpay *Transmarine Navigation* remedy recommended by the ALJ. Indeed, this remedy makes no sense at all in the facts of this case and would be purely punitive. The *Transmarine* remedy is typically granted in situations where the employer’s decision results in a loss of jobs. Indeed, in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), the decision involved a facility closing. *See also, Bridon Cordage, Inc.*, 329 NLRB 258 (1999) (decision to reduce inventory resulted in layoffs). This remedy is not routinely granted in effects bargaining cases where the decision results in no loss of jobs. For example, in *Good Samaritan Hospital*, 335 NLRB 901 (2001), the Board found a violation in the employer’s failure to bargain over the effects of a decision to change staffing matrices, but did not include a *Transmarine* remedy. Here, no employee lost his/her job, and the matter was processed through arbitration. Granting a *Transmarine* remedy would undermine the arbitrator’s decision.

If, however, the Board determines that some type of limited backpay remedy is required, it must be narrowly tailored to the specific decision and effects. Thus, in *Rochester Gas, supra*, the Board limited the remedy to the increased commuting costs incurred by employees as a result

of the employer's decision to discontinue a vehicle benefit. Here, the remedy, if granted, would need to be limited to any reduced work hours of specific affected employees, and the remedy should not begin to run from the date of the Board's decision, but should run from the date of any court of appeals decision enforcing the Board's order.

CONCLUSION

Respondent requests that the complaint be dismissed in its entirety.

Respectfully submitted this 16th day of April, 2013.

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CERTIFICATE OF SERVICE

I, Charles P. Roberts III, do hereby certify that the foregoing Brief in Support of Exceptions has this day been served by electronic filing to the Executive Secretary, National Labor Relations board, and that the following persons have been served via electronic copy:

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ATTACHMENT F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

HEARTLAND-PLYMOUTH COURT MI, LLC
d/b/a HEARTLAND HEALTH CARE CENTER—
PLYMOUTH COURT

Respondent

and

Case 07-CA-070626

SEIU HEALTHCARE MICHIGAN,
Charging Union

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING
BRIEF TO RESPONDENT'S EXCEPTIONS TO THE
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May 24, 2013

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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Respondent

and

Case 07-CA-070626

SEIU HEALTHCARE MICHIGAN,
Charging Union

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING
BRIEF TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsel for the Acting General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision.¹

INTRODUCTION

Respondent filed twenty-three individual exceptions to the ALJD in the instant matter. In its accompanying brief, Respondent coalesced those exceptions into six areas in which it asserts that the ALJ erred with respect to his findings, specifically that:

¹ The following abbreviations are used in this brief: ALJ-Administrative Law Judge; ALJD-Administrative Law Judge Decision; Tr-Transcripts; JT-Joint Exhibit; R BR-Respondent Brief.

- The ALJ erred in finding that the Union did not waive its right to bargain over the “effects” of Respondent’s decision to reduce the hours of dietary employees. (Exceptions 6, 7, 8, 9, 11, 15, 16, 18, 22, and 23);
- The ALJ erred by failing to utilize a “contract coverage” analysis in his decision, which would have relieved Respondent of any obligation to bargain over the effects of its decision to reduce hours. (Exceptions 5, 11, 15, 16, 18, 20, 22 and 23);
- The ALJ erred by failing to defer to the underlying arbitration decision. (Exceptions 11, 12, 13, 14, 16, 18, 22 and 23);
- The ALJ erred by not finding that the Union waived its right to effects bargaining because it made no effects bargaining request to Respondent. (Exceptions 1, 2, 3, 8, 10, 11, 18, 22, and 23);
- The ALJ erred by not limiting effects bargaining to “significant management decisions involving loss of employment and to other management decisions where the union adequately identifies specific effects warranting bargaining.” (Exceptions 11, 15, 18, 22, and 23); and
- The ALJ erred in recommending a remedy consistent with *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). (Exceptions 17, 18, and 19).

I. The ALJ did not err in finding that the Union did not waive its right to bargain over the “effects” of Respondent’s decision to reduce the hours of dietary employees. (Exceptions 6, 7, 8, 9, 11, 15, 16, 18, 22 and 23)

The ALJ appropriately found that the Union did not waive its right to

effects bargaining over Respondent's decision to reduce hours of dietary employees. (ALJD pp. 6-7) In excepting to the ALJ's findings, Respondent asserts that the Union "clearly and unmistakably" waived its right to bargain over effects. In asserting clear and unmistakable waiver, Respondent simply presents three provisions contained in the parties' collective bargaining agreement: Article 3 - Management Rights; Article 4 - Hours of Work and Overtime; and Article 25 - Waiver. Respondent claims that "waiver is explicitly stated" regarding effects bargaining when these articles are read in conjunction with one another. (R BR p. 10.) Respondent makes this claim even though there is no "explicit" mention of effects bargaining in any of these three provisions.

Given that effects bargaining is not explicitly mentioned in these three contract provisions, under Board law, any analysis of clear and unmistakable waiver cannot end with Respondent's cursory claim that effects bargaining is inferred by the provisions. Rather than attempting to draw an inference, an employer claiming a waiver must show that "the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter." *Airo Die Casting, Inc.*, 354 NLRB 92, 93 (2009), citing *Trojan Yacht*, 319 NLRB 741, 742 (1995). See also *Allison Corp.*, 330 NLRB 1363, 1365 (2000).

In the instant case, no such "clear and unmistakable" waiver exists with respect to effects bargaining. The ALJ appropriately found that Respondent failed to provide any evidence that effects bargaining was "fully discussed and

consciously explored” and that the Charging Union “consciously yielded its interest in the matter.” (ALJD pp. 6-7) *Airo Die Casting*, supra, at 93. The contractual language waiving the Charging Union's bargaining rights as to Respondent's decision to reduce dietary employees' hours does not constitute a waiver of the right to bargain over that decision's effects. *Natomi Hospitals of California, Inc.*, 335 NLRB 901, 902 (2001).

To further support its claim that the Union waived effects bargaining as a result of the “zipper” clause and other related provisions contained in the parties' collective bargaining agreement, Respondent cites to *Radioear Corp.*, 214 NLRB 362, 364 (1974); *CBS Corp.*, 326 NLRB 861-862 (1998); and *GTE Automatic Electric, Inc.*, 261 NLRB 1491, 1491-92 (1982). However, Respondent's reliance on these cases is misplaced.

In *Radioear Corp.*, the Board found that an arbitrator's decision that a union, pursuant to a zipper clause, had waived its right to bargain over an annual “turkey money” gift to employees was not repugnant to the Act. *Id.* at 364. In so finding, the Board determined that the record established that the parties had “consciously explored a clause which would specifically have required the maintenance of *all* existing benefits, whether mentioned specifically in the agreement or not.” *Id.* In light of those circumstances, the *Radioear* Board found that there was a conscious, knowing waiver of any bargaining obligation as to non-specified benefits, such as the “turkey money” bonus. *Id.*

In the instant case, Respondent proffered no evidence at trial or in its

exceptions that during the bargaining of their current agreement the parties had exchanged proposals, engaged in any bargaining, or, for that matter, had even one passing discussion, regarding effects bargaining over any subject, let alone a reduction of hours for bargaining unit employees. See *Airo Die Casting*, supra, at 93

Respondent's reliance on *GTE* and *CBS Corp.* is similarly misplaced. Respondent asserts that, based upon those cases, it was privileged to use the zipper clause as a shield with respect to any effects bargaining over the reduction of hours issue. (R BR p. 11-12) However, those cases are inapposite to the instant case.

In *GTE*, while finding that an employer may rely on the parties' zipper clause in refusing to bargain over a unilateral change, the Board explicitly stated that its finding was based upon the fact that the unilateral change effected only "nonunion personnel" and later reemphasized that point: "Significantly, [the employer] has not made unilateral changes that directly and adversely affect unit employees. . ." *Id.* at 1491-92. In the instant case, Respondent's reduction in hours directly affected at least 10 bargaining unit employees. (ALJD p. 3)

In *CBS Corp.*, the Board found that a union could use the parties' zipper clause as a shield against an employer attempting to utilize subcontracting. *Id.* at 861. The Board relied on the fact that the parties had expressly discussed subcontracting during negotiations for the collective bargaining agreement and the employer had outright "rejected the possibility of outsourcing unit work." *Id.* In

the instant case, as the ALJ found, Respondent presented not one scintilla of evidence that effects bargaining over a reduction in hours for bargaining unit employees was ever discussed by the parties prior to entering into their current contract. (ALJD p. 8)

Respondent also attacks the ALJ's reliance on *Good Samaritan Hospital*, 335 NLRB 901 (2001), asserting that there was no zipper clause to analyze in that case from which the Board could infer clear and unmistakable waiver of effects bargaining.² (R BR p. 12) Again, Respondent misapprehends what the Board requires to find clear and unmistakable waiver in the absence of contractual language that specifically and explicitly states that the Union waived effects bargaining. While Respondent argues that "there is no requirement that the agreement specifically mention 'effects bargaining' ", Board case law is clear that, absent specific contractual language, an employer claiming a waiver must show that "the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter." *Airo Die Casting, Inc.*, supra; see also *Allison Corp.*, supra.

Given the that the ALJ found that the parties never consciously explored this issue and, as a result, the Union never consciously yielded its right to bargain over

² In Respondent's fourth exception, it asserts that the ALJ's reliance on *Good Samaritan Hospital* for the proposition that effects bargaining is required even when the employer has no obligation to bargain about the decision itself is erroneous as a matter of law. Aside from this notation in the its exceptions, Respondent does not reference Exception four anywhere in its Brief in Support of Exceptions. To whatever extent Respondent supports Exception four in its brief, it will be addressed by Counsel for the Acting General Counsel in this section.

the effects in bargaining unit employees' reduction in hours, Respondent's Exceptions on this issue must be rejected.

II. **The ALJ did not err by failing to utilize a "contract coverage" analysis in his decision which would have relieved Respondent of any obligation to bargain over the effects of its decision to reduce hours. (Exceptions 5, 11, 15, 16, 18, 20, 22 and 23)**

The ALJ appropriately found Respondent failed to bargain over the effects of its decision to reduce hours of bargaining unit employees, in violation of 8(a)(5) of the Act. (ALJD pp. 6-11)

In its Exceptions, Respondent asks the Board to essentially abandon long-standing law and adopt the "contract coverage" analysis applied by various Federal circuit courts. See *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005); *Bath Marine Draftsmen's Assoc. v. NLRB*, 475 F.3d 14 (1st Cir. 2007); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *Local Union 36, IBEW v. NLRB*, 706 F.3d 73 (2^d Cir. 2013). It should be noted that only the *Enloe* case directly concerned effects bargaining. It should be further noted that at least one other Circuit has had the opportunity to adopt a contract coverage analysis and has explicitly declined to do so. See, e.g., *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008).

Respondent itself acknowledges that the Board has "steadfastly" refused to follow the contract coverage analysis, but nonetheless warns that any decision upholding the ALJ decision in this case is "doomed". (R BR p. 13) Indeed, the Board has explicitly weighed the costs and benefits of "clear and unmistakable

waiver” versus “contract coverage.” In *Provena Hospitals*, 350 NLRB 808, 812-813 (2007), the Board elaborated at length on this issue, including a discussion of the D.C. Circuit’s use of a contract coverage analysis:

The Board’s longstanding adherence to the waiver standard reflects the Supreme Court’s approval of the Board’s approach. In *C & C Plywood*. . . the Court reviewed the Board’s finding that an employer violated Section 8(a)(5) by unilaterally implementing a premium-pay schedule for a classification of employees. The employer argued that the union representing its employees had waived its statutory right to bargain over the matter, but the Board rejected that argument and found no waiver under its clear and unmistakable standard. *C & C Plywood Corp.*, 148 NLRB 414, 416-417 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965). The Court upheld the Board’s finding of a violation and explicitly approved the waiver analysis, stating:

[T]he Board relied upon its experience with labor relations and the Act’s clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board’s approach. . .

More succinctly, the waiver must be clear and unmistakable. No later decision of the Court casts doubt on the continuing approval that the Board’s traditional analysis enjoys. . . There can be no dispute, then, that the Board’s traditional waiver standard is exceptionally well established. The venerable age of the standard, coupled with its approval by the Supreme Court, makes a powerful case for stare decisis. But the dissent would have the Board break with its own precedent and turn to the “contract-coverage” standard devised by the United States Court of Appeals for the District of Columbia Circuit and followed by the Seventh Circuit, despite the fact that earlier decisions of those same courts, never reversed, applied the waiver standard. Indeed, in a decision pre-dating its enunciation of the “contract-coverage” standard, the District of Columbia Circuit criticized the Board for failing to follow its waiver standard. *Road Sprinkler Fitters Local 669 v. NLRB*, 600 F.2d 918, 922-923 (D.C. Cir. 1979). The court observed that it would “not allow an administrative agency to abandon its past principles without reasoned analysis.” *Id.* at 923. Accordingly, it required the Board to “explain[] why the waiver standard should be changed, and how the new standard furthers the agency’s statutory mandate.” *Id.* We can discern neither persuasive reasons for abandoning the waiver standard, nor evidence that a different approach would further the Board’s statutory mandate.

(Internal footnotes omitted.)

Respondent, in addition to seeking repudiation of the long standing legal and policy considerations outlined in *Provena*, above, argues that the burden of proof in waiver cases should be shifted, contending that, apparently, because “neither the AGC nor the Union offered any contract language or bargaining history to show that the parties intended to treat the effects differently than the decision itself”, waiver should be found. (R BR pp. 13-14) However, the Board has long recognized that the burden of proof is on the party asserting the existence of a waiver, in this instance, Respondent. *TCI of New York*, 301 NLRB 822 at 824 (1991).

Finally, Respondent argues that neither the Union, the Acting General Counsel nor the ALJ identified any specific “effects” of Respondent’s decision to reduce employee hours “other than those inherent in the decision, i.e., reduced work hours.” (R BR p. 14) However, Respondent cites no case law to substantiate its argument. Moreover, the ALJ noted in his decision that Respondent chose to reduce the hours of a number of bargaining unit employees rather than resort to layoffs. Certainly, the decision of whether to reduce hours or lay off bargaining unit employees in the dietary department is an “effect” of the implemented reduced hours the Union would have sought to negotiate with the Respondent, and indeed, had the right to negotiate under Board law, in this instance. (ALJD p. 3) Based on the above, Respondent’s Exceptions calling for a contract coverage analysis in this case must be rejected.

III. **The ALJ Did Not Err in deciding not to defer to the underlying**

arbitration decision. (Exceptions 11, 12, 13, 14, 16, 18, 22 and 23)

The ALJ appropriately decided not to defer to the underlying arbitration decision in this case. In doing so, the ALJ found that that the scope of the arbitration hearing was limited to contractual interpretation and that the evidence necessary for a resolution of the instant unfair labor practice was not the same evidence that was presented to, and considered by, the arbitrator. Therefore, the ALJ concluded that the issue of whether the Respondent violated its duty to engage in effects bargaining remained litigable before the Board. (ALJD p. 9)

In its Exceptions, Respondent first cites to *Dennison National Co.*, 296 NLRB 169, 170 (1989), asserting that it is proper for the Board to defer to an arbitrator's decision even in cases where the arbitrator was not presented with the facts relevant to the statutory issue. (R BR pp. 17-18) However, the facts surrounding *Dennison* were substantially different than those in the instant case. In *Dennison*, the Board specifically found that the arbitrator was presented "with facts relevant to the statutory issue." *Id.* In the instant case, the ALJ specifically found that the statutory 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." (ALJD p. 8) Thus, the basis for the Board's decision in *Dennison* is completely at odds with the instant case and cannot be relied on in making a determination as to whether deferral to the arbitrator's decision is appropriate.

Respondent similarly cites *Smurfit-Stone Container Corp.*, 344 NLRB 658

(2005), implying that deferral in the instant case is proper because the arbitrator adequately addressed the statutory issue by determining the contractual issue. (R BR p. 18) However, as noted by the ALJ, “There can be no doubt that the evidence pertinent to effects bargaining was not meaningfully or fully presented at the arbitration hearing”, adding that “nothing whatsoever in the arbitrator’s award purported to address effects bargaining.” (ALJD p. 8) Given that effects bargaining is precisely the statutory issue contained in the instant unfair labor practice charge and complaint, Respondent’s failure to present any evidence regarding effects bargaining and the arbitrator’s resulting failure to address the issue in his award, makes untenable Respondent’s assertion that deferral is appropriate. See *Kohler Mix Specialties*, 332 NLRB 630, 631-632 (2000); *Armour & Co.*, 280 NLRB 824 fn. 2 (1986); *Andersen Sand & Gravel Co.*, 277 NLRB 1204, 1205 (1985).

IV. The ALJ Did Not Err in finding that the Union did not waive its right to effects bargaining. (Exceptions 1, 2, 3, 8, 10, 11, 18, 22, and 23)

The ALJ appropriately found, based on record evidence and established Board law, that the Union at no time waived its right to effects bargaining, in part, by drawing adverse inferences from Respondent’s failure to call Bret Lucka as a witness in this proceeding, and the limited testimony of Karen Szkutnik. (ALJD pp. 4, 7-8)

As the ALJ found, Board law makes clear that Szkutnik , as a management representative, who Respondent called to testify in its case in chief, would reasonably be assumed to be favorably disposed to the Respondent. (ALJD p. 4) In finding an adverse inference due to Szkutnik's failure to rebut or testify at all regarding conversations she had with Union Representative Fowlkes outlined in Fowlkes testimony during the Counsel for the Acting General Counsel's case in chief , the ALJ appropriately cited to *Daikichi Corp.*, 335 NLRB 622, 622 (2001) and *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977), enfd. mem. 583 F.2d 1289 (9th Cir. 1978). (ALJD p. 4, Tr. 25,31-36, 39, 44, 45, GC 2, 3)

Similarly, the ALJ drew an adverse inference over Respondent's failure to call Lucka as a witness to testify about what was said at a December 2011 grievance meeting or in a November 2011 conversation that Fowlkes testified she had with him, relying on well-established Board law on the issue. See, e.g., *Champion River Co.*, 314 NLRB 1097, 1099 fn. 8 (1994); *Douglas Aircraft Co.*, 308 NLRB 1217, 1217 fn. 1(1992). (ALJD p. 4, Tr. 23-25, 31-39, 54) Respondent makes no argument as to why the ALJ's findings were inappropriate or why the cases cited in the ALJD were not applicable. As such, Respondent's exceptions on this point must be rejected.

Respondent further excepts to ALJ's finding that "Finley's bi-monthly hours were reduced from 80 to between 54 and 60", arguing that this finding is not supported by the record and is clearly erroneous. (ALJD p. 3, R BR p. 2) Respondent does not cite to any specific trial testimony, transcript page or any

other evidence in making its claim. However, Finley herself testified at the underlying arbitration proceeding that her bi-monthly hours were reduced to between 54 and 60. (JT, p. 10) Moreover, Respondent, in its brief, does recount the Union representative's opening statement at the underlying arbitration hearing in which he stated that Finley's hours were reduced to *approximately* 60 to 64 hours per pay period. (Emphasis added) (R BR p. 5) Given that the ALJ's and the Union Representative's range of hours for Finley overlap, the ALJ's factual finding is in line and completely consistent with the Union representative's statement on the matter which, apparently, Respondent has no issue with. As such, Respondent has not met its burden by showing "by a clear preponderance of the evidence" that the ALJ's factual findings on this point are not supported by the record. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951). Moreover, Finley's bi-monthly hours are not "critical" to the ALJ's ultimate findings and conclusions, e.g., that Respondent failed to bargain over the effects of its decision to reduce hours of not only Finley, but of nine other employees as well. (ALJD, p. 3) See *Jewel Bakery*, 268 NLRB 1326, 1327 (1984). Thus, Respondent's Exception on this issue must be rejected.

With respect to Respondent's contention that the Union waived its right to effects bargaining, Respondent concedes that the Union filed a grievance over the reduction of hours issue and further, that in *Rochester Gas & Electric Corp.*, 355 NLRB 507 (2010), enfd. 2013 WL 174110 (2d Cir. 2013), cited by the ALJ, the Board found that a grievance is sufficient to constitute a request to engage in

effects bargaining. However, Respondent points to *Noblit Bros.*, 305 NLRB 329 (1992), in arguing that the Board has come to a different conclusion on the issue. (R BR p. 19) Counsel for the Acting General Counsel is somewhat perplexed by Respondent's reliance on this case. In *Noblit Bros.*, while the Board does find that the union did waive its right to bargain over effects regarding the removal of unit work, the Board does not base its finding on any purported grievance filing and indeed, makes no mention of any grievance at all. *Id.* at 330, fn. 10. In reviewing the underlying administrative law judge decision in *Noblit Bros.*, it becomes clear why no mention of any grievance was made by the Board: the union admitted at trial that no grievance was filed over the issue because the parties' contract had expired. *Id.* at 357.

Respondent next suggests that the parties' grievance and arbitration procedure alone constituted effects bargaining. (R BR p. 20) Respondent cites to *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), in contending that the grievance and arbitration process is intertwined with the collective bargaining process. (R BR p. 20) While the Court in *Warrior & Gulf Navigation Co.* acknowledged that a grievance and arbitration procedure "is a major factor in achieving industrial peace", it does not appear to pass any judgment as to effects bargaining or relieve an employer of its duty to bargain over effects. *Id.* at 578.

Finally, Respondent argues that, based on testimony in the underlying arbitration proceeding, "it is . . . clear that the parties engaged in substantive

effects bargaining prior to the grievance process being invoked.” (R BR p. 20)

However, in reviewing the arbitration testimony cited by Respondent, there is absolutely nothing “clear” as to effects bargaining. As the ALJ correctly noted in this regard (addressing Union steward Brandi Malone’s testimony at the arbitration proceeding):

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.

(ALJD p. 7)

Respondent also argues that the Union representative at the underlying arbitration hearing essentially admitted that Respondent bargained over effects with the Union. (R BR p. 20) However, it is unclear to Counsel for the Acting General Counsel as to what “admission” was made in the opening statement as it concerns effects bargaining. (R BR p. 5) While the Union representative does mention “meetings” with Respondent management as well as the fact that Respondent did eventually restore the hours of a number of employees, there certainly is nothing to suggest effects bargaining took place before, during or after the reduction in hours was imposed by Respondent. To the extent not specifically addressed by the ALJ, Counsel for the Acting General Counsel would certainly

make the same argument with respect to Malone's arbitration testimony, particularly considering the Board's long-held position that a purported contractual waiver of a union's right to bargain is effective only if the relinquishment was "clear and unmistakable." *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-813 (2007).

Based on relevant Board law, it is clear that the Union did not waive its right to bargain over the effects of Respondent's decision to reduce bargaining unit employees' hours. Thus, Respondent's exceptions on this point must be rejected.

V. **The ALJ Did Not Err by not limiting effects bargaining to "significant management decisions involving loss of employment and to other management decisions where the union adequately identifies specific effects warranting bargaining" (Exceptions 11, 15, 18, 22, and 23).**

The ALJ appropriately found that Respondent had the duty to bargain over the effects of its decision to reduce hours of bargaining unit employees within the dietary department. (ALJD, p. 7) In its Exceptions, Respondent, which cites no case law for the proposition, appears to make a policy argument that "when there is no loss of jobs, the Board should at a minimum be able to identify specific effects of the decision before it will find an effects bargaining obligation." (R BR p. 22) Respondent goes on to assert that in the instant case, "neither the Union, the AGC, nor the ALJ has identified any specific 'effects' that Respondent's decision to . . . reduce employee hours had on employees other than those that are

inherent in the decision, i.e., reduced work hours.” (R BR p. 23) Counsel for the General Counsel would contend that the Respondent provided the Union absolutely no opportunity to articulate to Respondent ways in which to ameliorate the effects of its hours reduction, as Union Representative Kim Fowlkes was presented with a *fait accompli* on the matter. (ALJD pp. 4-5) Apparently, Respondent wants the Board to punish the Union for Respondent’s own bad actions. But, regardless, as the ALJ found, Respondent itself pointed to a possible direction of effects bargaining between the parties, as Respondent chose to reduce dietary employee hours as a whole, rather than lay off any employee. (ALJD p. 3) Perhaps the Union would have preferred to have a less senior employee laid off in favor of providing more hours to more senior employees. Of course, we will never know, as Respondent denied the Union any opportunity to weigh in on the issue. Based on the above, Respondent’s policy argument must be rejected.

VI. The ALJ Did Not Err in recommending a remedy consistent with *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) (Exceptions 17, 18, and 19).

The ALJ appropriately found that a *Transmarine* remedy is standard in effects bargaining cases, citing *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). (ALJD p. 9)

Respondent points to *Good Samaritan Hospital*, 335 NLRB 901 (2001), for the proposition that a *Transmarine* remedy is not awarded in every effects bargaining case. (R BR p. 23) While Respondent is correct on this point, as stated above, the fact remains that the Board has found that the “standard remedy” in effects bargaining cases is a *Transmarine* remedy, absent “unusual circumstances of a case” such as when employees’ terms and conditions of employment are not materially changed. *AG Communications*, supra at 173.

In the instant case, Respondent reduced the hours of approximately 10 employees, with at least one employee, Clondia Finley, subjected to a dramatic reduction in hours, which certainly constituted a material change in working conditions. (ALJD p. 3) Given the material change and given that the Union was met with a *fait accompli* on the matter, a *Transmarine* remedy is wholly appropriate in this case.

Finally, in the event a *Transmarine* remedy is ordered, Respondent seeks a limited remedy, similar to that in *Rochester Gas*, with Respondent’s liability running from the date of any court of appeals decision enforcing the Board’s order. (R BR pp. 23-24) However, as stated above, Counsel for Acting General Counsel contends that a full *Transmarine* remedy is warranted in this case. Moreover, despite Respondent’s implied intention to appeal the Board’s decision in the instant case, such an appeal remains purely speculative at this point, and to the extent a *Transmarine* remedy is ordered, such remedy should run from the date of the Board’s decision.

CONCLUSION

For the reasons set forth above and in Administrative Law Judge Ira Sandron's Decision and Order, it is urged that Respondent's Exceptions be denied in their entirety and the Board affirm the findings of fact, conclusions of law, and recommended remedy of ALJ Sandron in his Decision and Order in this matter.

Dated at Detroit, Michigan this 24th Day of May 2013.

/s/Dynn Nick

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CERTIFICATE OF SERVICE

I certify that on the 24th day of May 2013, I electronically served copies of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision on the following parties of record:

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