UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-1883

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

REGENCY HERITAGE NURSING
AND REHABILITATION CENTER,
Respondent

On Petition for Review
for Enforcement of an Order of the
National Labor Relations Board
(NLRB-1:22-CA-074343)

Submitted under Third Circuit LAR 34.1(a)
on April 6, 2016

Before: FISHER, RENDELL, and BARRY, Circuit Judges

JUDGMENT

This case came to be heard on the record from the National Labor Relations Board and was submitted under Third Circuit LAR 34.1(a) on April 6, 2016.

On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the Application for Enforcement of the Decision and Order of the National Labor Board entered April 30, 2014 is hereby **granted**. The April 30, 2014 order shall be enforced in full. See attached order.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Marcia M. Waldron,
Clerk

Dated: August 16, 2016

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Regency Heritage Nursing and Rehabilitation Center *and* 1199 SEIU, United Healthcare Workers East, New Jersey Region. Case 22–CA–074343

April 30, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On June 6, 2013, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Regency Heritage Nursing and Rehabilitation Center, Somerset, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time non-professional employees, including all licensed practical nurses, certified nursing assistants, housekeeping employees, laundry employees, dietary employees, cooks, maintenance employees, recreational aides, behavioral aides, beauty and barber employees, purchasing/central supply employees and unit clerks employed by the Employer at its 380 DeMott Lane, Somerset, New Jersey facilities, but excluding all office clerical employees, registered nurses, other professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Rescind the unilateral change in the terms and conditions of employment for its unit employees.

(c) Pay employees hired since March 1, 2011, no less than the minimum wage rates then in effect.

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[1] Chairman Pearce is not a member of the panel, and neither he nor any member of his staff participated in the consideration or decision of this case.

Member Hirozawa has determined not to recuse himself from participating in this case, despite the Respondent's request that he do so. No person with whom Member Hirozawa has a covered relationship within the meaning of 5 CFR § 2635.502 is or represents a party to this case, nor would Member Hirozawa's participation "cause a reasonable person with knowledge of the relevant facts to question his impartiality . . . ." Ibid. Nor does his participation in this case raise any question under the "Revolving Door Ban" for appointees included in Sec. 1 of Executive Order 13490 (Jan. 21, 2009). This case does not concern a former employer or former client of Member Hirozawa as those terms are defined in Sec. 2(i) and (j), respectively, of the Executive Order.

[2] In affirming the judge's finding that deferral to arbitration is not appropriate, we find it unnecessary to rely on the judge's citation to *North American Pipe Corp.*, 347 NLRB 836 (2006), petition for review denied 546 F.3d 239 (2d Cir. 2008), to support the proposition that cases involving statutory interpretation, rather than contract interpretation, are not appropriate for deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971). Although that proposition is well established, see, e.g., *Avery Dennison*, 330 NLRB 389, 390 (1999), there were no exceptions to the relevant substantive findings in *North American Pipe* and the Board thus did not review them.

We also find it unnecessary to rely on *Dedicated Services*, 352 NLRB 753 (2008), cited by the judge, which was decided by a two-member Board. See *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010).

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified and with *Durham School Services*, 360 NLRB No. 85 (2014).

The Respondent's defense that it had no duty to bargain over changes to the terms and conditions of employment for individuals hired after the contract expired because such individuals were "applicants" instead of employees is frivolous. The assertion of frivolous defenses may make an award of litigation expenses appropriate. See *Heck's Inc.*, 215 NLRB 765 (1974); *Tiidee Products*, 194 NLRB 1234 (1972), enfd. in relevant part 502 F.2d 329 (D.C. Cir.), cert. denied 417 U.S. 921 (1974). We decline to make such an award in the present case, though, where the General Counsel has not argued for one and where the Respondent's other defenses, although lacking merit for the reasons stated by the judge, were at least colorable. Member Miscimarra agrees with the decision not to award litigation expenses although he also agrees that Respondent's "applicants" defense was plainly lacking in merit, and Member Miscimarra does not reach whether or to what extent an award of litigation expenses is authorized or appropriate under the Act.

(d) Make whole all affected employees with interest in the manner set forth in the remedy section of the judge's decision.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

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

(g) Within 14 days after service by the Region, post at its Somerset, New Jersey facilities copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 30, 2014

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

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

All full-time and regular part-time non-professional employees, including all licensed practical nurses, certified nursing assistants, housekeeping employees, laundry employees, dietary employees, cooks, maintenance employees, recreational aides, behavioral aides, beauty and barber employees, purchasing/central supply employees and unit clerks employed by the Employer at its 380 DeMott Lane, Somerset, New Jersey facilities, but excluding all office clerical employees, registered nurses, other professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL rescind the unilateral change in the terms and conditions of employment.

WE WILL pay employees hired since March 1, 2011, no less than the minimum wage rates then in effect.

WE WILL make affected employees whole with interest for any losses suffered as a result of our unilateral action.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

REGENCY HERITAGE NURSING AND
REHABILITATION CENTER

The Board's decision can be found at www.nlrb.gov/case/22-CA-074343 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Bert Dice-Goldberg, Esq. and *Eric B. Sposito, Esq.*, for the General Counsel.

Morris Tuchman, Esq., of New York, New York, for the Respondent.

Ellen Dichner, Esq. (Gladstein, Reif & Meginnis, LLP), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed on February 7, 2012, by 1199 SEIU United Healthcare Workers East, New Jersey Region (the Charging Party or the Union), the Acting Director for Region 22 issued a compliant and notice of hearing on October 2, 2012, alleging that Regency Heritage Nursing and Rehabilitation Center (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by since on or about March 1, 2011, by failing to continue in effect all of the terms of the collective-bargaining agreement by unilaterally changing the rates for new hires without notice to or bargaining with the Union.

Respondent, thereafter, filed an answer, denying the primary allegations of the complaint and raising affirmative defenses of statute of limitations and deferral to arbitration.

The trial with respect to the allegations in the complaint was held before me in Newark, New Jersey, on December 5, 2012.

Briefs have been filed and have been carefully considered.

Based upon the entire record,[1] including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a New Jersey corporation, with an office and place of business in Somerset, New Jersey, where it operates a nursing home providing inpatient and outpatient hospital care.

During the 12-month period, ending September 21, 2012, Respondent derived gross revenues in excess of $100,000 and purchased and received at its Somerset, New Jersey facility, goods and supplies valued in excess of $5000 directly from points outside the State of New Jersey.

Respondent admits, and I so find, that it is and has been at all times material an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is also admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. BARGAINING HISTORY

Respondent has recognized the Union as the exclusive representative of its employees in a unit of nonprofessional employees at its nursing home facility in Somerset, New Jersey. The most recent collective-bargaining agreement covered the period from March 1, 2008, through February 28, 2011.

The contract provides an article 19, entitled "Wages," that minimum rates are applicable for various classifications and that raises in these rates are to be effective December 1, 2010.

The contract also includes article 4, entitled "Probationary Period." It provides that new employees are deemed proba-

[1] The General Counsel has submitted a motion to correct the transcript, which was unopposed. The motion is granted and the transcript is corrected. Certain changes in the transcript of proceedings were made.

tionary during the first 90 days of employment, which may be extended for an additional 30 days upon request by the Respondent.

The record reflects that employees are not eligible for the minimum wages, set forth in article 19, until their probationary period ends.[2]

IV. RESPONDENT'S FAILURE TO PAY THE 2010 INCREASES AND THE UNION'S GRIEVANCE AND ARBITRATION

Although, as noted, the contract required Respondent to grant increased minimum rates to all employees on December 1, 2010, Respondent failed to implement the increases for the eligible employees at that time. Upon finding out that these increases were not granted, the Union filed a grievance on January 13, 2011, alleging that Respondent did not comply with article 19, section 2 of the contract and requesting that employees should be brought up to their proper rates and backpay be paid to affected employees.

On February 11, the Union requested arbitration.

In connection with the above arbitration, Ellen Dichner, the Union's attorney, sent the following information request to Respondent, dated March 8, 2011.

> March 8, 2011
>
> Martin Bengio, Administrator
> Regency Heritage Nursing Center
> 380 DeMott Lane
> Somerset, NJ 08873
>
> Re: 1199 SEIU and Regency Heritage Nursing Center
> Failure to pay contractual wage rates
>
> Dear Mr. Bengio:
>
> In connection with the above-referenced grievance and arbitration, the Union requests the following documents for each bargaining unit employee. Payroll documents showing all hours worked, hourly rate of pay for straight time and overtime and gross wages, for each pay period between November 1, 2010 to the present.
>
> Kindly provide these documents to me no later than March 25, 2011. Thank you for your cooperation.
>
> Very truly yours,
> Ellen Dichner
>
> Cc: Ari Weiss, Esq.
> Roy Garcia
> Jean Cox

Respondent did not comply with this information request, and the Union did not receive the documents by March 25 as requested by the Union or, insofar as the record discloses, at any time thereafter. The arbitration hearing was held on May 5 before Arbitrator Martin Scheinman. The record does not reflect what defense or argument was made by Respondent as to why it failed to implement the contractually required increases. The record does reflect that Arbitrator Scheinman issued an oral ruling at the hearing that Respondent had violated the contract and ordered Respondent to apply the contractual wage rates to all employees.

Scheinman also directed the parties to create a spread sheet to calculate the backpay owed to the affected employees. In that connection documents were ultimately exchanged between the Union and Respondent over the next several months, and ultimately, Scheinman issued an award on November 18, 2011, based upon the amounts calculated in documents submitted to him by the parties and awarded backpay to 98 employees of varying amounts from $48 to $2275.25. He specified the amounts due to each employee in his award. The text of his opinion is as follows:

> The Union protests the Home's failure to pay the correct wage increases, including retroactive pay, in violation of Article 19, Wages. It asks for a direction requiring the Home to comply with Article 19 and to make the affected employees whole, regarding retroactive pay, for the period December 1, 2010, through the date the wages were adjusted to reflect the required contractual increases.
>
> In accordance with my direction at the hearing on May 5, 2011, an excel spreadsheet was created indicating the alleged amounts owed to employees for retroactive pay through June 11, 2011. Once created, the Union and Home attempted to reconcile the amounts due. Below, I have set forth the amounts due to the individual employees in accordance with my determination taking into account the document submitted.
>
> Should any back pay also be due after June 11, 2011, the Home is directed to calculate that back pay, forthwith. Any future disputes regarding the period after June 11, 2011, may be resubmitted to me.
>
> In addition, this Award reaffirms my oral ruling requiring the Home to apply the Collective Bargaining Agreement's wage increases to all employees.
>
> The following individuals are owed retroactive pay through June 11, 2011. The amounts due, minus applicable withholding, shall be paid no later than thirty (30) calendar days from the date of this Award.

I note that the award directed retroactive pay to the affected employees "through June 11." The decision did not reflect why that date was chosen as a cutoff date for the backpay calculations, but it appears from his November written decision that Scheinman had directed the parties to prepare spread sheets indicating amounts due through June 11, 2011. While no record testimony or other evidence reflects why that date was chosen, it may have been that since the eligibility for the increases does not start until the probationary period ends, that June 11 date coincided with approximately 90 days from the contract's expiration of March 1.

Pursuant to the arbitrator's direction, the Union and Respondent spent the next several months exchanging various documents and emails in an attempt to agree upon the backpay due to Respondent's employees. This record includes some of these documents, but not all of them but references to previous

[2] I note that the contract does not explicitly provide that the contractual minimums are not applicable until the probationary period expires, but the record reflects that is how the contract has been interpreted and applied by the parties.

email requests suggest what some of the missing requests included.

The record does reflect that Respondent furnished to the Union payroll registers, dated June 3, 2011, which consisted of payroll records for some employees for the pay period May 15–28, 2011. It listed 14 employees in the recreation department, 9 LPNs, 47 NAs, 1 maintenance employee, 27 dietary, 19 housekeeping, 7 laundry, and 22 employees listed as no frills NA.[3]

As noted above, the Respondent submitted various documents to the Union in connection with the computation of backpay for employees. These payroll registers do not include dates of hire for any of the employees listed nor any dates that the employees' probationary periods ended. The document does list the employees' names, their pay rates, hours, and pay for the 2-week pay period.

While as noted this payroll register was run on June 3, 2011 (for the period through May 28, 2011), and did not include dates of hire, it did include the names of four employees, who were hired on March 10, 2011. These employees are Regina Obeng, Nifeasia Clark, and Luz Graybush listed as no frills NAs and Reggie Reyes lists as an NA.

Records produced in this proceeding but never produced to the Union, showed that Respondent hired 17 other unit employees with dates of hire between March 24 and 26, 2011.[4]

On June 17, 2011, Respondent's attorney sent an email to Dichner, with an attachment, with the following comment, "Per your request. Fastest response ever." The attachment is as follows:

Regency Heritage Nursing Center—
Ellen's Request DOH as of 9/1/2010

LAST NAME	FIRST NAME	DOH
CANDELARIA	NADIA	01/10/2011
DRAYTON	HARVEY	12/02/2010
PRADEEP	SHIKHA BEENA	02/23/2011
VAUGHN	CHANDA	01/27/2011
GOLLEY-MORGAN	UNA	01/06/2011
ALCANTARA	LUISA	01/06/2011
BRANCH	REATHER	02/24/2011
COOK	RACHAEL	02/10/2011
GRAYBUSH	LUZ	03/10/2011
LOUIS	CHRISTELLE	10/28/2010
MANNING	MEISHA	11/11/2010
REYES	REGIE	03/10/2011
ROBERTS	RUKIATU	12/16/2010
THOMPSON	PETRIE	02/10/2011
AYIM	SUSANNA	11/21/2010
BARRIE	FATIMA	12/16/2010
GREY	MARK	12/02/2010
ROSARIO	O'BRIAN	10/25/2010
CALVO	MARIELOS	11/04/2010
FLORES	RONEL	11/11/2010
NUNEZ	MARTHA	10/18/2010
BELMONTE	CAMILLET	02/10/2011
BROWN	CAROL	01/06/2011
CLARK	NIFEASIA	03/10/2011
LAFORTUNE	ANNE	01/06/2011
MONTAS	SHERLEY	10/14/2010
MORENO	JINETH	01/06/2011
NICOLAS	MANOUSKA	12/16/2010
NUNEZ	MARIA	09/21/2010
OBENG	REGINA	03/10/2011
SMITH	JASMINE	12/16/2010

The record does not include a copy of "Ellen's request DOH as of 9/01/2010" as reflected in the above document, so the record is uncertain what this list was meant to convey. However, since the document submitted to the Union lists 30 employees with dates of hire, ranging from September 21, 2010, through March 10, 2011, one reasonable explanation is that Dichner had requested that Respondent furnish a list of employees hired from September 1, 2010, to the date of the request. However, since Respondent's attorney's email to Dichner, including this document stated, "Per your request, fastest response ever," it is likely that Dichner's request was sent sometime in early to mid-June.

Another conceivable explanation is that Dichner, based on the Union's inspection of the payroll records, previously submitted to it by Respondent as well as other information that the Union possessed, needed dates of hire for these 31 named employees in order for it to prepare their calculations.

I note that 29 of the 31 employees on the list submitted to the Union by Respondent appeared on the payroll register submitted by Respondent to the Union for the period ending May 28, 2011. Two employees on the list, Harvey Drayton and Una Golley-Morgan, did not appear on that register, and the record does not reflect whether the Union had any other documents or information as to these two employees, which might have alerted it to ask Respondent for their dates of hire.

In any event, whatever may have been the genesis for Respondent's submission of a list of employees "from 9/1/10" to the Union, the Union, upon receipt of that document, prepared its spreadsheet of its calculations for the backpay due to employees based on the arbitrator's direction for failure of Respondent to pay the minimums. The Union utilized this list and the payroll register submitted to it by Respondent as well as other documents and evidence not submitted into this record in order to prepare its calculations. Thus, as will be described below, the Union's calculations included dates of hire and end of probationary periods for a number of employees, which were not included in any of the documents, described above, that Respondent submitted to the Union in June 2011. It, therefore, appears that the Union had other information with respect to these matters (dates of hire and end of probation) that it included in its calculations that it sent to Respondent. On June 28, Dichner sent an email to Respondent's attorney attaching these calculations, which reads as follows:

From: "Ellen Dichner" <edichner@grmny.com>
Date: Tue, 28 Jun 2011 16:30:41-0400
To: <jariweiss@gmail.com>
Cc: <roy.garcia@1199.org>; <Genevieve.cox@1199.org>
Subject: Regency Heritage minimums—backpay calculations

[3] The category of no frills NA is not listed in the unit description in the contract or in the section providing for wage increases and minimums.

[4] This group included nine NAs, two recreation, three housekeeping, two dietary, and one no frills NA.

Hi Ari,

Attached are the Union's calculations of the back pay owed for failure to pay minimums. (Put this on your legal size print mode.) The calculations go through 6/11/11 but are missing the period from Dec. 1 through 11, 2010 as I noted in my email yesterday. We will add those amounts when we receive that payroll from you. You will see that there are a few people with missing data. It is possible that some of the employees no longer work at Heritage but some appear to work there and just have weeks where there is no payroll info. In addition, there is at least one employee whose probation ended after 6/11 for whom we could not do the calculations, e.g., Regie Reyes. We will complete those calculations upon receipt of additional data. All these adjustments are quite minor in the scheme of things.

I strongly suggest that your client adjust the rates to the correct level without further delay so we don't have to continuously update. But more importantly, these workers should be paid what they are owed as there is no doubt how Arbitrator Scheinman views this case.

Please let me know no later than July 12 whether your client disputes these calculations, and if so, which ones. According to my notes, Marty stated that if I receive no response within two weeks of presenting the calculations, we should go to him.

The calculations submitted by the Union to Respondent was entitled, "Regency Backpay Calculations." It consisted of a spread sheet, listing the names of unit employees, including dates of hires, but in some instances, the dates of hire were blank. It also included a column entitled "correct rate" as well as listing for probation end for employees. The department worked and classification is also listed as well as the rates paid to these employees by Respondent, overtime hours and a column listed as "underpaid." Finally, a column also lists the amount of backpay to the employees according to the Union.

An examination of this document reveals that for the most part the Union calculated the amounts starting when the employee ended his or her probation period and deducting the difference between the contractual minimum specified in the contract as of December 1, 2010, and then computing underpayments to each employee.

As noted in Dichner's email, the Union stated that it could not do the calculations for employee Reyes because his "probation ended after 6/11." The email added that the Union would complete the calculations for Reyes upon receipts of additional data. As noted above, Reyes was one of the four employees listed on Respondent's response to Dichner's request with a date of hire of March 10, 2011. Reyes was an NA (nurse's assistant), and the Union listed his correct rate as $11 per hour and listed his probation ending on June 8, 2011, with no underpayment listed.

Obeng, Clark, and Graybush were all included in the Union's calculations and were listed as "No Frills NAs." The record contains no testimony or other evidence as to what a "No Frills NA" does. The Union's calculations state that for these three employees, their correct rate was $12 per hour. The document further reflects that Obeng and Clark were paid $11 per hour, and Graybush paid $10 an hour for the first pay periods of her employment and then was paid $11 per hour for the last two pay periods listed (5/28/11 and 6/11/11). Under the column marked probation end for each of these employees appears the following "# Value." No testimony or evidence in the record was offered to explain the meaning of "# Value" in this document.

The Union, in calculating backpay for these three employees, used a $12 correct rate and calculated underpayment of these employees based on the difference between their rate and rate paid to these three employees for the entirety of their employment listed from their first day of employment (3/10/11[5] through 6/11/11). Furthermore, the contract makes no reference to the category of "No Frills NA." As noted above, the contract lists a category of NA with minimum rate of $11 as of 12/1/10. The contract makes no reference to a minimum rate of $12 for any employee and again no reference to the category of "No Frills NA" whatsoever. No testimony or evidence was offered in explanation of why the Union sought the $12 rate for these employees from the outset of their employment or for seemingly ignoring the requirement that employees reach their probationary period before being eligible for the minimums.

Similarly, and equally unexplained, the Union listed 22 other no frills NAs in the same way. Thus, for each of these employees, a correct rate of $12 was listed and under probation end, the words "# Value" were filled in. Under the DOH column appeared a question mark.[6] The pay listed for these 22 employees varied. Mostly, it was either $10 or $11 per hour, but one employee (Miriam Lopez) was paid $12.50 for same pay periods and another employee (Danielle Sommella) was paid $11.49 per hour. For these 22 employees, once again, the probationary issue was ignored, and their backpay and alleged underpayment was calculated starting with the payroll period ending December 25, 2010, through June 11, 2011.

The DOH for these employees was not included, so it is possible that they could have been all past their probationary period. As noted, one no frills NA, Morasigan, did have a DOH listed as January 5, 2010, so the probationary issue would not been a problem for her. However, as with Graybush, Obeng, and Clark, the $12 rate sought for these 22 employees was also not explained.[7]

As related above, Dichner had requested in her June 28, 2011 email that Respondent respond to the Union's calculations by July 12, and if not the parties go to Scheinman. She apparently did not do so even though Respondent did not respond by that date. Respondent finally did send to the Union its calculations on August 4, 2011. Dichner responded immediately by email as follows:

[5] Under the DOH column for these employees, there was no date of hire listed but a "?". However, the calculations for them began on the pay period ending March 19, 2011.

[6] With the exception of one no frills NA, Lorna Morasigan, who had a DOH of January 5, 2010, listed.

[7] As I noted above, the contract does not reflect a $12 minimum rate for any employee and indeed makes no reference to no frills NAs whatsoever.

> Thanks, Ari. My paralegal just left for vacation and will be back the week after next. I'll have him review this first thing. Of course, if Heritage is still not paying the proper rates, we'll have a least 2 more months of back pay. Any change [sic] you can get Gross to pony up and correct the rates now?

The calculations sent by Respondent to the Union used the same format and spread sheet utilized by the Union, as described in detail above. For the most part, Respondent's calculations and assessments of backpay due to the employees were the same as the Union's, and Respondent agreed with the Union as to the sums due to these employees.

There were some differences in part due to the fact that the Union did not have dates of hire information for some employees. That becomes important since, as I have detailed above, the parties agree that eligibility for the minimums rates do not begin until the employee's probationary period ends. Thus, date of hire and end of probation information is essential and explains some of the discrepancies between the calculations of Respondent and the Union. Thus, in a number of instances, the Union did not have date of hire information for some employees, so it apparently assumed that they had ended their probationary period by December 1, 2010, and started their backpay at that time. However, Respondent's calculations for a number of employees did have dates of hire and end of probation included and resulted in reductions in the amounts of backpay sought for these employees since Respondent began their entitlement to backpay at the end of their probationary periods.

Thus was the case for a number of the no frills NAs, referred to above, where, as noted, the Union had started their entitlement for backpay as of December 1, 2010.[8]

Respondent did agree with the Union's $12 rate for minimums for the no frills NAs and calculated backpay for these employees accordingly.[9]

While Respondent did agree with the Union on applying the $12 "correct" rate to no frills NAs, it did, as noted, change the Union's calculations with respect to a number of no frills NAs[10] by considering their date of hire and probationary end and starting their backpay from the latter date for each employee as opposed to the Union's calculations, which started backpay as of December 1, 2010.

As I noted above, Respondent's prior correspondence with the Union had reflected that it hired employees Obeng, Graybush, and Clark on March 10, 2011 (after the contract's expiration). As also described above, the Union's calculations requested backpay of these no frills NAs for their first day of their employment.

Respondent, somewhat surprisingly and inconsistent with its positions with respect to the other no frills NAs, as outlined above, did not dispute the Union's calculations with respect to Graybush and Clark and agreed to backpay for these two employees from the first day of their employment, despite the fact that Respondent's own document stated that their probation did not end until June 8, 2011. No explanation was offered in the record or in the document as to why Respondent agreed to the Union's backpay calculations for these two employees.

In contrast, with respect to Regina Obeng, Respondent's document listed her DOH as March 10, 2011, her probation ending on June 8, 2011, and that she was terminated on May 25, 2011. It also noted underpayment for Obeng from March 19 through May 28 of various amounts based on the difference between the $12 minimum and the $11 rate paid to her. However, in the column for total backpay, it was left blank for Obeng. This position is consistent with Respondent's treatment of several other no frills NAs, who were terminated prior to June 8, 2011, and who Respondent did not award any backpay to, apparently concluding that any employee terminated prior to June 8, 2011, was not eligible for any backpay, regardless of when they started working for Respondent or their probationary period ended.[11]

As I have related above, Regie Reyes was an NA (not a no frills NA) was also hired on March 10, 2011, and was included on the list of employees with dates of hire sent to the Union in June. The Union's calculations for Reyes did reflect that his probation ended on June 8, 2011, but did not list any underpayments for him or request backpay for him. As also detailed above, in Dichner's email to Respondent, which referenced the Union's calculations, she stated that Reyes's probation ended after June 11 and, therefore, the Union could not do his calculations and will complete some upon receipt of additional dates.

Respondent's calculations for Reyes reflected that his probationary period ended June 10, 2011, that his correct rate was $11 and that he was paid $10 for his work during the pay periods ending March 18 through June 11, 2011, but the columns designated as underpaid were left blank for Reyes for each period, and he was awarded no backpay in Respondent's calculations. This document did not reflect that Reyes had been terminated as did the document with respect to many of the no frills NAs, who had been disqualified by Respondent for backpay on that basis, as set forth above.[12]

Further, the record reflects that Respondent disqualified 11 other bargaining unit employees from any backpay in its calculations based on the fact that they were terminated prior to June

[8] As noted above, the Union had received the Respondent's list of employees with DOH on June 17. That list included 13 no frills NAs, including Clark, Graybush, and Obeng. No explanation in the record was offered as to why the Union, nonetheless, sought backpay for these no frills NAs for periods before their probationary period had expired.

[9] As noted above, the contract makes no reference to a $12 minimum rate or indeed any reference to no frills NAs at all. Apparently, there had been an agreement between the Union and Respondent with respect to these issues although the record does not reflect when, how, or in what form this agreement was made.

[10] Employees Luisa Alcantara, Carol Brown, Meisha Manning, Sherley Montas, Jineth Moreno, Maria Nunze, and Jasmine Smith.

[11] These other no frills NAs, who Respondent did not award backpay to for that reason, were Nene Barry, Camille Belmonte, Anne Lafortune, Manouska Nicolas, and Jacqueline Newton.

[12] During the course of the instant trial, Respondent turned over various documents for the General Counsel pursuant to a subpoena. A number of these documents, which were entitled, "Employee Ledgers for Respondent's employees" were introduced into the record. Such a ledger for Regie Reyes reflected that he was terminated on July 14, 2011.

11, 2011. I note that some of these employees were long-term employees, who had passed their probationary period during the entire period when the Union's calculations had requested backpay for them.[13]

The record does not reflect any further documents or communications from the Union to Respondent or to the arbitrator concerning the proposed calculations, detailed above. As set forth above, the arbitrator issued his decision on November 18, 2011, wherein he awarded backpay to 98 specifically named employees of varying amounts. His decision was in total agreement with Respondent's calculations in all respects. The decision did not provide any details as why he found as he did, and it provided no analysis of why he agreed with Respondent's calculations as opposed to the Union's calculations. His only discussion in his decision in this regard was that the Union and Respondent attempted to reconcile the amounts due and adding, "Below, I have set forth the amounts due to the individual employees in accordance with my determination taking into account the documents submitted."[14]

For example, the arbitrator did not explain why he accepted Respondent's position that employees, who were terminated prior to June 11, 2011, were not eligible for any backpay, even though they had clearly been underpaid for several months prior to their terminations.

Nonetheless, the decision was issued, as noted, on November 11, 2011 ordering the amounts as specified by Respondent and disqualifying a number of employees from any backpay. The record does not reflect whether the Union protested the arbitrator's decision or in any way urged him to reconsider his findings.

The parties have agreed that Respondent had paid to the employees the amounts awarded in the arbitrator's award and that it had complied with the arbitrator's order to apply the contract wage (minimum wage rates) to those employees.

The record does not reflect precisely when Respondent paid the backpay or when it granted the increases to these employees. The record is clear, however, that Respondent did not and has not granted the contractual minimum increases provided for in the collective-bargaining agreement for any employees hired subsequent to March 1, 2011, the date the contract expired.

The record reflects, based on Respondent's records submitted in this proceeding that during the period from March 1, 2011, through December 4, 2012, Respondent hired 70 employees. That included 32 NAs,[15] 1 LPN, 3 laundry, and 12 housekeeping employees. None of these employees ever received the wage increase minimums for their classifications provided for in the contract.[16]

The evidence with respect to no frills employees is somewhat murky, and the evidence does not disclose when, if ever, Respondent started giving the $12 minimum rate to no frills NAs that it implicitly agreed was due to these employees in its submission to the arbitrator and its decision to pay backpay to a number of no frills employees, some hired after March 1, 2011. Thus, the record does not reflect when or if it actually granted the increases to these employees or when or if it granted the $12 rate to other no frills NAs hired prior to December 2010.

An examination of the records in evidence establishes that Respondent's list of no frills NAs in its August submission to the Union contained 25 names, including Graybush, Clark, and Obeng, whose names also appeared on the list submitted to the Union in June, which stated that they were hired on March 10, 2011. The other 22 no frills NAs were all hired prior to March 1, 2011.

This list included 15 no frills NAs, who were hired prior to December 2010, and their probationary periods ended prior to March 1, 2011.[17]

As I related above, the Union's calculations for these employees asked for backpay for all of them from the first pay period in question after the raises were due, the period ending December 25, 2010. As also noted, the Respondent's calculations agreed with the Union that these employees were underpaid from the period ending December 25, 2010, since they did not receive the $12 rate that the parties had apparently agreed to for such employees, and awarded them backpay from that time in accord with the Union's calculations.[18]

Although, as noted, the parties have agreed that the no frills employees received the backpay awarded them by the arbitrator, it does not reflect whether or not their salaries were ever increased to the $12 rate.[19]

Respondent's list, submitted to the Union in June, also included nine no frills NAs, who were hired after September 1, 2010, but before March 1, 2011, and whose probationary period ended at various times in 2011.[20]

As I have related above, Respondent's calculations for these employees measured their backpay from the respective dates that their probationary periods ended. Respondent requested

[13] These employees and their classifications were as follows: Harvey Drayton (recreation); Charline Merat, Lakeysha Smith, and Patrice Thompson (NAs); Mark Grey, Sharon Pape, and O'Brian Rosario (dietary); Marie Brignolp, Romel Flores, and Maria Elen Sanchez (housekeeping); and Rebecca Brunson (laundry).

[14] Presumably, the two spreadsheets submitted by the parties, which have been detailed above, and perhaps the payroll registers submitted to the Union, detailed above. It is possible that other documents were submitted to him by the parties but this record does not reflect any other such documents or evidence.

[15] Including Regie Reyes.

[16] $11 for NAs, $24 for LPNs, $10 for recreation, and $9 for housekeeping, laundry, and dietary employees.

[17] These employees were Nene Barry, Khahano Granes, Cresita Jost, Fatmara Kamara, Michelle Lapointe, Miriam Lopez, Lorna Morasigan, Sherley Montas, Maria Morales, Jacqueline Newton, Manouska Nicolas, Maria Nunez, Quinette Rahman, Julia Raymond, and Danielle Sommella.

[18] With the exception of one no frills NA, Nene Barry, who was terminated prior to June 2011, Respondent disqualified that employee from any backpay, consistent with its positions taken concerning other employees.

[19] As also noted above, the $12 rate is not listed anywhere in the contract.

[20] These employees were Alcantara, Brown, Lafortune, Manning, Nicolas, Nunez, and Smith. Respondent's list submitted to the Union in June included these seven employees and their dates of hire.

backpay for seven of these nine no frills NAs, and the arbitrator agreed to these amounts, which were paid to these employees.[21]

The other two employees, Nicolas and Lafortune, according to Respondent's spreadsheet were terminated prior to June 2011. Therefore, Respondent disqualified both of these no frills employees from any backpay, even though each of them had worked for several months past their probationary periods at rates of $10 or $11 per hour. That position is consistent with the position that it took with one other no frills NA, Nene Barry, as I detailed above, whose probationary period ended on July 13, 2010, but was apparently terminated sometime in April 2011.

As I indicated above, Respondent apparently took the same position with respect to a number of other employees in other classifications, where the minimums specified in the contract were not paid, who had passed their probationary period prior to December 2010, and who Respondent failed to grant the December minimum wage increases to and for whom the Union had requested backpay. Respondent disagreed, and since these employees were terminated prior to June 2011, it contended that they were not entitled to any backpay, and the arbitrator apparently accepted this position and disqualified these employees from any backpay.[22]

Respondent's records established that it hired 53 unit employees between March 1 and October 29, 2011. As noted above, Respondent's list and information submitted to the Union included only four of these employees to the Union—Reyes, Graybush, Obeng, and Clark. Respondent's records also revealed that it hired a total of 69 employees from March 1, 2011, through December 2012, in classifications of housekeeping, dietary, recreation, laundry, LPN, and NA. As related above, none of the employees received the raises in minimums specified in the contract for their jobs.

During this same period, Respondent also hired 24 no frills NAs, including Graybush, Obeng, and Clark. The latter three no frills NAs, as detailed above, were included in the list submitted by Respondent to the Union. As also set forth above, Clark and Graybush were both awarded backpay for the entire prior of their employment with Respondent in the arbitrator's decision pursuant to Respondent's agreement. They were both terminated in July, so they never actually received the $12 rate in their salaries. Obeng was also terminated but she received no backpay and never received the $12 rate.

The Union was never notified about the 21 other no frills NAs hired subsequent to March 1, 2011. Respondent's records with respect to these 21 employees reveal varying and inconsistent treatment of these employees concerning their rates.

During this period, Respondent hired nine no frills NAs between March 24, 2011 and April 25, 2012, at $11 per hour.[23]

Respondent hired 11 no frills NAs between May 5 and August 15, 2012, and started these employees at a rate of $12 per hour.[24]

Apparently, these employees were hired at $12 per hour without regard to their probationary periods. Yet the other no frills NAs, described above, who were hired in 2012, never received the $12 rate.

To further confuse the no frills NAs issue, Respondent hired one no frills NA, Grace Mwangi, on May 9, 2012, at a rate of $10 per hour. She was raised to a rate of $12 per hour during the period from September 5 to 21, 2012, suggesting that for this employee, Respondent waited until her probationary period ended before giving her a $12 rate.

V. BARGAINING

On May 31, 2011, the parties began negotiations for a successor agreement. Morris Tuchman, Respondent's attorney, was its main spokesperson. Also, present on behalf of Respondent were Aaron Stefansky, chief financial officer, and David Gross, the principal owner of the nursing home.

Ron McCalla, an organizer for the Union, was its main spokesperson. Also present on behalf of the Union was Roy Garcia, another union organizer, Executive Vice President Jean Cox, and 7 to 10 bargaining unit members. The Union laid out its goals for a new contract, including improvements in wages and health insurance coverage and increases in pension payments. These issues were discussed but no proposals were made. The issue of contractual minimum wage rates was not mentioned during the meeting nor rates of pay for the new hires.

The parties met again on August 2. During this meeting, McCalla stated that the Union was not at fault for the delay in starting bargaining and thought it was only fair that the parties agree to extend the contract until completion of negotiations since it had already expired on February 28. Tuchman responded that Respondent would think about the Union's request.

The Union presented its initial written proposal at this meeting. The proposals called for wage increases of 5 percent per year over 3 years or an increase to the minimum rate whichever is greater. It also added the following new proposals, "The hourly percentage increases cited in Section 1 above shall be added to current post-probationary minimum hourly rates below."

The rates specified were the rates set forth in the expired contract. They were $11 for CNAs, $24 for LPNs, $10 for recreation, $10 for maintenance, $9.50 for GRI, and $11 for cook. There was no discussion at this meeting about the contractual minimums or whether Respondent was complying with the minimum rates in the contract for employees hired since the contract's expiration.

[21] Alcantara, Brown, Manning, Montas, Moreno, Nunez, and Smith.

[22] The record does not reflect whether the Union ever made any argument to the arbitrator that Respondent's position in this regard was incorrect or argued to the arbitrator that the employees should receive backpay for the period that they worked prior to their termination.

[23] Employees Victoria Ayes, Maria Castro, Nicole Hackett, Camille Honrada, Danielle Perry, Paris Davis, Fatima Sheriff, Delvin Gichara, and Precious Odiaka. None of these no frills NAs were ever raised to a salary of $12, although some of them were still employed by Respondent as of December 2012. Employees Ayes, Perry, Honrada, Sheriff, and Castro were terminated on various dates prior to December 2012.

[24] Agenes Aboagye, Kaday Bona, Hazelyn Cabanting, Miriam Cato, Enseng Mei Chu, Gervaise Zebase, Faith Daville, Chinelo Emsue, Syreeta Morris, Chioma Ndubuisi, and Mary Oburu.

The parties met once again on August 24. Tuchman rejected the Union's proposals, characterized them as excessive and noted that Respondent had put a lot of money into rescuing the home.

Respondent made its own proposals at this meeting. It included a wage freeze and a decrease in the contractual minimums. The proposals called for reductions for LPNs from the current rates of $24 to $22, for CNAs, reductions from $11 to $10 and for dietary, housekeeping, and recreation employees, reductions from $10 to $8.50. McCalla responded that the Union had no intention of agreeing to any reductions in the minimum rates and that it "was completely out of the question." McCalla encouraged Respondent to rethink its position and put a sensible proposal on the table that would move the bargaining process forward. Tuchman responded that Respondent had put forward a "ridiculous proposal" because the Union's initial proposal was "ridiculous also."

Once again, the Union requested that Respondent agree to a contract extension. Tuchman again said that Respondent would consider it.

On September 14, the parties met once more. Most of this session was spent discussing health insurance. Again, McCalla asked about an extension of the contract, noting that the Respondent had stopped the check off under the contract. Tuchman replied that Respondent would be willing to consider resuming the checkoff, but would not agree to a contract extension, because Respondent did not want to be subject to the contract's arbitration clause.

On September 14, the Union sent an information request to Respondent, reiterating an oral information request that it had made at the August 24 meeting for information including a list of all employees doing work in bargaining unit classifications, plus some additional information not previously requested. The September 14 request is as follows:

> September 14, 2011
>
> Morris Tuchman, Esq.
> 134 Lexington Avenue
> New York, NY 10016
>
> Re: Request for information needed for Regency Heritage bargaining
>
> Dear Morris:
>
> In bargaining on August 24, 2011 the Union requested the following information that you agreed to provide:
>
> 1) For the period September 2010 through August 2011 a monthly list of all employees doing work within bargaining unit classifications. Please include by individual employee their facility designation (i.e. facility acknowledged bargaining unit employee, agency employee, per diem employee, or any other designation used by the facility to differentiate facility recognized bargaining unit employees from non-bargaining unit employees).
>
> 2) A list of bargaining unit employees who do not receive health insurance and the hourly compensation they receive for "opting out" of medical benefits.
>
> 3) A list of bargaining unit employees who do not receive health insurance, retirement benefits, and paid time off and the hourly compensation they receive for being in "no-frills" status.
>
> 4) Documentation showing the life insurance benefits bargaining unit employees receive.
>
> In addition to the previously requested information above:
>
> 5) Please supply the Union with invoices showing payments to the health insurance carrier on a monthly basis for calendar years 2009, 2010, and 2011 to date.
>
> 6) Pursuant to Article 19, section 3 of the collective bargaining agreement please supply the union with a list of bargaining unit employees who received restoration wage increases on their anniversary date of employment in 2008, on September 1, 2009 and on February 1, 2011 and the amount they received on each date.

Respondent did not comply with the portion of the request in this letter for a list of employees performing unit work for the period of September 2010 through August 2011.

The parties met again on September 27. During a discussion of the economics of the home, both Tuchman and Gross informed the Union that Respondent would not agree to an extension of the contract and that one of the reasons why was that Respondent did not want to be bound by the minimum hiring rates in the contract for employees that Respondent was hiring during the bargaining. Both Garcia and McCalla questioned Respondent whether it thought it could disregard the contractual minimums. Tuchman responded that it was likely that the contractual minimums only apply to employees, who were working for Respondent prior to the expiration of the contract, and cited a section of the Act that in his view supported that assertion.

After a caucus, the union representatives specifically asked whether Respondent was not adhering to the minimum hiring rates. Tuchman responded, "You're not going to play 'gotcha' with me. I see what you are trying to do here. I'm not going to fall into that trap. I'm not going to say that I'm not adhering to the contract." Gross also added that Respondent needs the right to hire at less than the contractual minimum rates.

On November 3, 2011, the Union sent the following letter to Respondent, accompanied by a list of employees that the Union had in its possession from 2004. The letter is set forth below:

> November 3, 2011
>
> Morris Tuchman, Esq.
> 134 Lexington Avenue
> New York; NY 10016
>
> Re: Exchange of information for Regency Heritage bargaining
>
> Dear Morris:
>
> See the attached bargaining unit list from the Central New Jersey Jewish Home from 2004 containing 174 names. As we agreed please now send us the monthly list of employees doing work within our bargaining unit classifications from

September 2010 through August 2011 per request number 1 from our September 14, 2011 letter (attached).

Please confirm that Regency Heritage is adhering to the contractual minimum rates for all employees hired after the expiration date of our contract.

We would also like to add three new bargaining team representatives for our November 10, 2011 session. The new members are Fatima Conte 7-3 CNA, Anna Ganley 3-11 LPN, and Annesia Bisnath 3-11 LPN.

Please facilitate their release along with the rest of our bargaining team for the session next week.

Thank you for your attention to these matters.

Sincerely,

Ron McCalla
1999SEIU UHE
NJ Region

Cc: Roy Garcia

The list submitted by the Union was, as noted, from 2004 when the home was owned by a different entity. Respondent had previously requested the Union send that list to it since the Union had been complaining that employees were doing unit work and it was unaware who was being hired by Respondent.

Respondent did not respond to McCalla's request in this letter to confirm that Respondent is adhering to contractual minimums for employees hired after the contract's expiration.

At the next bargaining session, November 10, Tuchman notified the Union that Respondent had resumed the check-off clause and had taken case of some pension arrears that had been the subject of discussion at prior meetings. The union representatives then specifically asked Respondent whether Respondent was adhering to the contractual minimum rates. Tuchman made no response to that inquiry at that time. After a caucus, McCalla asked again and stated that since Respondent had not signed a contract extension, the Union needed to know if Respondent was paying employees hired after the contract expiration the contractual minimum rates. Tuchman replied, "No." Both McCalla and Garcia both responded that they couldn't believe it, stating that Respondent had no right to alter the minimum rates when the parties were still bargaining and were not at impasse and Respondent could not unilaterally just not pay the rates. McCalla then made an oral information request for a list of new employees and what Respondent was paying its employees.[25]

Subsequently, the Union filed the instant charge on February 7, 2012, alleging that Respondent unilaterally changed the rate of pay for new hires.

As I have detailed above, Respondent has failed to pay the contractual minimums for numerous employees hired since March 1, 2011 in the classifications of NA, LPN, housekeeping, dietary, recreation, and laundry.

As I have also detailed above, Respondent has not paid the $12 rate to numerous no frills NAs hired since March 1, 2011, but did pay this rate to no frills NA hired after May 30, 2012, immediately upon hire without having such employees reach the end of their probationary periods. As also noted above, the $12 minimum rate for no frills NAs does not appear in the expired contract and evidence in this proceeding does not establish how and when this rate was presumably agreed to by the parties. I use that term "presumably" since Respondent did in the arbitration agree that such a rate was applicable to no frills NAs.

VI. ANALYSIS AND CONCLUSIONS

The complaint alleges that since March 1, 2011, Respondent failed to continue in effect all the terms and conditions of the collective-bargaining agreement between the parties by unilaterally changing the rate of pay of new hires without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the rate for new hires.

While the complaint does not specify which new hires Respondent unilaterally changed rates, I conclude that the General Counsel did not intend to encompass no frills NAs in the complaint. I note in this regard that the General Counsel's brief makes no reference to this category of employees and specially refers only to Respondent's failure to grant contractual minimum increases to NAs, housekeeping, laundry, LPNs, and dietary employees. Similarly, Charging Party in its brief makes reference only to these employees in arguing where Respondent violated the Act and in fact, in its chart attached to its brief, listing the employees hired since March 1, 2011, who Respondent failed to grant increases to excluded no frills NAs while noting that the evidence at trial did not establish the rate for no frills NAs.

In that regard, while some evidence was adduced at trial concerning rates paid by Respondent to no frills NAs, it was introduced primarily with respect to the 10(b) issues raised by Respondent. As I detailed above in the facts, the arbitrator did issue an award for backpay to two no frills NAs (Clark and Graybush) based on a $12 rate. However, as also noted above, this $12 rate, is not included in the contract nor does the record establish how or when or if the parties agreed to this rate for the no frills NAs.

In such circumstances, I conclude that no frills NAs are not the subject of the complaint and that Respondent's conduct with respect to the no frills NAs is not before me. Even if it was, since the evidence does not establish the appropriate contractual rate of these employees, I could not find any failure by Respondent to pay a $12 rate to these employees to be violative of the Act.

Therefore, I find that is undisputed that since March 1, 2011, Respondent had failed to provide the contractual minimums for employees hired after that date as NAs, LPNS, dietary, housekeeping, recreation, and laundry employees. It is also undisputed that Respondent did not notify the Union about this action nor afford it an opportunity to bargain with it with respect to the wage rate for these employees.

[25] Note that Respondent had still not complied with the Union's previous oral request on August 24 and written request on September 14, for a list of employees performing bargaining unit work for the period of September 2010 through August 2011.

Respondent does not dispute this finding but vigorously asserts that its conduct does not violate the Act. It is this issue that I now consider.

It is well settled that, even though a collective-bargaining agreement has expired, an employer is obligated to adhere to the terms and conditions of employment of its employees established by the contract and may not make any changes in these terms, absent a new agreement or good-faith bargaining to an impasse. *E. I. DuPont De Nemours*, 355 NLRB 1084 (2010); *Cibao Meat Products*, 349 NLRB 471, 475 (2007), enf. 547 F.3d 336 (2d Cir. 2008); *Made 4 Film*, 337 NLRB 1152 (2002); *REC Corp.*, 296 NLRB 1293 (1989).

Thus, while the contract is no longer in effect, the employment terms and conditions are kept in place by virtue of Section 8(a)(5) of the Act rather than by force of contract. *E. I. DuPont*, supra, 355 NLRB at 1086 fn. 9.

Respondent does not dispute these general principles of law but contends that in this instance Respondent's failure to adhere to the contractually required minimum wages for employees hired after the contract's expiration is an exception to these principles, since the employees hired after March 1, 2011, are not employees but merely applicants for employment. As such, Respondent contends that the wages paid to these employees are not mandatory subjects of employment. *Postal Service*, 308 NLRB 1305, 1308 (1992) (employer's changes in hiring practices for new employees, not mandatory subject of bargaining); *Star Tribune*, 295 NLRB 543, 545–548 (1989) (employer instituting drug and alcohol testing not mandatory subject of bargaining since applicants for employment are not bargaining unit employees); *United Technologies Corp.*, 274 NLRB 1069, 1070 (1985) (employer's summer help program not a mandatory subject of bargaining); *Allied Chemical v. Pittsburgh Plate Glass Co.*, 904 U.S. 157 (1971) (changes to retirement benefits for current retirees not subject to bargaining obligation as retirees are no longer employees of employer).

I disagree.

Respondent's characterization of unit employees, who were not paid the contractually required minimums as applicants for employment, is inaccurate. These individuals were hired by Respondent and were, and are, part of the bargaining unit. Respondent's failure to accord them the contractually required minimum wage, which became part of the bargaining unit's terms of employment by virtue of Section 8(a)(5) of the Act cannot be changed without bargaining with the Union to impasse or agreement of the Union. *E. I. DuPont*, supra; *Cibao Meats*, supra; *Made 4 Film*, supra.

I, therefore, find that Respondent's failure to grant the contractual required minimums to employees in the classifications is violative of Respondent's obligation to bargain with the Union. *Triple A Fire Protection*, 315 NLRB 409, 416–419 (1994) (failure to grant contractually required wage increases after contract expired to new employees, absent impasse, violated Section 8(a)(5) of the Act); *Utility Vault Co.*, 345 NLRB 79 fn. 2, 82–88 (2005) (requiring new employees to sign dispute resolution agreement as a condition of employment by the third day of their employment, a mandatory subject of bargaining and implementation of policy violative of the Act).

The cases cited by Respondent in support of its assertion that Respondent's conduct is lawful[26] are clearly inapposite.

These cases involve respondents' conduct during the process of hiring, such as requiring drug and alcohol tests and testing procedures. In these circumstances, the Board finds that *Pittsburgh Plate Glass*, supra, requires a finding that these "applicants" for employment are not considered employees for 8(a)(5) purposes concerning respondent's hiring procedures and standards. However, as noted above, the employees have already been hired and have become part of the unit and are eligible of all contractual benefits, including minimum wages. This conclusion is fortified here, by the fact that the eligibility for contractual minimums does not arise until the employees complete their probationary period of between 90 to 120 days. Thus, the unlawful unilateral changes here did not take place until the probationary periods expired for these employees, and Respondent failed to grant them increases at that time.

Thus, these employees have been employed by Respondent, performing bargaining unit work for 90–120 days as employees so they cannot be construed as "applicants" for employment as Respondent contends.

Indeed, taking Respondent's argument to its logical extreme, Respondent would not be obligated to provide "any" contractual benefits, including seniority, pension, vacation, overtime, holiday pay, personal time, sick leave, or other benefits, for any employees hired after the contract's expiration. This would, in effect, remove these employees from the bargaining unit and allow Respondent to treat them as new, nonunit employees, subject to whatever terms and conditions of employment Respondent chooses and different from the terms and conditions established by contract and practice for the rest of the bargaining unit employees, who were hired prior to the contract's expiration. Such a finding would eviscerate the Union's status as exclusive bargaining representative for Respondent's unit employees and be contrary to long-established Board precedent as set forth above.[27]

Accordingly, I reject Respondent's defense that its conduct is privileged because of the status of the employees as "applicants" for employment.

However, Respondent also raises two other "procedural" affirmative defenses to a finding that its conduct has violated Section 8(a)(5) of the Act, which warrant consideration and discussion. They are Section 10(b) and deferral.

Taking the latter defense first, Respondent asserts that deferral to arbitration of the instant complaint is warranted under the principles of *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *Dubo Mfg. Co.*, 142 NLRB 431 (1963).

However, I agree with the General Counsel and Charging Party that deferral is not warranted here under either a *Collyer* or *Dubo* analysis. Under the deferral standards in *Collyer*, supra, the Board will not defer a case to arbitration, where the issues involved statutory construction rather than contract interpretation. *North American Pipe Co.*, 347 NLRB 836, 852 (2006) (issuance of stock awards to employees and enforce-

[26] *Postal Service*, supra; *Star Tribune*, supra; *United Technologies*, supra.

[27] *E. I. DuPont*, supra; *Cibao Meats*, supra; *Made 4 Film*, supra.

ment of no solicitation rules); *Honeywell International Inc. v. NLRB*, 253 F.3d 125, 134–135 (D.C. Cir. 2001), enfg. *Allied Signal*, 330 NLRB 1216 (2000) (eliminating severance payments for employees laid off after contract's expiration).

Here, the issue is whether Respondent violated Section 8(a)(5) of the Act by failing to maintain existing conditions of employment of employees after the expiration of the contract, not whether the Respondent had an enforceable contract obligation. *Allied Signal*, supra, 330 NLRB at 1216. Respondent's obligation to maintain the status quo "reflects black-letter labor law, which has been established in Board and court precedent for decades. See for example, *Litton Business Systems v. NLRB*, 501 U.S. 190, 198 (1991), citing *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988); *St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 145 (DC Cir. 1989)." Id.; *Avery Dennison*, 330 NLRB 389, 391 (1999) (changes in wages and benefits after contract's expiration not deferrable since they raise statutory issues within the exclusive purview of the Board).

Moreover, since the contract has expired, the arbitration provisions expire and arbitration will not be required based on postexpiration events unless it "arises under the contract" under the meaning of *Nolde Bros. v. Bakery Workers, Local 358*, 430 U.S. 243 (1977); *Indiana & Michigan Electric Co.*, 284 NLRB 53, 60–61 (1987). Here, all of the alleged violations of the Act were triggered by events that occurred after the contract expired. The failure to pay minimum wages to employees hired after the contract expired and after their probationary period ended is not subject to the arbitration provision of the contract under the rationale of *Indiana & Michigan*, supra. See *15th Avenue Iron Works*, 301 NLRB 878, 879 (1991) (failure of employer to make fund payments for months since contract not arbitrable since union's right to payment for these particular months did not accrue or vest until after the contract expired).

It is noteworthy that in *15th Avenue Iron*, supra, the Board did defer to the arbitration award, which had been issued concerning failure to make fund payments during the term of the contract under a *Spielberg* and *Olin* analysis.[28]

It is, therefore, inappropriate to defer here under *Collyer* and I so find.

Respondent also contends that deferral is appropriate inasmuch as the parties have already arbitrated the issue of the failure of Respondent to pay contract minimums to employees during the contract's term and that the arbitrator has retained jurisdiction over the issue of all failures of Respondent to pay the minimums. Respondent asserts that the issue of Respondent's failure to pay the minimums to employees hired after the contract expired should also be deferred and sent back to the arbitrator under the principles of *Dubo Mfg.*, supra (Board defers, where district court has ordered parties to arbitrate dispute). Respondent contends further that the postcontract hires were before the arbitrator since he ordered Respondent to make affected employees whole for the failure to pay the contractual minimums and that he retained jurisdiction to award backpay due after June 11, 2011. Finally Respondent notes that the arbitrator did have before him four employees, who were hired after the contract expired, and awarded backpay to two such employees. Further, Respondent observes that the Union itself commented to Respondent concerning employee Reyes, who it could not do calculations for him, since his probationary ended after June 1, and in that correspondence urged Respondent to pay workers what they were owed or the Union would go back to the arbitrator. Therefore, Respondent concludes that the matter of postcontract violations was before the arbitrator and deferral to him is warranted.

I, once again, disagree with Respondent. It is clear that on deferral issues Respondent bears the burden of proof. *Rickel Home Center*, 262 NLRB 731 (1982). Here, Respondent has fallen far short of establishing that the issues of postcontract failures to pay minimums to newly hired employees was before Arbitrator Scheinman and should be deferred to that proceeding. The award, the grievance, and the record as a whole demonstrates that the grievance was concerned with violations that occurred for employees, who had been hired prior to the contract's expiration. The grievance was filed on January 13, 2011, alleging failure to comply with the contractual minimums due December 2010. These events were while the contract was still in effect. Subsequently, the arbitration request was filed and the case heard by Arbitrator Scheinman on May 5. He made an oral decision that Respondent violated the contract by not awarding increases provided for in the contract and ordered backpay for "affected employees." There is no indication in the decision, ultimately issued by Scheinman in November, that "affected employees" included those hired after the contract's expiration. Indeed, when Scheinman issued his oral decision in May 2011, postexpiration, no employee could have been eligible for backpay at that time since their probation could not have expired.

While Scheinman's written award in November referred to backpay due after June 11, it is clear, and I find, that it referred to the employees, who were hired prior to the contract's expiration, which were the subject of the hearing and who were named in his arbitration decision.

While it is true that one employee, Reyes, who was hired postcontract, was referred to in the Union's letter to Respondent in June, his probationary period had not expired at that time, he was terminated in July and received no backpay from Scheinman. Reyes's name was not mentioned in the decision. I find that Reyes's inclusion in the calculations back and forth between the Union and Respondent does not establish that his claim was before the arbitrator but merely that his name (as well as the three no frills NAs, who were hired postcontract expiration, whose names also were transmitted to the Union) "slipped through the cracks." Indeed, numerous other unit employees, who were hired by Respondent after the contract expired were never submitted to Respondent and were never even considered as eligible for backpay in the arbitration proceeding.

Accordingly, I conclude that Respondent has fallen far short of meeting its burden that the issue of the rates paid to employees hired after the contract expired was considered part of the

[28] 112 NLRB 1080 (1955), and 268 NLRB 573 (1984).

arbitration process and that their entitlement to relief must be sent back to the arbitrator for final disposition.

Based upon the foregoing analysis and precedent, I, therefore, reject Respondent's contentions that deferral of the instant complaint is warranted.

Turning to Respondent's 10(b) defense, it is well settled that the 6-month limitations period prescribed by Section 10(b) begins to run only when a party has clear and unequivocal notice, either actual or constructive, of the violation of the Act. *Art's Way Vessels Inc.*, 355 NLRB 1142, 1147 (2010); *Dedicated Services*, 352 NLRB 753, 759 (2008). The burden of showing such clear and equivocal notice is on the party raising Section 10(b) as a defense. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), enfd. sub nom. 483 F.3d 628 (9th Cir. 2007); *Salem Electric*, 331 NLRB 1575, 1576 (2000); where a delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party, a defense of 10(b) will not be sustained, *A&L Underground*, 302 NLRB 467, 469 (1991); *Taylor Warehouse*, 314 NLRB 516, 526 (1994), enfd. 98 F.3d 892 (6th Cir. 1996).

Respondent contends that Section 10(b) provides a defense to its conduct since the alleged violations of failing to pay minimum rates to employees hired on and after March 1, 2011 occurred more than 6 months before the Union filed its charge on February 7, 2012. Respondent, cognizant of the requirement set forth in the above precedent that it must prove that the Union had actual or constructive notice of the violations, outside of the 10(b) period, argues that it has met that burden based on the events of the grievance and arbitration proceeding that took place between February and November 2011.

Respondent's argument in this regard as set forth in its brief is quoted below.

> The charging party (CP Exh. 2) demanded arbitration alleging that the charged party was not, under the extant contract, properly resetting the post probation "minimum" rate for its employees. In effect, the CP argued that since the implemented wage increases were not being applied to the base rate, employees hired after the raises that completed probation were being paid less than they should have been, "the minimums."
>
> There was a hearing on May 5th, 2011 (a date well after the contract expired). The arbitrator directed the preparation of a "spread sheet" "indicating the alleged amounts owed to employees for retroactive pay *through June 11, 2011.*" [Emphasis supplied.] (See R. Exh. 1, the arbitrator's award.)
>
> Respondent's Exhibit 5, an email from union counsel dated June 28, 2011, states "Attached are the Union's calculations of the back pay owed for failure to pay minimums. The calculations go through 6/11/11. . . . In addition, there is at least one employee whose probation *ended after 6/11* for whom we could not do the calculations, e.g. Regie Reyes . . . I strongly suggest that your client adjust the rates to the correct level without further delay so we don't have to continually update. But more importantly, these workers should be paid what they are owed as there is no doubt how *Arbitrator Scheinman views this case*. . . . According to my notes, Marty [Scheinman] stated that if I receive no response within two weeks of presenting the calculations, *we should go to him.*" [Emphasis supplied.]
>
> Thus, the Union *in June* 2011, knew beyond any doubt that 1) part of its claim *at arbitration* was for employees hired *post* contract, and who were post probation, and whose minimums were not being paid pursuant to the expired (2/28/11) contract (since only employee Reyes had no claim as he had not yet finished probation), 2) that the case was sub judice before Arbitrator Scheinman, and 3) that the Union was fully informed of the rates being paid and the employee dates of hire because of the information given to it (R. Exh. 4), inter alia, on *June 17, 2011.*
>
> Moreover, a list was submitted and acknowledged by union counsel in an email dated 8/4/11. (See R. Exh. 2 (at "2 of 2".) Union counsel knew that minimum rates were not "right" and noted that there is an ongoing liability. (Id., "Of course, if Heritage is still not paying the proper rates, we'll have 2 more months [June through August] of back pay. Any chance you can get Gross to pony up and correct the rates now?")
>
> Since the list also showed employees hired after the 2/28/11 contract expiration, the union knew beyond peradventure that the "correct" new hire rate was not being applied such employees.
>
> Yet the union did not file these charges until February 7, 2012. The charges are therefore time barred and the complaint must be dismissed.

I do not agree with Respondent's interpretation of the facts nor with its conclusion that the events of the arbitration provide sufficient evidence that the Union knew that Respondent was violating the Act with respect to failing to pay minimums to employees hired postexpiration by June 2011, a date more than 6 months from when the Union filed its charge.

The first problem with Respondent's analysis is that, contrary to its assertion, the violations of the Act did not occur here until Respondent failed to pay the contract minimums to the employees when they were due, not when it hired these employees after the contract's expiration. Employees were not eligible for the contract minimums until their probationary periods expired. Thus, the first violations here started when the first employee hired postexpiration reached the end of their probationary period (90–120 days after hire) and was not given their contractual increases. *Salem Electric*, supra, 331 NLRB at 1575–1576 (notice that employer was hiring in *Laidlaw*[29] violation, insufficient to trigger Section 10(b) since employer must prove, and did not, that positions filled outside 10(b) period were substantially equivalent to employees' prestrike positions); *University Moving & Storage Co.*, 350 NLRB 6 (2007) (denial of accrued vacation and sick pay benefits after expiration of contract, 10(b) period did not begin until employer notified union that employees had no right to benefits, even though it had stated outside 10(b) period (during lockout) that there is no "contract in place").

[29] 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

Here, the record reflects that Respondent hired three bargaining unit employees on March 24, 2011.[30] The record does not disclose when the probationary period for these three employees ended since the records submitted by Respondent in this proceeding, which were employee ledgers for its employees hired after March 1, 2011, did not indicate the end of the probationary period for any employees on the ledgers, including these three employees. However, since the record establishes that the probationary period for employees is 90 days, but can be extended to 120 days, it can be concluded that the probationary period for these employees ended between June 24 and July 24, 2011. Thus, the unfair labor practice that Respondent has committed here was at the earliest, June 24. Thus, this is the critical date that Respondent must establish that the Union had noticed that Respondent had committed unfair labor practices at that time or sometime thereafter, prior to August 7, 2011 (6 months before the Union filed its charge on February 7, 2012).

I conclude that Respondent has failed to meet its burden of establishing that the Union had either actual or constructive notice of Respondent's unfair labor practices, as I have detailed above, within that time period.

Respondent's contentions, as outlined in its counsel's argument, quoted above, are not persuasive. The arbitration proceeding, contrary to Respondent's assertion, involved employees hired prior to the contract's expiration and the evidence cited by Respondent do not establish its assertion that the issue of failure to pay minimum rates to employees hired postexpiration was before the arbitrator or was being considered by him. The arbitrator did not award any backpay to any employee in the unit in the categories involved in the unfair labor practices herein.[31]

Respondent's conduct towards Regie Reyes also does not provide either actual or constructive notice to the Union that it violated the Act in June 2011, as Respondent asserts, or at any other time. As reflected above, the Union was notified that Respondent had hired Reyes on March 10, 2011, by virtue of its June 17 response to the Union's request for information concerning hires since September 1, 2010. Respondent subsequently provided the Union with a payroll register for the pay period of May 15 through 28, 2011, dated June 3, 2011. In this document Reyes is listed as having been employed, paid at the rate of $10 per hour for 75 hours of work. This document made no reference to probationary period for Reyes or for any other employees for that matter.

Upon receipt of that document, the Union made its calculations for backpay due to employees, pursuant to Arbitrator Scheinman's directions. While the spreadsheet listed proposed underpayments for employees, for Reyes, the Union's submission reflected that his probationary period ended on June 8, 2011, and that he was paid $10 for his employment through June 11, 2011. The underpaid column for Reyes was left blank. In Dichner's email to Weiss on June 28, attaching the Union's calculations, she made specific reference to Reyes. The email stated Reyes's probation ended after June 11, and that because of that the Union could not do the calculations for him but that "we will complete these calculations upon receipt of additional data."

Insofar as this recorded discloses, the only additional data submitted by Respondent was its calculations sent to the Union on August 4. This document, which as related above, used the same format as did the Union but with some changes, reflected that Reyes's probationary period ended on June 10, 2011, that his correct rate was $11 but he was paid $10 for work during the period of March 18, 2011 through June 11, 2011. However, the underpaid columns for Reyes were left blank, and Reyes was awarded no backpay by Respondent. This document did not reflect that Reyes had been terminated prior to August 4, 2011, as it did with other employees whom Respondent disqualified from backpay. However, subsequent payroll information submitted in this proceeding revealed that Reyes was terminated on July 14, 2011.

Respondent's August 4 document also did not reflect how long Reyes was employed by Respondent between June 11 and August 4, 2011, or what rates he was paid for such work.

Respondent relies on the above evidence, plus Dichner's additional comments in her June 28 email that "I strongly suggest that your client adjust the rates to the correct level without further delay so we don't have to continually update. But more importantly, these workers should be paid what they are owed as there is no doubt how Arbitrator Scheinman views this case." It contends that this evidence shows that the issue of failure to pay minimum rates for employees hired postexpiration was before Scheinman, that the Union knew it, and the Union knew that Respondent was underpaying bargaining unit employees, including Reyes, by June 2011.

Once again, I do not agree with Respondent's contentions. While the above evidence does reflect that Reyes was included in the arbitration process, it does not necessarily prove that all of the postexpiration hires were included or that Dichner's email was referring to these employees when she commented on June 28 that Respondent should adjust the rates to the correct levels to avoid continual updating. Rather, I conclude that Dichner was referring to the fact that, despite Scheinman's oral decision in May that Respondent had violated the contract by not paying minimums to eligible unit employees since December 10, 2011, Respondent had not adjusted the rates for these incumbent employees as of June 28. While it could be construed as including an admonition to raise Reyes's rate as well, once his probation ended, that was clearly not the primary focus

[30] Lorenzo Contreras (housekeeping); John Isater (NA), and Sandy Serrilia (NA).

[31] He did order backpay for two no frills NAs, Graybush and Clark but, as noted above, the failure to pay minimums to no frills NAs are not alleged as unlawful conduct here. Further, to the extent that it could be argued that since the Union was aware that Graybush and Clark were underpaid by June 2011, it was put on notice that Respondent was underpaying bargaining unit employees at the same time. I reject that contention. Notably, Respondent agreed to pay backpay to Graybush and Clark from the start of their employment until their terminations in July, without these employees having reached the end of their probationary period. Thus, Respondent's conduct towards Clark and Graybush cannot be construed as notice to the Union that it was not paying minimums to other unit employees.

of Dichner's comment. Most significantly, Respondent never notified the Union of what rates it paid to Reyes in June (after June 11) or in July, or, indeed, how long Reyes worked for it. The August 4 submission of Respondent's calculations merely listed no backpay due for Reyes, without any explanation, although it listed his probation as ending on June 10, 2011. Presumably, Respondent disqualified Reyes from any backpay since he was terminated on July 14, 2011, or it is also possible that, in fact, Reyes's probation was extended and had not ended in June and he was terminated before the probationary period was concluded. In either event, the Union apparently did not protest Respondent's disqualification of Reyes from backpay and acquiesced in this position. Significantly, none of the above evidence establishes that the Union knew what rates that Respondent was paying Reyes for the brief period that he worked for Respondent when he might have been eligible for backpay (June 11 through July 14). The record is somewhat uncertain as to why Reyes was even included in the arbitration process since he was hired after the contract expired. I conclude that most likely he was included (as well as no frills NAs Graybush, Obeng, and Clark) because they "slipped through the cracks."

In any event, since Reyes had not reached the end of his probationary period, prior to the June cut-off date for backpay established by Scheinman, there can be no finding that the Union was aware that Respondent had violated the Act by failing to pay Reyes the $11 rate. He was not eligible for the rate until his probationary period ended, and while the Union was aware that he had not been paid the $11 rate through June 11, 2011, his probationary period had not ended prior to that time. Therefore, the Union was not on notice based on Reyes's treatment that Respondent had violated the Act in June or at any other time. Apparently, the Union acquiesced in Respondent's decision to disqualify Reyes for any backpay due to his July 14 termination, but since the Union did not know what rates Reyes was paid between June and July, it was not aware that Respondent may have violated the Act with respect to Reyes for the 1-month period that he worked after his probationary period ended until his discharge.

The evidence, therefore, with respect to Reyes, cannot be construed as sufficient to put the Union on notice that Respondent had violated the Act with respect to him and certainly not, as Respondent asserts, that Respondent was not applying the proper rates to other new hires. The facts indicate, as reflected above, that Respondent hired three unit employees on March 24, but Respondent never notified the Union that it had hired these employees since they were not included on Respondent's purported list of hires since September 1, 2010, submitted to the Union nor in any of the documents submitted by Respondent to the Union in August and even in October 2011. Thus, since these three employees could not have been eligible for the minimums until June 24 at the earliest, and possibly not until July 24, the Union did not know that these employees were underpaid in June, as Respondent contends, or even in July or August, since the Union was not made aware of their existence. Similarly, the record established that Respondent hired six bargaining unit employees in April 2011, five in May, and five in June. However, Respondent never notified the Union that it had hired any of these employees. Neither of the Union's lists of employees hired after September 1, 2010, submitted to the Union in June listed any of these employees nor did any of the other payroll documents or calculations submitted by Respondent to the Union in June, August, or even October 2011, include these names. I note also that the eligibility of these employees for the minimums did not start until their probationary periods expired, so any possible unfair labor practices committed by Respondent by failing to pay minimums for these 16 employees could not have started until sometime in July, August, or September for these employees, depending on when their probations ended. Since Respondent had not demonstrated that the Union was ever made aware of Respondent's hiring these employees, much less when their respective probationary periods ended, the Union cannot be charged with either actual or constructive notice that Respondent was not paying minimums to employees hired after the contract's expiration.

In this regard, Respondent emphasizes Dichner's email to Respondent on August 4, where, after the Union received Respondent's calculations for backpay, Dichner observed, "Of course, if Heritage is still not paying the proper rates, we'll have at least 2 more months of backpay. Any chance you get Gross to pony up and correct the rates now." According to Respondent, this email demonstrates that the Union knew that minimum rates were not "right" and notes that there is an ongoing liability. Thus, it asserts that "since the list also showed employees hired after the February 28, 2011 contract expiration, the union knew beyond peradventure that the "correct" new rates was not being applied to such employees."

I disagree. Respondent mischaracterizes the record. The lists submitted by Respondent in June and the documents submitted by it to the Union in June and October did not contain the names of any unit employees hired after the contract's expiration, except for Reyes and the three no frills NAs, who, as noted, are not alleged as having been underpaid by Respondent tin violation of the Act. Thus, the fact that the Union was aware that Respondent had hired one unit employee, Reyes, after the contract's expiration, but was not aware that Respondent failed to pay Reyes the proper rate,[32] cannot be construed as sufficient actual or constructive notice that Respondent was not paying proper rates to new hires.

Dichner's comments in her email about Respondent not paying proper rates and an ongoing liability clearly referred only to Respondent's failure to pay the proper rates to incumbent employees, who were the subject of the grievance and where backpay was being considered by the parties, and who the arbitrator eventually decided were eligible for backpay. Notably, as of August 4, Respondent still had not yet corrected the rates for these employees (hired prior to the contract's expiration), who were the subject of the arbitrator's oral decision, issued in May that the proper rates must be paid to these employees. Apparently, Respondent, although purporting to comply with the arbitrator's oral decision by producing documents and submitting proposed backpay figures, had decided not to change the rates until after the arbitrator issued his written decision.

[32] His probationary period had not ended prior to June 11, 2011.

Thus, Dichner's comments in August do not provide evidence of constructive or actual notice to the Union of any unlawful conduct by Respondent.

Further, assuming, as Respondent vigorously argues, that the arbitration proceeding covered employees hired, both pre and postcontract, constructive notice to the Union cannot be found. If, in fact, the parties were, as Respondent argues, in the process of computing backpay due for employees hired postexpiration, Respondent's conduct in connection with that process eviscerates any possible 10(b) defense. Thus, Respondent submitted several documents to the Union in connection with calculating backpay pursuant to Arbitrator Scheinman's order. They include a list of employees hired since September 1, 2010, plus dates of hire, payroll registers for the pay period May 15 through 28, 2011, Respondent's backpay calculations sent to the Union in August and a payroll register for the pay period October 16–29, 2011, sent to the Union on November 4. Notably, between March 1 and October 29, 2011, Respondent hired 53 bargaining employees in the classifications covered by the contractual minimums, as detailed above. Respondent's four documents submitted to the Union, purportedly to properly calculate backpay for all eligible employees, failed to list 52 of these employees, whom Respondent hired during these months. The only such employee listed was Reyes, who, as set forth above, was terminated in July 2011, and was not awarded any backpay by the arbitrator with the apparent acquiescence of the Union.

The failure of Respondent to include these 52 employees in the documents submitted to the Union is unconsciousable, misleading, and an affront to the arbitrator. Further, although the Union had made several information requests to the Respondent, asking for a list of employees performing bargaining unit work from September through August 2011, Respondent never complied with these information requests. These actions by Respondent seriously hampered the Union's effort to diligently represent Respondent's employees, and I conclude that any delay in the Union filing the instant charges was a consequence of conflicting signals and otherwise ambiguous conduct by Respondent, thereby, requiring a rejection of its 10(b) defense. *A&L Underground*, supra, 302 NLRB at 469; *Art's Way Vessels*, supra, 355 NLRB at 1142 (employer refused to tell union of location of temporary facility); *CAB Associates*, supra, 390 NLRB at 1392 (employer failed to reply to union that it sign independent agreement but complied with terms of agreement while employing employees); *Concourse Nursing Home*, 328 NLRB at 694 (conduct of employer sufficiently ambiguous as to whether it ceased providing pension contributions for LPNs); *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995) (union's ability to monitor changes in wages and working conditions hampered by delays in employer's submission of requested information); *Frontier Hotel & Casino*, 318 NLRB 857 fn. 2 (1995) (no constructive notice of employer's violation of requirement to use union hiring hall since change made surreptitiously and union not notified of new hires); *Taylor Warehouse Corp.*, 314 NLRB 516, 526 (1994) (employer gave mixed signals to employees concerning their responsibilities in performing unit work); *Leach Corp.*, 312 NLRB 990, 992 fn. 8 (1993), enfd. 54 F.3d 802 (DC Cir. 1995) (lack of clear and unequivocal knowledge by union of facts that relocation unlawful at least partially attributable to employer's refusal to provide union with relevant information that it had requested during period leading up to and during the relocation); *University Moving & Storage*, supra, 350 NLRB at 7, 12 (employer promised to provide information to union concerning vacation leave).

Thus, Respondent's assertions that it established that the Union had at least constructive notice to Respondent's unlawful conduct outside the 10(b) period (i.e., prior to August 7, 2011) are rejected in view of Respondent's own misleading ambiguous conduct.

Additionally, I note the Board's decision in *Land-O-Sun Dairies*, LLC, 357 NLRB No. 73 (2011), which provides further support for my conclusion that Section 10(b) is not a bar to the Union's claim here. There, the union and the employer, in a newly certified unit, negotiated a first contract. During the negotiations, the parties disagreed concerning the status of five individuals, who the Union claimed were plant clericals (included in the certified unit) and the employer asserted were office clericals (excluded from the unit). This disagreement was not resolved during the negotiations, but the parties signed a contract, including a wage rate for "plant clerical employees if any."

Thereafter, the employer filed a UC petition seeking a determination of whether these five employees are plant clericals or office clericals. The director dismissed the UC petition, stating that the five clerical employees in dispute were the only clerical employees at the time of the elections and the *Excelsior*[33] list provided by the employer included these employees. Thus, the director concluded, "Obviously, therefore, you included all five employees as plant clericals." The employer filed a request for review of this decision, which the Board denied on August 5, 2010.

The employer argued that the union's charge, therein, filed on October 25, 2010, was barred by Section 10(b) since the union had notice of the employer's refusal to bargain over these five employees by virtue of the negotiations, where the employer continued to insist that these employees were office clericals and not in the unit (March of 2010), and by virtue of the employer's filing the UC petition on April 6, 2010. Since these events were more than 6 months from the union's charges, filed on October 25, 2010, the employer contended that the union knew at that time that the employer was not going to include these employees in the unit and that the union should have filed a charge within 6 months of those dates.

The Board disagreed and found in accordance with the position of the General Counsel that the operative date for 10(b) purposes was August 5, 2010, the date that the Board denied the respondent's request for review of the director's decision dismissing the UC petition. The Board reasoned as follows:

> We agree with the Acting General Counsel that the instant unfair labor practice charge is not barred by Section 10(b) of the Act. It is undisputed that the parties had not reached final agreement concerning the status of the five

[33] *Excelsior Underwear*, 156 NLRB 1236 (1966).

clerical employees at issue when they signed the collective-bargaining agreement on March 27, 2010. Instead, as indicated above, they negotiated several wage rate provisions in the collective-bargaining agreement for "Plant Clerical Employees (if any)." Thus, it appears that the parties agreed to disagree regarding whether the five clerical employees were plant clericals or office clericals. On April 6, 2010—only 10 days after the parties entered into the collective-bargaining agreement—the Respondent filed a unit clarification petition seeking a determination of whether the five employees at issue are plant clericals or office clericals. At that point, it cannot be said that the Union had clear and unequivocal notice of Respondent's refusal to bargain with the Union concerning the five employees. To the contrary, it seems reasonable that the Union would have assumed that the Respondent, by seeking clarification from the Board, would abide by the Board's resolution of the parties' dispute. Accordingly, until such time as the Board had acted on the pending unit clarification petition, the Union could not know whether or not the Respondent would refuse to bargain over the disputed employees or, for that matter, whether such a refusal would be unlawful. As a result, we find that the earliest date on which the Union could have had clear and unequivocal notice of the unlawful conduct alleged in the charge was August 5, 2010, the date that the Board issued its Order denying the Respondent's request for review of the Regional Director's decision to dismiss the Respondent's unit clarification petition concerning the clerical employees. Accordingly, we find that the unfair labor practice charge at issue was timely filed.

The reasoning of *Land-O-Sun*, supra, is equally applicable here. Thus, since Respondent participated in the arbitration process during which the obligation of Respondent to pay contractual minimums was being litigated, it is reasonable for the Union to assume that Respondent would abide by the arbitrator's decision that Respondent must pay the contractual minimums to "all affected employees." The Union had no reason to believe that Respondent would be taking a different position with respect to employees hired after the contract expired. However, Respondent did not abide by the arbitrator's decision vis a vis the employees hired after the contract expired,[34] although it did pay backpay ordered by the arbitrator to the employees hired before the contract expired, and adjusted the pay for these employees to the appropriate rate after the arbitrator's November 18 decision.

I conclude that whatever the actual scope of the arbitrator's decision, it is reasonable for the Union to conclude that Respondent would comply with the arbitrator's oral decision, issued in May 2011, that the minimums must be paid to all eligible employees, and, in fact, Respondent was cooperating with the Union in calculating backpay (for incumbent employees primarily) while not actually granting the applicable rates to these employees until after the arbitrator's written decision, issued on November 18, 2011. Thus, the Union had no basis for believing that Respondent was going to take a different position with respect to employee hired after the contract expired.

It is true that at the August 24 bargaining session, Respondent made a proposal to reduce the starting rates for each classification, and this proposal was rejected by the Union. At no time, however, during this session did Respondent notify the Union that it was not paying the minimums to employees hired after the contract's termination or that it had implemented these contract proposals at any time, or that it intended to take the position that employees hired since the contract's expiration would not be entitled to the minimums, even after the arbitrator issues his written decision, affirming his oral decision of May 5, that the minimums must be paid.

Interestingly, Respondent asserts somewhat offhandedly that "it could be argued that the parties were at impasse on this issue. The Union regarded the proposals as a 'non-starter' and was 'completely out of the question'. It was aware, moreover, that the employer needed relief from the minimums." To the extent that Respondent is arguing the parties were at impasse on August 24 on the issue of contractual minimums and that it was, therefore, justified in implementing that proposal, that position is without merit. It is well settled that during negotiations for a collective-bargaining agreement, an employer may not unilaterally change any terms or conditions of employment without having bargained to impasse as a whole, subject to certain limited exceptions. *RBE Electronics*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). None of these exceptions are present here or even alleged to be present by Respondent. Thus, even if it were to be found that a valid impasse existed with respect to the issue of contractual minimums on August 24, that would not be a valid defense to Respondent's implementation of this proposal. *RBE Electronics*, supra; *Bottom Line*, supra.

In this regard, the Charging Party contends that a violation can be found based on an alternative theory of a violation, *to wit* that Respondent violated the Act by implementing its proposal on August 24 without overall impasse being reached. Charging Party argues that this legal theory is encompassed within the scope of the complaint and it need only contain a clear and concise description of the acts, which are claimed to constitute unfair labor practices. *Cofire Paving Corp.*, 359 NLRB No. 10, 6(?) fn. 20 (2012); *Massey Energy Monmouth Coal*, 358 NLRB No. 159, slip op. at 10 (2012). Thus, it is asserted that the unlawful acts alleged in the complaint concern the wage rates for employees hired after the contract's expiration and, therefore, the range of legal theories upon which this is found to violate Section 8(a)(5) are properly before the ALJ. Under that theory of a violation, Section 10(b) would not be violated since the violation would be found to be on August 24 and thereafter, and the charge filed on February 7, 2012, would be timely. I agree with the Charging Party that this could be an alternative theory for a violation since the basic issue of unlawful payment of minimums was fully litigated, *Massey Energy Monmouth*, supra; *Cofire Paving*, supra. Such a finding would

[34] As noted, the arbitrator's decision makes no distinction between employees hired pre and postcontract expiration, but since the backpay issued in the decision went only to unit employees on staff before the contract's expiration, it is not clear that the award applied to employees hired after the contract expired.

start the violation from August 24, the alleged date of implementation after the alleged impasse. That might eliminate some backpay for employees, who reached their probationary period prior to August 24, of which the record discloses, there are clearly some employees.

Although, as noted, I agree with Charging Party that this is a viable alternative theory for finding a violation, in view of the above-detailed employees, whose rights could be lost by virtue of Section 10(b) if that theory is utilized, I do not rely on it here.

I find that for purposes of assessing Respondent's 10(b) contentions that the violations here, although alleged as of March 1, 2011, should be measured as of the dates that the probationary periods of the employees hired by Respondent since March 1, expired, since that is the date that their eligibility for contractual minimums kicks in. In this case, Respondent hired three unit employees on March 24, 2011, so their probationary periods would have ended sometime between June 24 and July 24, 2011. This is the date for measuring the unfair labor practice by Respondent here.

The issue then is whether Respondent's conduct at the August 24 meeting (i.e., proposing and arguably insisting on lower minimum rates for employees hired postcontract expiration) provided actual or constructive notice to the Union that Respondent had failed to pay these increases to the employees, who became eligible in June or July. I find that it did not for the reasons described above. Respondent's conduct was at best ambiguous and misleading with respect to this issue, the Union was not informed of the names of individuals, who Respondent hired, who became eligible for these increases, and Respondent failed to include these names on the numerous documents submitted to the Union during the arbitration process and failed to provide information in response to the Union's information requests, which would have revealed these names.

Moreover, even if Respondent's conduct on August 24 was held to be sufficient to provide constructive notice of the Respondent's unlawful conduct, that date is within the 10(b) period, less than 6 months from the date of the charge filed on February 7, 2012.

Similarly, at the bargaining session of September 27, Respondent informed the Union that one of the reasons why it did not want to agree to a contract extension was because it did not want to be bound by the minimum rates in the contract for employees that Respondent was hiring during the bargaining. At that point, the union representatives questioned whether Respondent thought it could disregard contractual minimums. Tuchman responded that it was likely that the contractual minimums only apply to employees, who were working for Respondent prior to the expiration of the contract, and cited a section of the Act that in his view supported that assertion.

After a caucus, the union representatives specifically asked if Respondent was not adhering to the minimum hiring rates. Tuchman responded, "You're not going to play gotcha with me. I see what you are trying to do here. I'm not going to fall into that trap. I'm not going to say that I'm not adhering to the contract."

While an argument can be made that these comments by Respondent on September 27 provided at least constructive notice to the Union that Respondent was not paying the minimums to employees hired postexpiration, I agree with the General Counsel and Charging Party that these comments are too ambiguous to constitute constructive notice of such conduct. Indeed, Tuchman expressly refused to answer the Union's question in this regard, asserting that Respondent was not going to admit that it had violated the contract. Further, after that meeting, the Union sent another information request to Respondent asking for its previously requested list of bargaining employees from September 2010 through August 2011 and adding that Respondent should confirm that "it is adhering to the contractual minimum rates for all employees hired after the expiration of the contract."

The above evidence demonstrates that the September 27 conduct created some doubt in the Union's mind about whether the Respondent was complying with the minimums for postexpiration hires, but, in my view, is not sufficient evidence to establish constructive notice, again in view of the ambiguity of Respondent's position as well as Respondent's failure to reply to the Union's information requests.

I, therefore, conclude that the Union did not receive sufficient notice of the alleged unfair labor practices until the November 10 bargaining session when Respondent finally responded to the Union's direct question if it was adhering to the contract minimum rates for employees hired after the contract expired. Tuchman replied, "No." Interestingly, after the Union responded to Tuchman that Respondent had no right to alter minimum rates when the parties were still bargaining and were not at impasse, it also made an oral information request for a list of new employees and what Respondent was paying its employees. This request has not been complied with, and the evidence with respect to new hires and their rates, detailed above, was obtained only through subpoenas in this proceeding.

Thus, since I conclude that November 10, 2011, was the date on which the Union obtained notice of the unfair labor practices committed by Respondent above, the charge filed by the Union on February 7, 2012, was clearly timely.

Moreover, even if I were to conclude that the September 27 bargaining comments by Tuchman, as detailed above, provide sufficient and constructive notice of a violation, that date would also be within the 10(b) period, less than 6 months from the February 7, 2010 charge filed by the Union.

Accordingly, based on the foregoing analysis and precedent, I reject Respondent's 10(b) defense and find that the Union's charge was timely filed.

Therefore, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by unilaterally changing minimum wage rates for employees hired after March 1, 2011.

CONCLUSIONS OF LAW

1. The Respondent, Regency Heritage Nursing and Rehabilitation Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, 1199 SEIU United Healthcare Workers East, New Jersey Region, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has been the designated bargaining representative of Respondent's employees in the following appropriate unit:

> All full-time and regular part-time nonprofessional employees, including all licensed practical nurses, certified nursing assistants, housekeeping employees, laundry employees, dietary em-ployees, cooks, maintenance employees, recreational aides, behavioral aides, beauty and barber employees, purchasing/central supply employees, and unit clerks employed by the Employer at its 380 DeMott Lane, Somerset, New Jersey facilities, but excluding all office clerical employees, registered nurses, other professional employees, guards, and supervisors as defined in the Act, and all other employees.

4. Respondent, by unilaterally changing the established terms and conditions of employment of its employees and failing to pay minimum salaries for all eligible employees hired on and after March 1, 2011, without notice to and bargaining with the Union has violated Section 8(a)(1) and (5) of the Act.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I recommend that it cease and resist therefrom and take certain affirmative action designed to effectuate the Act. Respondent must rescind the unlawful unilateral changes and restore its past practices and grant the wage increases that it unlawfully withheld from its employees.

Respondent shall also make whole the employees for any losses suffered by reason of Respondent's conduct in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall also file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for the affected employees. Respondent shall also compensate the employees adversely affected by Respondent's conduct for the adverse consequences, if any, of receiving one or more lump sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[35]

ORDER

The Respondent, Regency Heritage Nursing and Rehabilitation Center, Somerset, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the Union as the exclusive representative of employees in the following appropriate unit:

> All full-time and regular part-time nonprofessional employees, including all licensed practical nurses, certified nursing assistants, housekeeping employees, laundry employees, dietary em-ployees, cooks, maintenance employees, recreational aides, behavioral aides, beauty and barber employees, purchasing/central supply employees, and unit clerks employed by the Employer at its 380 DeMott Lane, Somerset, New Jersey facilities, but excluding all office clerical employees, registered nurses, other professional employees, guards, and supervisors as defined in the Act, and all other employees.

(b) Unilaterally implementing the elimination of wage increases due to its employees or any other changes in terms and conditions of employment of its employees in the above unit, without notifying and bargaining with the Union and without bargaining in good faith with the Union to a lawful impasse.

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

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Grant the wage increases that Respondent unlawfully withheld from its employees, hired since March 1, 2011.

(b) Make whole all affected employees with interest in the manner set forth in the remedy section of this decision.

(c) Reimburse the affected employees an amount 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 discrimination against them.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the affected employees it will be allocated to the appropriate periods.

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

(f) Within 14 days after service by the Region, post at its Somerset, New Jersey facilities copies of the attached notice marked "Appendix."[36] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other

[35] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2011.

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

Dated, Washington, D.C. June 6, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with 1199 SEIU United Healthcare Workers East, New Jersey Region, as your exclusive representative in the appropriate unit by failing to give notice to and bargain with the Union before making changes in your wages or your working conditions.

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

WE WILL grant the wage increases that we unlawfully withheld from eligible employees, whom we hired since March 1, 2011.

WE WILL make you whole with interest for any losses that you suffered as a result of our failure to grant you wage increases when they were due.

WE WILL reimburse all employees from whom we unlawfully withheld wage increases, amount equal to the difference in taxes owed on receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them.

WE WILL submit the appropriate documentation to the Societal Security Administration so that when backpay is paid these employees it will be allocated to the appropriate periods.

REGENCY HERITAGE NURSING AND REHABILITATION CENTER