



UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MHA, LLC d/b/a MEADOWLANDS HOSPITAL  
MEDICAL CENTER

and

HEALTH PROFESSIONAL AND  
ALLIED EMPLOYEES, AFT, AFL-CIO

Cases 22-CA-086823  
22-CA-089716  
22-CA-090437  
22-CA-091025  
22-CA-091521  
22-CA-092061  
22-CA-096650  
22-CA-097214  
22-CA-099492  
22-CA-100324

**ANSWERING BRIEF ON BEHALF OF THE COUNSEL FOR THE GENERAL  
COUNSEL IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION  
OF ADMINISTRATIVE LAW JUDGE STEVEN DAVIS**

Saulo Santiago  
Counsel for the General Counsel  
National Labor Relations Board  
Region 22  
20 Washington Place, 5<sup>th</sup> Floor  
Newark, New Jersey 07102  
(862) 229-7057

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## **I. SUMMARY OF ARGUMENT**

The record evidence adduced at the hearing clearly supports the Administrative Law Judge's finding that MHA, LLC d/b/a Meadowlands Hospital Medical Center, ("Respondent") violated Section 8(a)(1) of the Act by threatening its employees with closure of its Rehabilitation Unit if employees engaged in protected activity and violated Section 8(a)(5) of the Act by (1) selecting employees to be laid off without affording the Union an opportunity to bargain; (2) assigning Service Unit work to non-unit per diem employees without prior notice and an opportunity to bargain; (3) failing and refusing to produce to the Union the DNV Inspection Report and information concerning Veritas; (4) unilaterally eliminating RN and Technical Unit 12-hour shifts; (5) failing to continue in effect all the terms and conditions of the RN contract by refusing to apply the RN contract to RN interns; (6) failing to continue in effect all of the terms and conditions of the RN, Service, and Technical contracts by refusing to make contributions to employees' 401(k) pension plan; (7) failing to continue in effect all of the terms and conditions of the RN, Service, and Technical contracts by failing to allow Union representatives to meet with employees in the Hospital's cafeteria; (8) failing to continue in effect all of the terms and conditions of the RN, Service, and Technical contracts by failing to offer bumping and recall rights to laid off employees; (9) failing to continue in effect all of the terms and conditions of the RN, Service, and Technical contracts by refusing to apply the Service contract to the Hospital Assistants; and (10) failing to continue in effect all of the terms and conditions of the Service contract by refusing to apply the Service contract to the Nursing Assistant interns.

The record evidence shows that in or about January 2010, Respondent entered into an asset purchase agreement with Liberty Health Systems to acquire Meadowlands Hospital Medical Center ("Meadowlands"). Respondent filed the necessary paperwork with the State of New Jersey's Department of Health and Attorney General's office for approval of the sale of the

hospital. After a review process that included public hearings, the Department of Health and the Attorney General's office approved Respondent's purchase of Meadowlands. Respondent acquired Meadowlands from Liberty Health Systems on December 7, 2010.

Prior to the acquisition of Meadowlands, on September 9 and September 11, 2010, Respondent engaged in bargaining with the Health Professionals and Allied Employees, AFT, AFL-CIO ("Union"), the certified representative of Meadowlands' RN, Service, and Technical unit employees. Respondent and the Union reached agreement on separate collective bargaining agreements for the RN, Service, and Technical units and agreed to sign the agreements upon the purchase of the hospital. The effective date of the agreements was December 7, 2010 to May 31, 2016.

The overwhelming record evidence demonstrates that the parties' bargaining relationship has been contentious from the start. The Union has filed approximately 46 grievances and 16 unfair labor practice charges. [GCX-1, GCX-66, GCX-67, GCX-68, GCX-69].<sup>1</sup> Many of these disputes concerned the entire unit or multiple employees. For example, almost immediately after the purchase of the hospital, Respondent improperly classified all employees as probationary (with a hire date of December 7, 2010) and discharged 20 of those employees without just cause. The Union filed a grievance on March 17, 2011. [GCX-14, GCX-66 pg.1]. On May 9, 2011, the Union filed a grievance alleging that the Respondent denied 20 unit clerks and secretaries their contractual bumping rights after those classifications were eliminated. [GCX-66 pg.4]. On June 8, 2011, the Union filed a grievance alleging that Respondent failed to maintain the contractual health benefits of all Unit employees. [GCX-66 pg. 5].

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<sup>1</sup> In this answering brief, the transcript of the hearing will be referred to as [Tr. ] and references to the General Counsel and Respondent's Exhibits entered into evidence in the hearing will be referred to as "GCX" and "R" followed by exhibit number. References to the ALJD will be designated by the page number and line divided by a colon [i.e. ALJD page:lines].

Moreover, the Union filed charges in Cases 22-CA-29980, 22-CA-30065 and 22-CA-63233 alleging, inter alia, discriminatory discipline, discharge, and layoff of employees; unlawful surveillance; direct dealing; the failure to furnish information; the refusal to process grievances; the unilateral layoff of unit employees and transfer of unit work to non-unit positions; and the unilateral change in Union access to the facility, bumping rights, medical benefits, work policies, job descriptions, and evaluation forms. [GCX-67, GCX-68, GCX-69].

The bargaining relationship deteriorated further after Respondent closed several hospital units, laid off employees, refused to bargain layoff procedures, and made unilateral changes to the 12-hour shift schedules, and delayed grievances. Roughly around the same period, Respondent began internship programs for RNs and Nurse Assistants ('NA') that effectively supplanted bargaining unit employees with interns. Such actions led the Union to engage in a publicity campaign to raise awareness of Respondent's discriminatory practices. The publicity campaign reached an apex when the Union released a white paper, featuring a comprehensive study of the hospital's operations. After the release of the Union's white paper, Respondent responded swiftly and abruptly with threats to further close units and trampled on employee's rights covered by the collective bargaining agreements. Such a discordant bargaining relationship is evident in Respondent's conduct that underscored these matters and commenced almost immediately after MHA's takeover and continues to the present day.

General Counsel relies upon the Statement of the Case and Findings of Fact as set forth in ALJ Steven Davis' decision and the record of the hearing in these proceedings. The ALJ correctly concluded that the General Counsel presented credible, forthright witnesses while Respondent's witnesses offered manufactured testimony in support of its shifting legal defenses. Therefore, General Counsel addresses Respondent's exceptions in a limited way since the issues raised in the Respondent's Exceptions have been thoroughly dealt with by the ALJ's decision.

## II. ARGUMENT

POINT I: THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT FAILED AND REFUSED TO SUPPLY THE UNION WITH REQUESTED INFORMATION IN VIOLATION OF SECTION 8(a)(5) OF THE ACT

### A. Applicable Law

It is well settled that an employer, on request, must provide a union with information that is necessary and relevant to the carrying out of its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Dodger Theatricals*, 347 NLRB 953, 967 (2006). The duty to provide information includes information relevant to contract administration and negotiations. *McKenzie-Williamette Medical Center*, 362 NLRB No. 20 (2015); *First Energy Generation, LLC*, 362 NLRB No. 73 (2015); *Pulaski Construction Co.*, 345 NLRB 931, 935 (2005).

Where the requested information concerns terms and conditions of employment within the bargaining unit, the information is presumptively relevant and the employer has the burden of proving lack of relevance. *AK Steel Co.*, 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). Moreover, a union may rely upon the presumption of relevance pertaining to employees within the bargaining unit and has no further obligation to explain its significance unless and until the employer establishes legitimate affirmative defenses to the production of the information. *Beverly Health and Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); *River Oak Center for Children*, 345 NLRB 1335, 1336 (2005). See also *Quality Building Contractors*, 342 NLRB 429, 430 (2004) quoting *Commonwealth Communications*, 335 NLRB 765, 768 (2001).

Further, an employer must respond to information requests in a timely manner. *Woodland Clinic*, 335 NLRB 735, 736 (2006); *Samaritan Medical Center*, 319 NLRB at 398;

*Leland Stanford University*, 307 NLRB 75, 80 (1992). An unreasonable delay in furnishing information is as much a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *Woodland Clinic*, 335 NLRB at 736; *Newcor Bay City Division*, 345 NLRB 1229, 1237 (2005).

**B. Substantial record evidence supports the ALJ's finding that Respondent violated Section 8(a)(5) of the Act by Refusing to Provide Information**

In this case, Respondent failed to provide the Union with requested information regarding the DNV Inspection report and information concerning Veritas. The following is a discussion of Respondent's unlawful conduct in connection with such information.

**i. DNV Inspection Report**

**a. The ALJ Correctly Found that the DNV Inspection Report is Presumptively Relevant**

Inspection reports are presumptively relevant and necessary for the Union to effectively represent bargaining unit employees. *Olean General Hospital*, 363 NLRB No. 62, slip op. at 3 (2015).<sup>2</sup> As the ALJ properly concluded, the Inspection report is vital in determining changes to hospital operations that could impact employees' terms and conditions of employment. Although Respondent contends that the ALJ mischaracterized its witnesses' testimony concerning Respondent's intended use of the DNV Inspection report, the evidence clearly shows that Director of Nursing ("DON") Felicia Karsos indicated that the inspection report examined nursing services, orientation, nursing certification and credentials while owner Tamara Duneav indicated that the report was "a working tool for the hospital staff and management" to make changes, fix deficiencies and implement improvements. [Tr. 1433, 3075-6]. Karsos and Duneav's testimony are helpful to interpret Respondent CEO Lynn McVey's email on February 14, 2013 in which she reported that the DNV inspection found 14 new findings that "will

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<sup>2</sup> The DNV Inspection report is equivalent to Joint Commission on Accreditation Healthcare Organization ("JCAHO") inspection report, the report requested in *Olean General Hospital*.

become our playbook for 2013's improvements." [GCX-72]. Thus, contrary to Respondent's contention, the ALJ correctly found that the DNV report related to the unit employees, Respondent intended to use the report's findings to implement "improvements" in the hospital's operations, and therefore, it is presumptively relevant.

**b. The ALJ Properly Held that Levine Presented Objective Evidence of a Reasonable Belief**

By letter dated March 15, 2013, Carlton Levine, the Union's assigned staff representative, requested a copy of the DNV Inspection report. [GCX-73]. Although McVey had not specified in her email to employees what the report's 14 new findings were, her intent to use the DNV report's findings to make improvements using its "evidence-based management practice" made the report more relevant to Levine's effort to see how it implicated the bargaining unit. In its exception brief, Respondent suggests that the ALJ disregarded McVey's clarifying statement that "we will use the same evidence-based management practices we are using now." To the contrary, the ALJ properly concluded that McVey's statement signaled that Respondent intended to use the DNV report to make improvements. Despite Respondent's assertion to the contrary, McVey's statement clearly indicates that Respondent intended to implement changes using the same evidence-based management practices utilized by the hospital in the past for similar changes. [ALJD 15:7-13].

Respondent's further argument that Levine was unable to identify any specific information in the DNV report that could have assisted the Union in administering the contract is disingenuous. Relying on *Olean General Hospital*, the ALJ rightly concluded that Levine's inability to identify specific relevant information in the report cannot be held against the Union because the Union has never seen the report. Instead, the burden is on the Respondent who has seen the report, knows what is in it and had ample opportunity to show that the information

contained in the report would be of no benefit to the Union. Thus, Respondent's contention that the Union's inability to show a specific need for the report undercuts the Union's claim that the report was relevant is unpersuasive.

**c. The ALJ Rightly Held that Respondent Failed to Show the Union Acted in Bad Faith**

Respondent's claim that the ALJ rejected its argument that the Union requested the DNV report in bad faith by simply finding that the Union had "at least one good faith reason" for the request misinterprets the ALJ's decision. Rather, the ALJ rightly found that if "Respondent had those concerns about the Union's use of the report, it did not make those concerns known to the Union." [ALJD 14:40-41]. It is well-settled Board law that Respondent carries the burden to establish a legitimate confidentiality interest. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318-319 (1979). Here, Respondent presented no evidence as to why the report is confidential. [Tr. 3077, 3136]. Respondent simply refused to provide the Union with the report because of its long-running feud with the Union. Even if Respondent had established a legitimate and substantial confidentiality interest, it had an obligation to notify the union in a timely manner and seek an accommodation. *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 3. It is undisputed that the Respondent failed to take either step. *Bundy Corp.*, 292 NLRB 671, 672 (1989) (unlawful for employer to ignore union's information request for 2-1/2 months); *Borgess Medical Center*, 342 NLRB, 1105, 1106 (2009) (employer unlawfully failed to offer a reasonable accommodation for the union's request).

Moreover, the burden is on Respondent to show that the only purpose of the Union's request was a bad-faith purpose. Even though Respondent presented no evidence to substantiate its assertion concerning the Union's alleged bad faith, the ALJ determined that "the existence of even one legitimate purpose would nonetheless render the request valid." [ALJD 15:1-3]. It is

clear that the Union had a legitimate purpose, for requesting the DNV report because McVey's remarks clearly indicate that the report impacted the employees' terms and conditions of employment. Therefore, the ALJ correctly held that Respondent violated Section 8(a)(5) of the Act by failing to provide the DNV Inspection report.

2. Veritas

Board law is clear that a union must generally establish the relevancy of information regarding single employer, joint employer, or alter ego relationships in which an employer is involved. While the Union is not required to prove the existence of such a relationship, the union must have an "objective factual basis for believing" that the relationship exists. *Consolidation Coal Co.*, 307 NLRB 69, 72 (1992) citing *Bohemia, Inc.*, 272 NLRB 1128 (1984); *Maben Energy Corp.*, 295 NLRB 149 (1989). See also *Shoppers Food Warehouse*, 315 NLRB 258 (1994); *Knappton Maritime Corp.*, 292 NLRB 236 (1988); *M. Scher & Son*, 286 NLRB 688 (1987); *Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531, 536 (4th Cir. 1985), enf. 270 NLRB 652 (1984). Where, for example, a union is informed that certain of its members will be paid by an outside entity for their participation in a new training program, the Board has found that the union is entitled to information that would shed light on the identity of that third party and whether, in fact, it would have the right to direct the work of the unit employees. *Olean General Hospital*, 363 NLRB No. 62, slip op. at 3.

In this case, Respondent contends that Levine did not have reasonable objective factual basis for believing an alter ego relationship existed. It further argues that, even if Levine had some proof it was not sufficient to satisfy the Union's legal burden of proof. Unlike Respondent's claims, by the time of Levine requested information in his April 17, 2013 letter, the Union had already demonstrated to Respondent both the relevance of the requested information and the basis for this reasonable belief. [GCX-54, 57]. The Union had specific

evidence of Respondent's suspected alter-ego or single-employer relationship with Veritas. As the ALJ properly found, this included evidence that Respondent shared a common address, registered agent and identical officers with Veritas and information that Veritas employees attended the same orientation as Meadowlands employees. Although Respondent excepts to the ALJ's characterization of GCX-56 as "an official document filed with the State" to satisfy the Union's reasonable belief, Respondent's exception is disingenuous. Respondent is correct that Levine testified that after he received emails from Respondent's Human Resource Generalist Nancy Forsyth with attached Excel spreadsheets he investigated the orientation lists because they listed Service bargaining unit titles (i.e. medical assistant (MA), ultrasound tech, front desk and receptionist) which had not been reported to the Union and enlisted the help of Union researcher Adrien Doumlin-Smith to conduct an investigation into "Veritas," it is clear that Doumlin-Smith gave Levine a copy of the New Jersey Department of the Treasury's Certificate of Formation filed on May 30, 2013 for Veritas Health Management, LLC. [GCX-56, Tr. 136-45]. That Levine did not find the Certificate of Formation himself does not, as Respondent's exception seems to suggest, make the document authenticated or hearsay. It is noteworthy that Respondent here conveniently failed to admit that Duneav admitted that Meadowlands' principals formed Veritas. [Tr. 3141-8]. Thus, Respondent raises minor discrepancies which do not impact on the ALJD findings.

The ALJ further noted that Karsos told the Union that, on occasion, bargaining unit RNs were pulled to help out in Veritas' outpatient clinic since the clinic had just started off and that she had every intention to post any and all unit positions that were required for Veritas outpatient clinics. Respondent, however, erroneously suggests that the ALJ relied on this to find that Levine had an objective basis for his request. Rather, the ALJ clearly noted that by the time Levine made his requests, he had a reasonable belief that an alter-ego or joint employer relationship

existed based on the Certificate of Formation showing the same principals, registered agent, purpose of business and office location, and the list of Veritas employees which showed that Veritas employees worked in the same units performing the same work as unit employees and had the same business purpose as Meadowlands. [ALJD 18:1-17]. As such, Respondent's contention is meritless. Based on this information, the ALJ properly concluded that the Union reasonably believed that Respondent and Veritas had similar business purposes, management, operations and ownership, and thus were alter egos. See *H&R Industrial Services*, 351 NLRB 1222, 1224 (2007); *M. Scher & Son*, 286 NLRB at 691 fn. 1. Thus, Respondent had no lawful justification to refuse to supply the information and violated Section 8(a)(5) and (1) of the Act.

**POINT II. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT UNLAWFULLY REFUSED TO APPLY THE SERVICE UNIT CONTRACT TO HOSPITAL ASSOCIATES IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

This is the rare situation where there is actual direct evidence that Respondent failed to apply the Service unit contract to the hospital associates. Respondent admits that it created the hospital associate job classification to relieve Service unit Nursing Assistants ("NA") from having to answer phones. Despite Respondent's assertion to the contrary, the record is abundantly clear that hospital associates did much more than answer phones. The record shows hospital associates transported patients, took blood and urine samples to the laboratory, restocked rooms and sat one-on-one with patients. All of these tasks were previously performed by NAs. In fact, NA Yvette Garvin testified without contradiction that hospital associates performed every NA bargaining unit task with the exception of physical contact with patients. She also testified that NAs overtime opportunities were eroded as a result. [Tr. 1148-50].

As the ALJ rightly found, Respondent's witness Arthur Kharonow admitted that hospital associates performed additional tasks, such as sitting duties, which had been previously been

exclusively performed by full-time NAs. [Tr. 1148-50, 1171-4, 2121-7, 2160-3]. Kharonow's testimony simply boils down to his belief that he was justified in moving NA unit work to non-unit hospital associates because he was trying to address operational issues. Kharonow's testimony is premised on facts not supported by record evidence and upon a claim of contractual right devoid of any reasonable contractual interpretation. What is clear is that the enumerated functions above had always been performed by NAs and these duties were not isolated in nature.<sup>3</sup>

Likewise, Respondent contends that the ALJ erred in finding that the sitters were not per diem employees. Respondent's exception is a gross mischaracterization of the record evidence. Per diem employees are defined as employees who were not regularly scheduled and were called on "as needed" basis. The record evidence clearly demonstrates, through Kharanow, that Respondent scheduled sitters to work "one shift per day." Respondent's reading of the record evidence slightly confuses Kharanow's testimony in this respect. In actuality, Kharanow testified that Respondent scheduled sitters for each shift, but after the shift commenced if sitters were not needed, they would be sent home. [Tr. 1148-50, 1171-4, 2121-7, 2160-3]. This is different than what Respondent claims now and does not defeat the ALJ's finding that sitters were not per diem, but rather were regular full-time or part-time employees recognized under the Service bargaining unit contract.

While Respondent further contends that the ALJ wrongly cited to *Mountainview Hospital, Inc.*, 356 NLRB 1384 (2011) and *Cogburn Healthcare Center, Inc.*, 335 NLRB 1397 (2001) to confirm that sitters have been included in Service bargaining units, Respondent's

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<sup>3</sup> Respondent's exceptions on page 98-99 of its brief concerning NA Yvette Garvin boils down to its dissatisfaction with the ALJ's credibility resolution. Although Respondent tries to paint Garvin's testimony as prejudiced by her termination, tainted and vague, the record evidence overwhelmingly supports the ALJ's credibility findings, especially when Kharanow's testimony substantiated and bolstered Garvin's testimony about the Hospital Assistants performing sitter's tasks previously performed by bargaining unit Nurse Assistants (NAs). Thus, Respondent's attack on Garvin's credibility is spurious.

reading of the ALJ's decision misinterprets his reasoning for citing to the two relevant NLRB cases. In citing to *Mountainview* and *Cogburn*, the ALJ simply pointed to the fact that sitters in other healthcare facilities have routinely been included in bargaining units and thus, there is Board precedent that the job title of sitter is recognized industry-wide. In no way was the ALJ citing to *Mountainview* and *Cogburn* to discuss whether sitters were per diem as Respondent suggests. [ALJD 99:37-45 and 100:1-10]. This is particularly evident when the ALJ cited to Kharanow's testimony which corroborated Garvin's testimony that sitters were regularly scheduled, and in so doing confirm that sitters are not per diem as Respondent would like us to believe. Therefore, Respondent's exceptions must be rejected.

Simply put, Respondent's unilateral transfer of bargaining unit work to non-bargaining unit employees is unlawful. Consequently, the ALJ properly concluded Respondent's failure to put the hospital associates into the Service unit and apply its terms to them also violates the Act.

**POINT III. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ's CONCLUSION THAT RESPONDENT UNLAWFULLY ELIMINATED 12-HOUR SHIFTS WITHOUT BARGAINING WITH THE UNION IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

The issue here is whether Respondent violated Section 8(a)(5) and (1) of the Act by modifying its collective-bargaining agreement with the Union by eliminating 12-hour shifts without the Union's consent. The Board has long held Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer that is a party to a collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union. *Nick Robilotto Inc.*, 292 NLRB 1279, 1279 (1989). Section 8(d) contains the various obligations, of which one is to bargain in good faith about terms and conditions of employment, and, a second is to continue in full force and effect the terms and

conditions of an existing contract between the parties. In *San Juan Bautista Medical Center*, 356 NLRB No. 102, slip op. at 3 (2011), the Board held:

Absent the union's consent, a mid-term contract modification of a term governing a mandatory subject of bargaining violates Section 8 (a)(5). See *Bonnell/Tredegar Industries*, 313 NLRB 789, 790 (1994), enf'd. 46 F.3d 339 (4<sup>th</sup> Cir. 1995). An employer, however, can justify that conduct by articulating a "sound arguable basis" for believing that the contract allowed such a modification. See *Hospital San Carlos Borromeo*, 355 NLRB No. 26, slip op. at 1 (2010).

The Board has held that hours of work and work schedules are a mandatory subject of bargaining. *Carpenters Local 1031*, 321 NLRB 30, 31 (1996); *Sheraton Hotel Waterbury*, 312 NLRB 304, 307 (1993)(changes in employees' hours of work are mandatory subjects of bargaining). Unilaterally eliminating hours of work constitutes material and substantial change. See *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965); *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006).

The RN and Technical contracts between the parties provide for 12-hour shifts. Appendix B states: "The 12 hour shift will be offered in the (ED, 3W, ICU/CCU, PEDS, LDP, NURSERY, LRI and 4C). The employee had the right to return to his/her previous 7.5 hour shift, if mutually agreed upon and not unreasonably denied."

On September 21, 2012, Human Resources Director Pavisic informed Dudsak that Respondent was eliminating all 12-hour shifts. Dudsak promptly notified Levine and, in turn, Levine wrote Pavisic demanding to bargain over Respondent's intent to eliminate 12-hour shifts. Levine testified that at a meeting with Felicia Karsos on September 28, 2012, she informed him that Respondent intended to eliminate 3 days 12-hour shifts and move to 5 days 8-hour shifts to ensure patient quality of care and safety. Levine made it clear that Dudsak and he were there to hold an informal discussion that was not a substitute for the Union's right to bargain the change and that the Union would need the requested information before it would be prepared to engage

in bargaining. Karsos told him that she agreed it was informal and that the purpose of the meeting was to exchange information. [Tr. 33-7, 849-52]. The meeting ended with Levine telling Karsos that the Union had many concerns about the change, but looked forward to engaging in bargaining once the Union received the requested information. [GCX-13].

There is little dispute that Respondent eliminated 12-hour shifts. On October 8, 2012, the Union received a letter from Pavisic indicating it that Respondent intended to move forward with its decision to eliminate 12-hours shifts. Pavisic indicated that Respondent determined that the “assignments of work are within the prerogative of the employer” and disagreed that Respondent “must bargain prior to the implementation of the changes in the assignments or shift changes.” [GCX-10]. There is no dispute that the Union did not agree to change the 12-hours shifts in Appendix B.

While Respondent argues in its exceptions that the Union waived its right to bargain over changes to employees’ work hours and work schedules in the Management Rights Clause, this assertion must be rejected.<sup>4</sup> To substantiate such a claim, Respondent relies on two Board cases *Kerry, Inc.*, 358 NLRB 980 (2012) and *United Technologies Corp.*, 300 NLRB 902 (1990) to argue that similarly worded Management Rights clauses have been found to be a waiver. Both *Kerry* and *United Technologies* are distinguishable from the instant case. In *Kerry*, while the Board found “the schedule of work and production” to be unambiguous and fit perfectly the

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<sup>4</sup> In its brief on page 26, Respondent argues that the ALJ used the incorrect standard to analyze whether the Union waived its rights to bargain over certain terms and conditions of employment. Respondent asserts that the ALJ’s use of the “clear and unmistakable” waiver standard rather than the more reasonable “contract coverage” waiver standard is erroneous. While Respondent cites to *Enloe Medical Center*, 433 F.3d 834 (D.C. Cir. 2005) and *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. September 30, 2016) in support of its proposition, the Board has consistently rejected the “contract coverage” standard and instead reiterated its use of the “clear and unmistakable” standard. *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). The Board has also consistently indicated that the burden to prove a waiver is difficult, that waiver must be an explicit contract disclaimer or clear evidence of intentional waiver during bargaining. *Georgia Power Company*, 325 NLRB 420, 420-21 (1998). Thus, Respondent’s exceptions pertaining to paragraphs 12, 13, 16, 20, 29, 31, 37, 39, 55, 57, 143, 144 and 149 boil down to a challenge to the Board’s “clear and unmistakable” waiver standard and it must be rejected.

employer's action in changing work schedule hours, it also noted that the language had been arbitrated and found to be a waiver and there was no qualifying language. In *United Technologies*, the Board held that the union's agreement to certain language in a management functions clause waived its right to bargain over the employer's decision to increase a Saturday overtime shift from 5 to 8 hours. The clause stated, in part, that "[T]he company has and will retain the sole right and responsibility to direct the operations of the company and in this connection to determine shift schedules and hours of work." The Board stated:

Unlike our dissenting colleague, we find no ambiguity in the language of the management functions clause pertaining to "shift schedules and hours of work." Because it is without qualifying language, it plainly authorizes the Respondent to determine the hours of scheduled shifts whether they occur on Saturday, when employees are paid at a premium rate, or on a weekday. 300 NLRB at 902.

Unlike in *Kerry* and *United Technologies*, the Management Rights clause here is neither explicit nor unambiguous. The Management Rights clause does not specify work schedules or shifts, but rather generally addresses "to assign work" and "to determine the number of employees, duties to be performed and the hours and locations of work, including overtime." A plain view reading of this language shows that it did not intend to give Respondent sole discretion over the elimination of 12-hour shifts or that the Union waived its right to bargain over the subject. Additionally, unlike *Kerry* and *United Technologies*, the Management Rights clause here has qualifying language stating "unless such other rights are abrogated by a clear and express provision of this Agreement." Thus, as the ALJ rightly concluded the Management Rights Clause was unspecific and cannot be read to specifically cover the subject. [ALJD 64:4-10].

Moreover, Respondent asserts in its exceptions that the language in Appendix B gave it the right to unilaterally eliminate 12-hour shifts. Karsos and Duneav both testified that Appendix B *only* offered 12-hour shifts, but cannot be read to guarantee 12-hour shifts to

employees. But Respondent failed to produce any documentation or bargaining notes from the parties' negotiations to substantiate this interpretation of Appendix B. Nor is Karsos or Duneav's testimony substantiated by how Respondent has applied this language for 2 years prior to the change as the ALJ correctly concluded.

Rather, Respondent's interpretation of the management rights clause as it fits in conjunction with Appendix B is flimsy. The language of Article 23.1 of the RN and Technical unit contracts is clear and unambiguous. The contract gives Respondent the right to set "the hours and location of work" and to "determine the number of employees assigned to any shift;" however, Respondent's right is not unlimited. In fact, Article 23.1 limits Respondent's rights to "clear and express provision of this Agreement." Nothing in the clear language of the contract allows Respondent to unilaterally eliminate 12-hour shifts, nor justifies, or even establishes support for, Respondent's position that the plain language of the parties' contract permitted its unilateral action.

Further, Karsos's contention that Appendix B was a temporary clause is self-serving. In its exception brief on page 53, Respondent posited that the ALJ "summarily rejected Respondent's explanation – that the 12-hour shift was placed in the Appendix as it was temporary." However, this assertion is a misreading of the ALJD. The ALJ specifically addressed Karsos' testimony and properly concluded that he could not credit Karsos' testimony because (1) Appendix B did not establish it was "only a test or experiment," (2) the provision was in place and applied for 2 years and (3) Respondent presented no evidence that prior to the elimination, the "trial basis" had been completed. [ALJD 64:20-24]. Thus, the ALJ properly concluded there is no reference in the parties' contract that even comes close to suggest that Appendix B is "temporary" or "for a trial period." Consequently, the record evidence clearly supports the ALJ's failure to credit Karsos's account based on these facts.

Accordingly, Respondent's unilateral mid-term modification of the parties' contract eliminating 12-hour shifts for its RN and Technical unit employees without the Union's consent violates Section 8(a)(5) and (1) of the Act.<sup>5</sup>

**POINT IV. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT UNLAWFULLY REFUSED TO ENGAGE IN EFFECTS BARGAINING, NAMELY THE CRITERIA TO BE USED FOR SELECTING EMPLOYEES FOR LAYOFF IN VIOLATION OF SECTION 8(a)(5) OF THE ACT.**

The effects of a layoff are a mandatory subject of bargaining, largely without regard to the cause for the layoff. As with decisional bargaining, effects bargaining also requires an employer to provide a union with notice of layoffs before they occur in order to satisfy the employer's duty to bargain over the effects. *Toma Metals, Inc.*, 342 NLRB 787 (2004); *Kajima Engineering & Construction*, 331 NLRB 1604, 1620 (2000); *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021 fn. 8 (1994), enfd 87 F.3d 1363 (D.C. Cir. 1996).

Under the parties' contracts, Article 5-Seniority contains a separate provision which provides that employees shall be selected for layoff in reverse order of seniority. The RN and Technical contracts each provide in Section 5.2 that "Seniority shall apply to all issues involving lay-off. " The Service contract provides in Section 5.5(B) that "[n]on-probationary Employees shall be laid off in inverse order of their classification seniority." The contracts do not address how employees in the same classification should be selected for layoff if they have the same seniority. All three contracts also contain, in Article 3-Probationary Period, a provision

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<sup>5</sup> Respondent excepts to the ALJ's refusal to find that there was a "sound arguable" basis for it to have understood Appendix B giving it a right to unilaterally eliminate 12-hour shifts. In support of its exception, Respondent regurgitates the same post-hearing brief arguments rejected by the ALJ. Although Respondent tries to paint Appendix B as "temporary," there is no evidence other than Karsos' self-serving and discredited testimony that this was the intent of the parties. It is noteworthy that Karsos did not participate in contract negotiations and thus, was left to only offer her speculation as to the intent of the parties. Moreover, as the ALJ held, her testimony is rebutted by the contract language and the fact that Respondent applied the terms of Appendix B for 2 years before the elimination. [ALJD 64:25-35].

which allows Meadowlands to discharge employees without cause during a 90 day probationary period and without going through the grievance and arbitration procedure.

Prior to the Harris arbitration award, the parties simply disagreed about whether MHA seniority or Hospital seniority should be used. After the Harris arbitration award (which concerned employee probationary periods – Article 3), the Union did not concede that MHA seniority necessarily applied to Article 5 and layoffs. Respondent is adamant that it did (thereby creating a problem as to how to select among many employees with equal seniority for layoff). On April 27, 2012, Arbitrator Restaino issued an award which adopted the reasoning in the Harris arbitration award.

Based upon these two adverse arbitration awards, the Union was willing to entertain Respondent's position that most employees had the same seniority and deal with the problem that this created for selecting employees for layoff. The contracts required employees to be selected for layoff in reverse order of seniority. This requirement was essentially rendered moot now that most employees had equal seniority. It is noteworthy that the Union repeatedly requested that Respondent explain the criteria it was using to select amongst employees with equal seniority for layoff, but Respondent would not provide this information. The Union repeatedly requested to bargain over alternative criteria and suggested that these criteria be objective rather than subjective. It took the position that this objective criteria should be employees' original hire dates (even if this date was rejected by the Harris arbitration decision for purposes of interpreting the probationary provision). However, despite Respondent's characterization of the Union's recalcitrant behavior, in which it claimed that the Union insisted on Hospital seniority to determine the order of layoff in its brief on page 36, the ALJ previously rejected Respondent's same arguments here, and held that the Union was willing to discuss and negotiate over other criteria. [GCX-23, 25, 92, Tr. 2337-8, ALJD 34:4-8]. Rather, the record

evidence supports the ALJ's finding that it was Respondent who refused to engage in meaningful bargaining, not the Union. The record evidence shows that Respondent insisted that the management rights clause gave it the right to make layoff determinations among employees with equal seniority at its own discretion. [Tr. 2015, 2615]

However, it is Respondent's recalcitrant behavior which is shown when Respondent counsel Alfred Maurice testified that he attended three meetings with the Union about layoffs. Maurice stated that the first two meetings occurred before the Harris arbitration decision issued on February 25, 2012, and that Karsos was present at one of those meetings. Maurice claimed that at this meeting, Karsos asked Union representative Leo Torrey how the Union wanted Respondent to make layoff selections among employees with the same seniority dates, and Torrey responded that the use of any criteria other than seniority on the basis of original seniority hire dates would be grieved. In support of this position, Respondent produced a page from Karsos' calendar which notes that a meeting with the Union was scheduled for April 17, 2012. [R-66]. However, Karsos admits that meetings with the Union were often placed on her schedule by Pavisic as an invitation to meetings, but the schedule entry did not confirm that she actually attended the meeting. [Tr. 2353-4, 2489-91]. Further, Respondent's counsel Robert Mulligan was not called to corroborate Karsos' account of the meeting.

Interestingly enough, Maurice testified that he attended a third meeting with the Union, which occurred after the Harris arbitration decision issued. The ALJ rightly credited Dudsak's testimony that Maurice did not attend the meeting with Pavisic on April 17, 2012 or any other meeting regarding layoffs thereafter. Nevertheless, even if Maurice were present, he does not describe the meeting in a manner that contradicts the General Counsel's case. Maurice testified that at the meeting, he said, "we have this problem with trying to break ties and Mr. Torrey – and we think we resolved it now because we had this decision from Arbitrator Harris. " [Tr. 2015].

According to Maurice, Torrey said that the Harris arbitration only applied to 20 probationary employees and was not controlling with layoff decisions in the broader unit. Maurice testified that he told Torrey that Respondent disagreed and would not do what Torrey suggested. Pavisic echoed the same sentiment that Respondent had just tried this case and refused to engage in discussions concerning layoff criteria. [GCX-24, Tr. 61-5, 237-44, 606, 627-8, 846]

It is undisputed that the day after the April 17, 2012 meeting Torrey asked Respondent in writing to explain its criteria for selecting among employees for layoff and demanded that Respondent bargain over the same. [GCX-92, 237]. This further contradicts Maurice and Karsos' bewildering testimony. Rather, Karsos, like Garrity, had a recollection of Robert Mulligan (not Maurice) telling the Union that the issue of layoff criteria was "settled" by the Harris arbitration decision. [Tr. 1276]. Mulligan believed that after the Harris arbitration decision, Respondent was entitled to select at its own discretion among employees with equal seniority for layoff without bargaining over the layoff criteria. Mulligan would not explain why Hospital seniority could not be used as criteria for layoff selection and refused to bargain any alternative criteria. [GCX-212].

Thus, there is ample evidence that Respondent asserted that the selection among employees with equal seniority was a managerial right instead of an open mandatory subject that was not addressed by the current contracts. Yet, the Union repeatedly made written requests to bargain over the use of alternative criteria. [GCX-16, 19, 21, 23, Tr. 54-5]. Levine even suggested some objective criteria that Respondent had originally proposed, but Respondent simply refused to negotiate over the issue and never proposed a single alternative position. [GCX-25, Tr. 55-6, 60-1, 248-9, 1300, 2641, 3655].

Respondent now claims that the ALJ erred by combining his analysis of the resolution of the "effects" versus the "tie-breaking" issue. There is nothing further from the truth. The ALJ

addressed the effects bargaining issue first. The ALJ considered Respondent's contention that the use of "discuss" rather than "bargain" was significant. However, the ALJ rightly held that Respondent's strong reliance on *Ingham Regional Medical Center*, 342 NLRB 1259 (2004) was misplaced. Although Respondent, like in *Ingham*, has a right to layoff employees pursuant to seniority, the ALJ noted that that right to layoff was limited to Respondent exercising that right by applying the employee's seniority in determining who is to be laid off. Although Respondent is correct that Section 5 of the contracts reads "discuss" rather than "bargain," the ALJ properly concluded that the contract language here is distinguishable from *Ingham* because it did not include a critical interpretative statement explaining the subjects of those discussions. [ALJD 34:44:46 – 35:1-7]. As such, the contract language, even taken together with the layoff clause, would not constitute a "clear and unmistakable" waiver.

Since the ALJ did not find a "clear and unmistakable" waiver, it is also correct that he did not agree that Section 5.4 should simply be interpreted by reading the contract provision. The facts in this case should be analyzed under the Board's "clear and unmistakable" waiver precedent as noted in footnote 4 of this brief. While Respondent contends this result is wrong, it cannot point to any other Board precedent except *Ingham*. Given that the ALJ intelligently distinguished *Ingham* from the facts in this case, Respondent's assertion that the ALJ incorrectly applied the standard in *Georgia Power Company* and *Provena St. Joseph Medical Center* is spurious. Thus, when the ALJ found that "there is no evidence that the language of the management rights clause or the requirement that the Respondent 'discuss' aspects of the layoff was 'fully discussed and consciously explored' or that 'the union consciously yielded or clearly and unmistakably waived its interest in the matter' or its right to bargain," he addressed the confluence of the effects and tie-breaking issue involved in this case separately first and then

- jointly after his initial findings. Thus, Respondent's exceptions are a misreading of the ALJD. [ALJD 35:27-32].

As mentioned above, the Harris decision did not resolve the issue of layoff criteria as Respondent insisted, but instead created a problem that had to be resolved through bargaining. Respondent claimed that it did not need to bargain over the layoff provision, but there is no mistake that the layoff provision was silent on the "tie-breaking" issue. Respondent chided the ALJ for saying this is a "unique circumstance." However, despite Respondent's rhetoric it implicitly conceded that when the parties negotiated the contracts they did not envision this particular situation. If this is so then the ALJ's label that this situation was a "unique circumstance" is correct. [ALJD 35:34-36]. That Respondent refused to bargain over the layoff criteria or its effects solely based on the "discuss" versus "bargain" language controversy demonstrates that the ALJ's finding that the subject was "eminently well-suited topic for bargaining" is not an evisceration of the parties contract, but a proper assessment of Respondent's obligation to bargain under the circumstances. [ALJD 35:44-47].

Respondent's exception brief on page 33-34 further contends that the ALJ erred in citing to *Tesoro Refining and Marketing*, 360 NLRB No. 46 (2014) because it was not remotely analogous to this matter. While Respondent tries to distinguish the facts in *Tesoro* to this case, Respondent is clearly missing the picture the ALJ has painted. Although there was no contract language which mandated bargaining here like in *Tesoro*, given that the language did not constitute a "clear and unmistakable" waiver there is a similar obligation on Respondent to bargain with the Union. Thus, Respondent's objection to the ALJ's reliance on *Tesoro*'s holding is a classic example of manufacturing an exception.

Likewise, the record evidence supports the ALJ's finding that Respondent had no "sound arguable" basis for its interpretation. While Respondent chided the ALJ's "sound arguable"

- finding as misleading, it is actually Respondent who is misrepresenting the facts here. As mentioned above, Respondent met with the Union on several occasions to bargain over the layoff criteria. Respondent's witnesses admitted that they asked the Union to give ways to resolve the "tie-break" issues and it insisted that the Union failed to provide them with an alternative (although the ALJ rightly found this was not the case). [ALJD 36:1-25]. That is, Respondent's conduct shows that it itself interpreted Section 5:4 to require it to bargain over layoffs. Yet in its exceptions Respondent now argues there were two reasonable interpretations. However, the ALJ properly relied on *Tesoro* to expose the lie behind Respondent's masquerade. As such, the ALJ properly concluded that Respondent violated Section 8(a)(5) of the Act by refusing to bargain over the layoff criteria or its effects even though it had an obligation to do so. *Intersystems Design and Technology Corp.*, 278 NLRB 759 (1986).

**POINT V. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT UNLAWFULLY FAILED TO MAKE REQUIRED EMPLOYER CONTRIBUTIONS TO THE BARGAINING UNIT EMPLOYEES' 401(k) PLANS IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

It is well-settled Board law that employer contributions to a 401(k) plan are a mandatory subject of bargaining. *Lakeside Healthcare Center*, 340 NLRB 397, 399 (2003). The unilateral failure to make contributions is a material and substantial change. There is no dispute that Respondent has not made employer contributions into the 401(k) plan. The only question presented here is whether the employer had a contractual obligation to do so.

On September 9 and 11, 2010, prior to Respondent's purchase of Meadowlands, the parties met to negotiate new collective bargaining agreements. Respondent was represented by Michael Miller while Ann Twomey was the lead negotiator for the Union. With regard to the 401(k) plan, Respondent offered to continue to make the 2% contributions toward the employee retirement fund (i.e. 401(k) plan), but objected to the payment of any mandatory matching

contribution. At the negotiations, Respondent indicated that it might be willing to reinstate the matching contributions when Respondent's finances permitted.

While Respondent's exceptions argue that the ALJ rewrote the parties' 401(k) pension plan provision by finding that "conclusion" and "distribution" are interchangeable, there is ample extrinsic evidence to prove that Respondent agreed to the 2% pension contribution. [GCX-78 through GCX-83]. Twomey's proposals, notes, a clarification memo that was circulated at the end of the September 11, 2010 bargaining session, post-negotiation correspondence, a tentative agreement that was ratified by unit members and the contracts themselves each point to the parties' agreement. Twomey's original proposal requested that the Liberty pension be maintained with a "2% contribution and 50% match of up to additional 2%." But Twomey's notes show a handwritten line placed across "and 50% match up to additional 2%." Her notes also reflect that the pension plan commenced "1/1/2011" with the same rule as Liberty that the contribution would be paid in October 2012. The parties confirmed this agreement by preparing and circulating a "Clarification Memorandum" which reiterated the parties' agreement of a 2% contribution to be paid in 2012. [Tr. 401-4, 426, 784-5].

Shortly after the negotiations were complete, Miller sent the Union's counsel a letter confirming and attaching the Clarification Memorandum. Miller's confirmation prompted Twomey to put together a Tentative Agreement, which she emailed to him on September 20, 2010. Twomey indicated to Miller that a ratification vote was scheduled for September 22, 2010. Miller responded by email the same date attaching a revised Tentative Agreement with changes in red. It is noteworthy that with respect to the pension plan in Article 38, Miller added a paragraph on full-time employee eligibility, the plan description and plan disputes, but did not change Twomey's language confirming the 2% contribution provision. [GCX-81, 82].

Twomey's presentation of Miller's revised Tentative Agreement to the membership for ratification is consistent with her belief that the parties' had reached agreement on the pension plan. It is also noteworthy that Twomey promptly notified Miller of the ratification. Thereafter, an associate in Miller's firm prepared full-length contracts which contained additional language. Twomey credibly testified that she did not believe that the expanded language was inconsistent with the parties' Tentative Agreement and that she reasonably read the word "distribution" to be synonymous with "contribution." [Tr. 426, 469]. The contract language clarifies that "the Hospital will make a 2% distribution (instead of contribution) into the 401(k) plan," but no additional match to employee contribution." Respondent asserts that the word "distribution" carries a different meaning than contributions and was intended to spell out that Respondent would only be responsible to distribute the employees' contributions to the pension fund administrator, not make employer contributions. If Respondent's contention is to be believed, the necessity for the additional language that the Hospital's sole obligation shall be to select the Plan's providers, to pay contributions withheld from the employees' pay "as well as any contribution made by the Hospital under the plan" would be dubious. Rather, the ALJ properly concluded that "this language undermines Respondent's argument that it was under no obligation to make a contribution or distribution of its own funds to the 401(k) account of employees" when it obligated Meadowlands to make a contribution. (ALJD 68:33-37).

While Respondent now argues that the General Counsel only proved that the parties did not reach a meeting of the minds, this contention is self-serving. Respondent failed to call Miller to testify. It also failed to explain why Miller could not appear and testify and failed to provide any notes, contemporaneous correspondence, emails or documentation to prove Respondent did not agree to contribute 2% towards the pension plan. Rather, Respondent called Dr. Lipsky and

Duneav who broadly testified that Respondent did not agree to a 2% pension contribution.<sup>6</sup> However, at the hearing when Dr. Lipsky was confronted with his earlier testimony at the Harris arbitration concerning the pension contribution rate, he admitted that during negotiations Respondent proposed the pension plan 2% employer contribution rate to the Union. [GCX-221 pg. 26, 96, Tr. 3520-2, 3539-40]. Thus, the ALJ properly found that Dr. Lipsky's admission was strikingly similar to Twomey's recollection and concluded that Dr. Lipsky's statement that he agreed to "give" the 2% contribution was in exchange for Meadowlands receiving the employees' performance. [ALJD 69:9-21]. If this was not Respondent's intent, it would mean that it would receive "employees' performance" without actually giving anything in exchange. As such, Respondent's exceptions are riddled with inconsistencies and must be rejected.

Finally, Respondent argues that the ALJ erred when he did not find Respondent had a "sound arguable basis" for its contract interpretation. Respondent's exception is a classic example of "smoke and mirrors." Although the record evidence clearly supports the ALJ finding that there was no reasonable basis for Respondent to interpret the contract differently than the Union, Respondent nonetheless argues that there are two reasonable interpretations. But Respondent's position is defective. Yet Dr. Lipsky's testimony serves as a fatal blow to Respondent's "sound arguable" argument. The ALJ properly found then there is no mistake that Respondent knew that it had to contribute to employees' 401(k) pension plan, but it tried to take advantage of an alleged flaw in the language to circumvent its obligation.

Accordingly, the record evidence overwhelming supports the ALJ's conclusion that Respondent's refusal to make pension contributions violated Section 8(a)(5) of the Act.

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<sup>6</sup> The ALJ rightly credited Twomey's detailed testimony over Dr. Lipsky and Duneav's blanket denials. The ALJ found that Twomey's notes, contemporaneous correspondence, clarification memo and Tentative Agreement offered greater detail about who attended the negotiation, and most importantly, what was said with respect to the pension plan. More importantly, Dr. Lipsky's testimony corroborated Twomey's recollection of Meadowlands' agreement to the 2% employer contribution.

**POINT VI. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT UNLAWFULLY DENIED EMPLOYEES ACCESS TO THEIR UNION REPRESENTATIVE WITHOUT GIVING THE UNION AN OPPORTUNITY TO BARGAIN IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

A union access provision in a collective bargaining agreement is a term and condition of employment that survives the agreement's expiration. *T.L.C. St. Petersburg, Inc.*, 307 NLRB 605, 610 (1992), enfd. mem. 985 F.2d 579 (11<sup>th</sup> Cir. 1993). "[A] unilateral change in an employer's policy permitting access by union representatives to its premises is a unilateral change in the employees' terms and conditions of employment and is, ordinarily unlawful. *Oaktree Capital Management, LLC and TBR Property, LLC, a single employer, d/b/a Turtle Bay Resorts and Benchmark Hospitality, Inc.*, 355 NLRB 1272, 1272 (2010). A unilateral change in the past practice of permitting union access is a material change about which an employer is obligated to bargain. *Ernst Home Centers, Inc.*, 308 NLRB 848, 849 (1992). In expelling a union representative from its property, an employer deprives employees of the contractually granted access to their bargaining representative on the property, and that interference constitutes a unilateral change of a material term or condition of employment. See *Unbelievable, Inc., d/b/a Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), enfd. sub. nom *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9<sup>th</sup> Cir. 1995); *Lytton Rancheria of California d/b/a Casino San Pablo*, 361 NLRB No. 148 (2014).

By email on January 14, 2013, less than a week after Union representatives William Boydston, Valerie Zito and Juan Seguinot visited to the hospital, Respondent denied the Union access to meet in the cafeteria, ostensibly because the parties' November 2011 MOU only allowed two Union representatives to meet with employees for one hour every two weeks in a conference room (and not the cafeteria). [GCX-45]. That same date, by email, Levine advised

Garrity that the November 2011 MOU was not intended to limit the Union's access rights. Rather, the "designation of a meeting room was solely for the purpose of providing the Union with an opportunity to meet with new hires." Although the Union protested Respondent's infringement on the contract, Garrity persisted that "meetings for these purposes will NOT be held in the cafeteria for the reasons previously articulated to you. The cafeteria, although a public place, is occupied by patients, visitors, administrators and non-Union staff. Accordingly, the conduct of business in their presence is not appropriate."

Although Respondent claimed that the parties had reached a November 2011 MOU which restricted the Union's access, Twomey testified that the November 2011 MOU settled Dudsak's suspension and had nothing to do with Union access to the cafeteria. Rather, as the ALJ found, Twomey credibly testified that, at a grievance meeting, the parties negotiated a July 2011 MOU reiterating the Union representative's right to access the hospital in non-public areas. Twomey's bargaining notes of the grievance meetings confirm the parties' agreement. [GCX-85, 88]. In support of its contention, Respondent called its counsel Alfred Maurice, who testified that the July 2011 MOU Section C had nothing to do with Torrey and his access to the cafeteria. It is noteworthy that Respondent's point person in completing the July 2011 MOU former CEO Thomas Gregario, contradicted Maurice. Gregario acknowledged that paragraph C of the MOU (which addressed Union representative access to the facility) was drafted to relate to Torrey's criminal trespass allegation. He also admitted that the July 2011 MOU confirmed the contract's access language and that Union access to the cafeteria was acceptable. [Tr. 2183].

Respondent also asserts that it entered into the July 2011 MOU to essentially clarify Section 4.4 of the contract. However, Gregario's testimony exposes Respondent's explanation as a farce. To this end, Gregario reiterated that the parties' CBA as well as the parties' past practice confirmed that the Union could visit the facility to investigate grievances and access the

cafeteria. [2200-1]. As a matter of fact, unlike Respondent's interpretation of Section 4.4 of the contract, the contract does not include "during their scheduled work time." Rather, Section 4.4's only requirement is that the Union's visit must not "interfere with the work of any employee or with a patient's or guest's activities or otherwise disrupt the Employer's operations." Simply put, as the ALJ rightly found, the contract gave the Union access to the cafeteria since it was clearly deemed to be a "non-patient area" and employees met with Union officials during their breaks. Thus, the ALJ did not ignore Section 4.4 of the parties' CBA as contended by Respondent.

Despite clear documentation to the contrary, Gregario testified that the parties renegotiated the July 2011 MOU and restricted the access of Union representatives to a designated room. However, Respondent failed to produce any bargaining notes or other witness testimony as to what the November 2011 MOU pertained. Instead, Dudsak credibly testified that she was disciplined shortly after the July 2011 MOU for speaking to two orientees. She noted that since Respondent frequently failed to give her reasonable notice about orientations, the HR manager sent the two orientees who had questions about the Union to go speak to her. The record is clear that the Union filed a grievance over Dudsak's discipline, and after a series of grievance meetings which focused on Dudsak's discipline and Respondent's failure to give proper notice for orientations, the parties reached agreement on the November 2011 MOU. [GCX-66 pg. 5, 94, 100, Tr. 819-26, 831-6]. Contrary to Respondent's contention, the ALJ rightly found that the November 2011 MOU focused on Dudsak's discipline and Torrey criminal trespass and addressed the lingering problems with notice to the Union about orientations. Despite the clear record evidence, Respondent's exception centers on the ALJ's alleged error in

crediting Dudsak and Levine's testimony over Maurice's and Gregario's testimony.<sup>7</sup> However, not coincidentally, Gregario confirmed that the parties did not discuss contractual access provisions and did not discuss whether the Union would continue to have access to the cafeteria at their meetings.

What makes Respondent's exceptions even more absurd is that the November 2011 MOU limits the use of this room to (2) MHA employees for 1 hour every other week and provides Respondent the sole right to cancel the use of the room at anytime time upon thirty (30) day notice. [GCX-101]. Thus, Respondent would want us to believe that it was the Union's intention not only to dramatically reduce its contractual access rights, but also limit it to Respondent's unfettered discretion. As such, the ALJ properly concluded that nowhere in the November 2011 MOU is this indicated and this suggestion cannot be culled from any other evidence.<sup>8</sup>

It is noteworthy that after negotiating the November 2011 MOU, the Union continued to notify Respondent of its intention to have staff representatives meet with employees in the cafeteria. [GCX-42]. Respondent produced no evidence that it objected to this practice. Rather,

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<sup>7</sup> Respondent's exceptions amount to a challenge to the ALJ's credibility resolution. The overwhelming record evidence supports the ALJ's finding that the November 2011 MOU had nothing to do whatsoever with the Union's access to the hospital, but rather dealt with Dudsak's termination concerning her meeting with two orientees in patient areas contrary to the contract. Since the Union had previously complained that Respondent had frequently failed to provide it with prior notice of orientations, the November 2011 MOU was an attempt to resolve that grievance as well as Dudsak's termination. Thus, the November 2011 MOU's reservation of a conference room for the Union was clearly to deal with the Union's ability to meet with employees during the orientation. Thus, the ALJ properly concluded that even if Dudsak had "actual or apparent authority" to enter into the agreement – which the evidence shows she did not and Respondent unintentionally concedes in its brief on page 79 by noting that the contract language clearly required Dudsak's actions to be ratified – he credited Dudsak's and Levine's testimony concerning the origin of the November 2011 MOU. Respondent further doubles down on its exception to the ALJ's credibility of Levine given he wasn't involved in the negotiation of the November 2011 MOU. Contrary to the Respondent's exception, the record evidence is clear that Levine first talked with Dudsak and Torrey about the November 2011 MOU when McVey proposed to restrict the Union's access to the cafeteria and subsequently when Dudsak and Torrey joined him in discussing the matter with Garrity when Respondent restricted the Union's access to the cafeteria completely. [GCX-42, GCX-43, GCX-44, Tr. 1327-39]. Based on the above, it is clear that the record evidence supports the ALJ's credibility determination with respect to Levine as well.

<sup>8</sup> Respondent's assertion that the ALJ discredited Gregario's testimony without reason is untrue. As stated below, the record evidence clearly showed that Gregario's testimony failed to support Respondent's asserted meaning to the November 2011 MOU. Rather, Gregario's testimony actually undermined Maurice, and instead corroborated Dudsak and Levine's accounts.

on one occasion, McVey denied a request but quickly reversed course after Levine advised her of the parties' past practice. [GCX-43]. As the ALJ properly found, the Union continued to access the cafeteria unabated until Respondent protested about Seguinot's ability to access the hospital.

Notwithstanding the above, Respondent further contends that the contract provided it with a "sound arguable" basis for believing that the November 2011 MOU privileged its actions to restrict union representatives' access to the cafeteria. In *Bath Iron Works Corp.*, 345 NLRB 499, 503 (2005), the Board found that the definition of "sound" and "arguable" is focused on reasonableness, stating that where both parties 'present reasonable interpretations of the applicable contract language, the employer has a sound arguable basis and there is no unfair labor practice. The ALJ properly rejected Respondent's sound arguable argument citing *Kmart Corp.*, 331 NLRB 362, 362 (2000). [ALJD 114:22-25]. In *Kmart*, the Board held that a parties' past practice is examined as to the effectuation or implementation of the contract provision. *Id.* at 362. As a result, the ALJ found that for more than two years Respondent had permitted the Union to meet with employees in the cafeteria for the purpose of investigating grievances and Respondent's human resources official Nancy Forsyth clearly knew Respondent's past practice. [ALJD 114:27-31]. More importantly, Forsyth was still employed by Respondent when Garrity restricted the Union's access. Thus, Respondent was well aware of its past interpretation and implementation and its swift and abrupt reversal is unreasonable under the circumstances. Thus, the record evidence supports the ALJ's findings that Respondent violated Section 8(a)(5) of the Act by failing to bargain over its decision to refuse Union representatives access to the cafeteria.

**POINT VII. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT UNLAWFULLY ABROGATED THE SERVICE UNIT CONTRACT BY LAYING OFF FULL-TIME SERVICE UNIT EMPLOYEES AND RETAINING PART-TIME AND PER DIEM SERVICE UNIT EMPLOYEES IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

A layoff of employees effects a material, substantial and significant change in the affected employees' working conditions. *NLRB v. Katz*, 369 U.S. 736, 747 (1962), *Local 512, Warehouse & Office Workers v. NLRB*, 795 F.2d 705, 710-711 (9th Cir. 1986); *Rangeaire Co.*, 309 NLRB 1043, 1047 (1992). An employer may not modify a contract and, thereby, reduce employee benefits during the contract term other than by mutual agreement or with consent of the Union. *San Juan Bautista Medical Center*, 356 NLRB No. 102, slip op. at 3; *Bonnel/Tredegear Industries*, 313 NLRB 789, 792 (1994), *enfd.* 46 F.3d 339 (4<sup>th</sup> Cir. 1995); *Carrier Corp.*, 319 NLRB 184, 192, 199 (1995); *St. Vincent Hospital*, 320 NLRB 42, 45 (1995).

By laying off full-time service unit employees instead of part-time and per diem service unit employees, Respondent unlawfully modified the contract without the Union's consent. Although Respondent concedes that the Service unit contract provides that employees shall be selected for layoff in reverse seniority order and that "in the event of a layoff within a classification, probationary employees within that job classification shall be laid off first" followed by non-probationary employees, it contends that the ALJ erred because it was privileged to lay off unit employees since the contract does not "provide for the layoff of per diem workers before full-time and part-time employees" and it followed the contract to layoff employees by job classification.<sup>9</sup> However, Respondent's exceptions try to disguise what

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<sup>9</sup> In its exceptions, Respondent contends that Section 5.2 of the contract applies only to the accrual of seniority not how layoffs are to be conducted. Respondent here points to Section 5.4 which states "classification seniority shall apply in layoff and recalls." Yet, like the ALJ properly held, Respondent intentionally leaves out that Article 5.5 of the contract which provides "in the event of a layoff within a job classification, probationary employees within that job classification shall be laid off first. Non-probationary employees shall be the next to be laid-off in inverse order of their classification seniority." Thus, based on this clear contract language, the ALJ properly concluded that "since per diem have no rights under the contract that would mean that they have no seniority rights over the full-

occurred here. Interestingly enough, Respondent's Director of Human Resources Elizabeth Garrity admitted that she did not make any effort in advance of service unit layoffs to determine if full-time employees were being laid off instead of less senior part-time or per diem employees. Garrity also mentioned that full-time Service unit employees were 30% "more costly" than per diem employees performing service work because the full-time worker received benefits. Garrity's testimony reveals the true motivation for Respondent to layoff full-time and part-time employees rather than per diem employees. [GCX-156, Tr. 1307-9, 1369].

Even though Respondent argues for the first time in brief that layoffs were required in the Service bargaining unit, the record is devoid of any evidence to support this assertion. That there was a reduction in work hours can be attributed to many factors, including the prior layoff of Service employees (i.e. clerks). Respondent's exception is a blatant attempt to muddy the uncontested evidence that it laid off full-time and part-time employees while retaining per diems. Accordingly, there can be no doubt that Respondent has violated Section 8(a)(1) and (5) and 8(d) of the Act by failing to adhere to the express terms of its contract with the Union. *Carrier Corp.*, 319 NLRB at 199; *Oak Cliff-Golman Co.*, 207 NLRB 1063 (1973).

Moreover, Respondent argues that the ALJ erred in analyzing this as a "work assignment" issue rather than a contract issue. However, the record evidence clearly shows that full-time bargaining unit work was assigned to part-time employees and per diem employees. Such conduct falls safely in the "work assignment" category. Thus, this exception is a desperate

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time and part-time employees." [ALJD 23:26-34]. Nowhere in the ALJ's decision did he conclude that per diem did not have any rights, rather he indicated that per diem's seniority rights were only relevant within their job classifications. [ALJD 23:33-34]. In contrast, Respondent argues that the ALJ's conclusion on the contract language is erroneous and critical misreading of the language. However, Respondent misconstrues its own contract because Article 15.3 states "Per diem employee are not guaranteed work hours nor do they have any rights under the bargaining Agreement including the just cause provision." If per diem employees are not guaranteed hours, then why is there ample proof in the record evidence that per diems were retained – guaranteeing their hours. There is no legitimate contractual argument to rescue Respondent's unlawful conduct. Additionally, there is no evidence that the Union waived its right to bargain over this subject by agreeing to the Management Rights clause, nor is Respondent's interpretation of the contract "sound arguable" basis. Instead, Respondent's interpretation can be labeled manufactured and self-serving in order to guarantee itself cost savings.

ploy to manufacture contract interpretation issues where none exist in order to conceal Respondent's unlawful conduct.

The following evidence adduced from Respondent's payroll records, job schedules and master employee lists illustrate Respondent's unlawful layoff practices in the Service unit.

**a. Dietary Employees**

Respondent laid off four full-time dietary employees on September 8, 2012 (Cook Homer Navarro and dietary aides Ida McGuinness, Martha Serrano and Cesar Medina) while on November 23, 2012, it laid off dietary aides Zenaida Rodriguez, Zenaida Lee and Lisa Michael.

**1. Homer Navarro**

The dietary schedules show that Navarro worked Monday through Friday 5 AM to 1 PM while one full-time cook (Wilfredo Orozco) and three per diem cooks (Soriano, Hernandez and Naranjo) also appeared on the schedules. After Navarro was laid off on September 8, 2012, less senior cooks Naranjo and Soriano took over his position and less senior cook Hernandez retained her full-time job. The uncontested evidence shows that Orozco replaced Navarro starting at 5:30 AM while Naranjo took over for Orozco on the second shift. Soriano then filled in for Naranjo as the replacement cook and Hernandez retained her third shift cook duties despite the layoff of the more senior Navarro. [GCX-151, 152, 156]. As such, Respondent retained the same number of cooks and shifts, but laid off one of the two full-time cooks with the most seniority while retaining less senior full-time, part-time and per diem cooks to cover the hours. Respondent has offered no explanation for failing to retain Navarro. Consequently, the testimony and record evidence strongly supports the ALJ's finding that Respondent failed to follow the layoff provision with respect to Navarro in violation of Section 8(a)(5) of the Act and it modified the terms of the Service unit contract without the Union's consent.

**2. Dietary Aides Ida McGuinness, Martha Serrano, Cesar Medina, Zenaida Rodriguez, Zenaida Lee and Lisa Michael**

Similar to Navarro, the dietary schedules show that after McGuinness, Serrano and Medina were laid off, Respondent still scheduled more than enough shifts for three additional full-time employees. However, Respondent hired 10 per diem dietary aides (Soriano, Bangura, McCray, Patel, Francisco, Maluto, Velasquez, Martinez and Schappa) and continued to schedule two per diem dietary aides to work starting at 7 AM every day in place of Serrano and Medina. Respondent also used one dietary aide to work an earlier shift in place of McGuinness. For example, on September 9, 2012, Respondent scheduled per diem McCray to work 7 AM to 7:45 PM, per diem Schappa from 7 AM to 3 PM and per diem Patel from 6 AM to 2 PM.

The record evidence reveals a similar pattern on November 23, 2012 when Respondent laid off full-time dietary aides Zenaida Rodriguez, Zenaida Lee and Lisa Michael. After November 23, 2012, Respondent regularly used five per diem dietary aides to work eight hour shifts in place of McGuinness, Serrano, Medina, Rodriguez and Lee. Respondent also scheduled a per diem to work longer than eight hours to cover Michael's former shift. [GCX-151,152, 156].

Thus, a cursory review of the schedules reveal that Respondent continued to schedule daily shifts for less senior per diem dietary aides after it laid off more senior full-time dietary aides who could have performed the same work. Respondent has not offered any reason for failing to retain the six full-time dietary aides. Consequently, the overwhelming record evidence supports the ALJ's finding that Respondent failed to follow the layoff provision with respect to McGuinness, Serrano, Medina, Rodriguez, Lee and Michael. The record evidence also clearly supports the ALJ's conclusion that Respondent's failure to retain these full-time employees violates 8(a)(5) of the Act because it modified the terms of the Service unit contract without the Union's consent.

**b. Housekeeping**

Respondent laid off seven full-time environmental service aides on March 29, 2012 (Lidia Mateo, Noralba Montenegro, Catherina Veale, Katie Polite, Delmy Carreras, Bienvenido Berida and Nebis Diaz) while it laid off one more environmental service aide (Paula Robertson) on March 25, 2013. Housekeeping schedules show that Respondent continued to employ one less senior part-time employee (Sonia Diaz) who should have been selected for layoff, but instead continued to work. Additionally, the schedules listed 14 per diem environmental service aides who were hired after Mateo, Montenegro, Veale, Polite, Carreras, Berida, Diaz and Robertson. [GCX-153, 163].

After the March 29, 2012 layoff, Respondent retained all 14 per diem environmental service aides and transferred one per diem aide from the 3 PM to 11 PM evening shift to the 7 AM to 3 PM day shift to cover the loss of Montenegro, Veale, Polite, Carreras and Diaz. At the same time, Respondent combined job functions and eliminated the 7 AM to 3 PM and 3 PM to 11 PM floater and ground assignments. Respondent's schedule changes effectively allowed it to replace the full-time aides and operate with the less senior per diem employees instead. Respondent presented no credible defense justifying its retention of part-time and per diem environmental service aides contrary to the Service unit contract. Therefore, the testimony and evidence strongly supports the ALJ's finding that Respondent modified the terms of the Service unit contract in violation 8(a)(5) of the Act.

**POINT VIII. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT UNLAWFULLY FAILED TO BARGAIN WITH THE UNION WITH RESPECT TO THE ASSIGNMENT OF SERVICE UNIT EMPLOYEE WORK TO NON-UNIT PER DIEM SERVICE UNIT EMPLOYEES IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

It is well-settled Board law that once a specific title is included within a bargaining unit by either consent or Board action, an employer cannot remove the title from the unit without the union's consent or the Board's imprimatur. *Solutia, Inc.*, 357 NLRB No. 15 (2011); *Wackenhut Corp.*, 345 NLRB 850, 855 (2005); *Beverly Enterprises*, 341 NLRB 296, 307 (2004).

The parties' Service unit contract describes a part-time employee "as an employee who is regularly scheduled to work less than 75 hours per pay period" while defining a per diem employee as "an employee who works on an as needed basis" and who is "not guaranteed work hours nor do they have any rights under this bargaining agreement including the just cause provision." With respect to layoffs, the Service contract is clear that "non-probationary employees shall be laid off in inverse order of their classification seniority."

Respondent has admitted to the unlawful conduct here. As discussed above in Point VII, Garrity testified that Respondent laid off full-time and part-time service unit employees, and gave service department managers the authority to replace them with non-unit per diem employees. Garrity's testimony is an admission that Respondent purposefully disregarded unambiguous contract language. As the ALJ properly found, Respondent's motivation in unilaterally transferring the work outside the Service unit was revealed by Garrity when she testified that such transfers "save[d] money because full-time and part-time employees were 'more costly.'" [ALJD 20:37-39].

The record evidence shows that after layoffs in the Service unit classifications (dietary aide, dietetic assistant, environmental services and nurse aide), Respondent used more non-unit

per diem employees and fewer full-time and part-time employees as a percentage of hours. [GCX-149, 150, 156]. Thus, for example, unit dietary aides performed 39% to 50% of the hours within the classification prior to the layoffs. Yet after the September 8, 2012 layoff (McGuinness, Serrano and Medina), unit dietary aides only received 11% to 29% of the hours. The percentage fell to 0% after dietary aides (Rodriguez, Lee and Michael) were laid off on November 23, 2012. By the start of 2013, Respondent had laid off all of the unit dietary aides and was using non-unit per diems to perform all the work within the classification.

Respondent's payroll records also demonstrate that dietetic assistants performed 62% to 78% of the hours within the classification prior to the layoffs. Unit employees performed over 70% of the hours in 16 out of 18 pay periods. Starting with unit dietetic assistant Maria Rivera's layoff on August 24, 2012, the percentage of hours performed by unit employees dropped dramatically. For pay period September 13, 2012 to March 28, 2013, the percentage fell to 47% and unit employees performed less than 70% of the work in 14 of 16 pay periods. The percentage dropped more dramatically when Respondent laid off full-time employee Victoria Cornejo and inexplicably brought her back as a per diem employee working her full-time hours. Beginning on April 11, 2013 (the date of Cornejo's layoff), the percentage of hours performed by unit dietetic assistants was reduced to between 28% to 55% and in 16 out of 19 pay periods, those unit employees performed less than 40% of the hours.

This trend is further evinced with unit environmental service aides and nurse aides. For example, environmental service aides performed between 52% and 63% of available department work from January 5, 2012 to October 25, 2012, yet that percentage dropped to between 37% and 53% after the October layoffs. The same is true for nurse aides where from January 5, 2012 to November 21, 2012, unit nurse aides performed between 68% to 77% of the available department work. In 18 out of the 23 pay periods unit nurse aides accounted for at least 70% of

the work hours. Yet starting with the December 6, 2012 layoffs, the percentage fell to a range of 53% to 69% and in all but one pay period (22 out of 23) unit nurse aides accounted for less than 70% of the work hours.

Thus, the record is uncontested that Respondent transferred Service classification unit work to non-unit per diem employees. Respondent offered no evidence to justify the dramatic shift of bargaining unit work to non-bargaining unit employees. As the ALJ rightly concluded, although the Service contract's management rights clause speaks of Respondent's right to assign work, it does not clearly and unmistakably give Respondent the unilateral right to assign work to non-unit per diem employees. *Stevens International, Inc.*, 337 NLRB 143 (2001); *AGA Gas, Inc.*, 307 NLRB 1327 (1992). Rather, it is clear from Garrity's admission that Respondent's decision was motivated by economics. This justification does not relieve Respondent of its bargaining obligation, but rather it undercuts Respondent's "sound arguable" basis and contract waiver arguments. [ALJD 22:29-46]. Thus, the record evidence supports the ALJ's findings that Respondent violated Section 8(a)(5) of the Act by unilaterally transferring unit work outside of the unit without affording the Union an opportunity to negotiate over the decision itself or its effects.

**POINT IX. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT FAILED TO CONTINUE IN EFFECT THE TECHNICAL CONTRACT BY CHANGING BUMPING PROVISIONS WITH RESPECT TO JUAN SEGUINOT IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

**1. Seguinot Is Qualified to Bump into Storeroom Clerk and Environmental Service Aide positions**

Juan Seguinot was hired by Meadowlands in about 2001 and initially worked in environmental services for a couple of months. Seguinot was next promoted to storeroom clerk. As a storeroom clerk, Seguinot performed shipping and receiving functions when supplies were

delivered and checked par levels of unit supplies, returned to the storeroom to get the necessary supplies and then returned to the units to replenish the supplies. In 2006, Seguinot was promoted to endoscopy tech and worked in that position until his layoff on November 8, 2012. Since about 2008 or 2009, Seguinot has been the Union's Service unit vice president and after his layoff, he was hired as a union organizer. [GCX-50, 51, Tr. 552-9, 565-6, 574].

After Seguinot's layoff, Levine sent Garrity an email asking if there were any opportunities for Seguinot to exercise his bumping rights. Garrity simply responded "Unfortunately there are no positions in [Seguinot's] department for him to bump." [GCX-51]. On at least three separate occasions, the Union indicated to Respondent that Seguinot was qualified to bump into a storeroom clerk position as well as an environmental service aide position since he had prior experience in both jobs. [Tr. 127-33, 856-63]. There is no dispute that Seguinot had the contractual right to bump because of his prior experience and seniority.

**2. Respondent Refused to Allow Seguinot to Bump A Less Senior Employee Contrary to Article 5.6 of the Service Contract**

Respondent hired Admad Abdelqader on June 17, 2012. There is little doubt that Seguinot had more seniority than Abdelqader since Seguinot's seniority date was December 7, 2010. Respondent claims in its exceptions that Abdelqader was "fully qualified" while Seguinot was not and further contends that to be so the storeroom clerk had to train on the computer system (PMM), however, Respondent produced no evidence concerning Abdelqader's training. [Tr. 1909, 1944]. The record evidence reveals that Respondent's Vice President of Support Services Afif Escheik retrained all the storeroom clerks on the computer system prior to Respondent hiring Abdelqader. Escheik testified in a general fashion and failed to provide any detail about the re-training, like dates, times, and which storeroom clerks were trained. He also feigned ignorance about the date of the installation of the PMM system.

Respondent produced no documentary evidence to confirm that the re-training program actually occurred. That Respondent could not produce emails from Escheik to the clerks or hospital administration about the re-training is troubling. Thus, Escheik's testimony that he had retrained all of the storeroom clerks is an overstatement and could not be credited. [ALJD 96:31-52 and 97:1-7].

Moreover, Escheik testified that he spent a week and a half orienting Abdelqader in the storeroom position. This training included functions like what to do when someone in the hospital wants an item from inventory and how to handle the receipt of supplies. [Tr. 1944-6]. But, these were all tasks Seguinot was already qualified to perform. Contrary to Respondent's exceptions that the ALJ lacked an understanding of bumping rights or that he substituted his own judgment for Respondent, the record evidence supports the ALJ's finding that Abdelqader was not "fully qualified," and instead was still training on the job. Given that Abdelqader was not "fully qualified," the ALJ properly concluded that he could not credit Escheik's testimony that Seguinot had to be able to begin work immediately without training when Abdelqader was afforded on-the-job training. [ALJD 97:1-5]. Thus, when the ALJ stated "no reason was given as to why the same period of time could not have been provided to Seguinot who has five years' experience in the storeroom" it was a proper conclusion to draw from Respondent's untenable position.<sup>10</sup> If that is not enough, Escheik admits he made no effort to determine what Seguinot's qualifications actually were; he only assumed that Seguinot could not perform the job. He also did not explore whether Seguinot could bump into the position of storeroom clerk with minimal re-training. [Tr. 1961]. Had Escheik done so it may have led to a different result.

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<sup>10</sup> In its exception brief, Respondent argues that the ALJ erred by not finding that it had a "sound arguable" interpretation of the contract. Given the undisputed facts, there is no logical way Respondent could have interpreted the contract to not allow Seguinot, a person with more seniority to bump Abdelqader. This "sound arguable" argument speaks volume to the level, Respondent will pursue to avoid admitting that it violated clear contractual bumping language.

**3. Respondent Did Not Investigate Whether Seguinot Could Bump into an Environmental Service Aide position**

It is undisputed that the environmental service aide position did not require special training, certification or degree. As noted above, Seguinot previously worked as an environmental service aide at the hospital. Although Seguinot had not worked as an environmental service aide since 2001 or 2002, Respondent failed to proffer any evidence that the environmental service aide position had changed. Rather, Garrity admits that she only looked into the store clerk position and did not investigate whether there was an environmental service aide position into which Seguinot could bump. [Tr. 1332-33]. Had she investigated, Garrity would have seen that Seguinot could have bumped part-time environmental service aide Sonia Cruz, who had less seniority than Seguinot.

Thus, the record evidence shows that Respondent circumvented the Service unit contract's bumping rights provision to prevent Seguinot from bumping into Service unit positions he was qualified to perform as found by the ALJ. Therefore, Respondent violated Section 8(a)(5) of the Act.

**POINT X. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT FAILED TO CONTINUE IN EFFECT THE RN, SERVICE, AND TECHNICAL UNIT CONTRACTS BY FAILING TO OFFER BUMPING AND RECALL RIGHTS TO LAID OFF EMPLOYEES IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

The Board has held that mandatory subjects of bargaining are "those which set a term or condition of employment or regulate the relation between the employer and the employee." *Kansas National Education Ass'n*, 275 NLRB 638, 639 (1985). Since the bumping and recall procedure in the instant case determines which employees remain in Respondent's employ and those who do not, as well as which job positions affected employees will fill, the continuation or termination of employment is unquestionably a term or condition of employment. *Litton*

*Business Systems*, 286 NLRB 817, 820 (1987) citing *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 210 (1964).

It is undisputed that Respondent laid off employees in the RN, Technical, and Service unit classifications. While Respondent argues that it followed the contract with respect to layoff and recall, the record evidence in GC Exhibits 156, 157, 159, 160, 161, 162, 163 and 204 establish that RN, Technical, and Service unit employees were wrongfully refused their bumping rights and that Respondent then failed to recall them in violation of the contracts. Contrary to Respondent's contention here, it presented no reliable evidence to contest the General Counsel's showing that it failed to allow these RN, Technical, and Service unit employees to exercise their bumping rights over less senior full-time, part-time or per diem employees. In contrast, the record is replete with emails sent by Dudsak to Respondent noting that employees were not being told about their bumping rights. Although Respondent had a contractual obligation to identify employees' bumping rights under Article 5, Pavisic sent Dudsak an email stating "Per our last conversation please provide me with the list of employees who you believe should exercise their bumping rights." Pavisic's email makes it clear that Respondent failed to identify those employees who could bump less senior employees, further bolstering employee witnesses' testimony.

Respondent argues that the ALJ failed to properly cite to Karsos' testimony with respect to determining which RNs were "fully-qualified" to bump into RN positions in the same or different department. Karsos conceded that the Human Resources Department played a role in selecting the RNs and later in the recall of those same RNs. [Tr. 2503-2506]. Karsos' testimony leaves little doubt that Human Resources played a critical role in determining RNs' qualification as evidenced in her testimony:

- Q: Now did – do you know whether the Hospital had access to the personnel files of employees before they were employed by MHA?
- A: I know we didn't
- Q: Okay. So that's not something – so in terms of the evaluating somebody's qualifications, you weren't able to look at their experience prior to MHA?
- A: No
- Q: An was it the Hospital's position that in order for somebody to be qualified for recall or bump, they must have established that qualification while employed by MHA?
- A: I can't even answer that. That's a Human Resources question. I don't have a position.

As discussed fully below, Karsos indicated that she addressed each RN to announce his or her layoff and provide them with their recall rights. However, the ALJ rightly credited the RN's testimony over Karsos' vague and contradictory testimony. To highlight this point, Gloria Huggins, who was laid off on February 2, 2012, could have bumped into positions held by less senior RNs Alice Oguku, Marina Belaya, Rina Patel and Lyudmyla Bendas, but was not allowed to do so. In the Technical unit, OR Techs Barbara McCoy and Yesenia Ortiz, who were laid off on March 12, 2013, could have bumped OR Tech Carmen Giron, a less senior tech. Likewise, in the Service unit, environmental service aide Ana Pena, who was laid off on March 12, 2012, could have bumped three part-time employees, but was denied this opportunity.

The record evidence also shows that Respondent hired new employees during laid off employees' 6-month recall window instead of recalling these employees to work. Garrity admits that Respondent did not send recall letters to laid off employees, nor did it advise them of their recall rights. [Tr. 1301-4]. Garrity's admission also confirms employee witness testimony concerning contractual bumping rights and recall.

**A. The ALJ Correctly found that Respondent Unlawfully Failed to Allow RNs Jane Patel, Rona Lowy, Gloria Huggins and Josephine Bringas to Exercise their Bumping or Recall Rights**

RNs Patel, Lowy, Huggins and Bringas are veteran nurses at the hospital. Patel worked in the telemetry unit, Lowy worked in the rehab unit while Huggins and Bringas worked in the

pulmonary unit. Each nurse testified that, as part of their nursing duties, they regularly floated to other units. [Tr. 647-9, 3694, 3710-13, 3730-4, 3736-9]. This testimony is bolstered by the RN contract, which provides float schedules.

Patel and Huggins were not advised that they could bump employees and they were not subsequently recalled to employment. [Tr. GCX-154, 648-9, 3711-3, 3695-8, 3731-2, 3739-40]. Although Karsos testified that she talked to Patel and offered her to bump, Karsos' poor recollection of the details of their supposed talk made Karsos' contention unworthy of credit. Patel could not recall having a conversation with Karsos because no such talk occurred. However, Karsos admits that she did not talk with Huggins, but that Huggins could have bumped Alice Oguku and Ludydmyla Bendas. And Huggins testified that if Karsos had offered a permanent position on the 7 PM to 7 AM shift, she would have worked it. [Tr. 3735].

With respect to Lowy and Bringas, they each credibly testified that they spoke with their unit supervisors and Pavisic about their bumping rights. Lowy indicated that Pavisic told her that there was an opening on the 3 PM to 11 PM shift, but since she was an Orthodox Jew, she was disqualified since she would be unable to work weekends. Lowy testified without contradiction that she had worked the 3 PM to 11 PM and 7 PM to 7 AM shifts before and the hospital routinely accommodated her by scheduling her every Sunday in place of the Saturday shifts or by working night shifts on Saturday and Sunday. [Tr. 3696-7, 3702-5]. Likewise, Bringas credibly testified that Pavisic offered her a 3 PM to 11 PM shift RN position which she accepted, however, she never ultimately bumped into the position. [Tr. 3743, 4749-57]. Like with Patel and Huggins, Karsos testified in a cursory manner that she had offered Lowy work on the 3 PM to 11 PM or 7 PM to 7 AM shifts and offered Bringas work on the 7 PM to 7 AM shift, but Lowy and Bringas refused to bump into those shifts. Both Lowy and Bringas denied that they spoke with Karsos about bumping rights. Lowy and Bringas' testimony offered specific,

detailed testimony about their encounters with Respondent managers and is far more trustworthy than Karsos' vague unsupported testimony. Thus, the ALJ properly credited Lowy and Bringas' testimony over Karsos.

**B. Respondent Failed to Provide Bumping Rights to Elizabeth Purvis, Helen Harris and Lilibeth Pradhanang, but Offered Them Per Diem Positions**

RNs Purvis, Harris and Pradhanang worked for the hospital for many years. Purvis and Harris worked in endoscopy while Pradhanang worked in PACU. While Respondent excepts to the ALJ's finding that RNs who floated worked independently, Purvis, Harris and Pradhanang each testified without contradiction that they floated to other units and performed those unit duties independently. [Tr. 1494-6, 1594-8, 1601-2, 1679].

Purvis and Harris testified that their unit manager and Pavisic notified them of their layoff, but were not advised of their bumping rights and they were not subsequently recalled. Instead, the hospital offered Purvis and Harris per diem shifts. Purvis credibly testified that she worked one per diem shift, but was never called back. Harris testified, on the other hand, that even though she accepted per diem status, she was never contacted to work. [Tr. 1681-2].

Karsos testified, nonetheless, that Purvis and Harris were terminated for lack of per diem shifts, they were not laid off and that Purvis and Harris were not qualified to work in med-surg. This testimony is unpersuasive and was properly rejected by the ALJ. Purvis and Harris testified without contradiction that they floated regularly to med-surg making them supremely qualified to bump into this department. [Tr. 1594-8, 1601-2, 1677-9]. Their testimony is further corroborated by the RN contract's float schedule that shows that the endoscopy nurses are qualified to float to med-surg.

Additionally, at the time of Pradhanang's layoff, Respondent employed less senior part-time RNs in PACU (e.g. Fernando Carbillas) and less senior full-time RNs in units, including

ER, ICU and med-surg, which she was qualified to work. [GCX-157, Tr. 1497-8]. Pradhanang was not advised that she could bump into these RN positions. Subsequently, Karsos offered Pradhanang to bump into an 11 PM to 7 AM night shift in ICU, but she turned it down. Karsos did not advise her about her right to bump into a part-time position in PACU or a full-time position in another unit. She was eventually offered per diem shifts, but before she could start, she was advised that she was no longer in Respondent's computer system. Pradhanang tried to call Karsos and others about the problem, but it was never resolved. [Tr. 1502, 1205-13].

**C. Respondent Failed to Recall Shirley Bastien-George or Provide her with Bumping Rights**

Shirley Bastien-George worked in the respiratory unit. Her supervisor notified her about her layoff, but did not advise Bastien-George of her bumping rights. Her supervisor told her that the layoff was effective immediately. The next day, Bastien-George was contacted by the supervisor telling her she had spoken in error about the layoff date. Since Bastien-George was under the impression she would not be coming back to the hospital, she made arrangements to work elsewhere after her layoff. [Tr. 3581-2].

**D. Respondent Failed to Provide Bumping Rights and Recall to Anna Hsue**

Hsue worked in the telemetry unit for over thirty years. During this time, she floated to different units, including pediatrics, post-partum and Labor and Delivery. Hsue was notified about her layoff sometime in 2011. Prior to her layoff, Hsue said she had a casual conversation with her supervisor Donna Ortiz about retirement and Hsue told her that she could put her name down. Hsue credibly testified that her conversation with Ortiz was well in advance of her layoff. She was not advised of her bumping rights or subsequently recalled. [Tr. 3586-8].

In contrast, Karsos testified that Hsue chose to take a voluntary layoff. She indicated that Hsue talked to her about her (Hsue) planned retirement and then she volunteered to take a layoff.

However, Hsue contradicts Karsos' account by denying she ever talked to Karsos about retirement. [Tr. 3585-9]. Given that Hsue testified in a forthright, detailed manner, her testimony must be credited over Karsos' vague, unsupported testimony.

**E. Respondent's Assertion that RNs Did Not Work Independently in Other Units is Rebutted by Record Evidence**

Respondent contends that the ALJ interjected his judgment by finding that RNs worked independently when they floated and thus, were "fully qualified" in contrast to Karsos' testimony. In its exception brief, Respondent argues that Karsos selected which RNs were "fully-qualified" and created R-45 and R-46 that provide her reasons for her determinations. However, Karsos testified in a cursory and perfunctory manner. Her testimony was also undermined by Garrity, who testified that Human Resources assisted in determining which RNs were laidoff and did not keep recall lists available. It should be obvious if Human Resources did not keep recall lists which presumably would list which departments RNs could bump into, that R-45 and R-46 were solely created for litigation purposes and are not reliable evidence. Further, the record evidence demonstrates that the contract established float schedules and the RNs floated to other units regularly and performed those duties independently. Thus, when he did not credit Karsos' testimony, he did not substitute his judgment for Karsos, but rather the ALJ found RNs' testimony to be more reliable than Karsos's testimony.<sup>11</sup>

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<sup>11</sup> Respondent's exception decrying that only 9 out of 19 RNs who the ALJ found to have bumping rights did not testify is spurious. The record evidence amply supports the ALJ's findings through tables culled from Respondent's records. Such tables show that Respondent failed to allow full-time RNs, Technical, and Service unit employees to exercise their bumping rights over less senior full-time, part-time and per diem employees. [GCX-157, GCX-160, GCX-163]. For each classification, the tables highlight in blue full-time employees by date of their layoff and identify underneath in green (part-time) and yellow (per diem) employees who full-time employees could have bumped. Despite Respondent's dismay at the supposed lack of witness testimony, the 9 RNs signify close to 50% of the laidoff RNs. Moreover, all 9 RN witnesses testified to having worked for Meadowlands for many years, floated to different RN units and then being summarily laid off without being told about bumping opportunities or then recall rights. That the RN witnesses each testified to similar experiences undercuts Respondent's obvious insinuation that perhaps the other 10 RNs would not have testified similarly. More importantly, the vast majority of the RN witnesses who did testify in this proceeding were subpoenaed and did not cooperate voluntarily. Thus, Respondent's exceptions amount to attacks on the witnesses' credibility without substantive proof to substantiate such claims.

**F. Respondent Failed to Provide Bumping Rights and Recall to Service Unit Employees**

Environmental Service aides Delmy Carreras and Katie Polite credibly testified that they were both qualified to perform the work of any other housekeeper. At the time of their October 29, 2012 layoff, Respondent employed less senior part-time Environmental Service aide Sonia Cruz. Thus, the record evidence supports the ALJ's finding that Respondent failed to allow Carreras and Polite to contractually bump Cruz or be recalled to the available position.

**G. Respondent Failed to Provide Bumping Rights and Recall to Technical Unit Employees.**

**1. Boni Bodalia**

Boni Bodalia worked as a medical technician specializing in microbiology. She also performed work as a laboratory technician. Med techs and laboratory techs perform the same work and there is no separate title for microbiology technician in the Technical unit contract. [757, 762-3, 1996, 2000, 2047, 2078, 1889, 2051-2].

While Respondent claims in its exceptions that Bodalia was not qualified to perform the same functions Alex Hsue performed as a microbiology tech, the record evidence contradicts this assertion. Respondent is correct that Dr. Rimmer testified with respect to Bodalia's qualifications and that he also testified that he restricted Bodalia to perform only microbiology functions rather than med tech and laboratory tech job functions after he learned that the education she received in India was not equivalent to a bachelor's degree, however, Respondent failed to produce any evidence to corroborate Dr. Rimmer's assertions. This is probably because Dr. Rimmer was compelled to admit that Bodalia's educational credentials exceeded the State requirement to perform med tech and laboratory tech job functions. [Tr. 2045]. But the ALJ properly found, Respondent's laboratory schedules and Bodalia's personnel file discredit Dr. Rimmer's testimony. This documentary evidence shows that Bodalia worked for 2 ½ years as a

med tech and laboratory tech, not solely as a microbiology tech (even after Dr. Rimmer began working at the hospital). [GCX-202(a)-(c), R-30, 30]. Thus, under the circumstances Respondent's assertion that the ALJ did not credit Dr. Rimmer's unrebutted testimony is disingenuous.

Similarly, Respondent argues that the ALJ ignored Dr. Rimmer's testimony when he asserted that Bodalia did not desire to work weekends and did not have a right to bump per diem employee, Alex Hsue. Contrary to Respondent's contention, Respondent's laboratory schedules reveal that in the two months preceding her layoff, Bodalia worked 6 out of 16 weekend days. [GCX-202(b) pg. 2-6]. Moreover, under the Technical unit contract, Respondent was obligated to layoff per diem employees first and then part-time and full-time employees in inverse order. Alternatively, even if per diem employees, like Hsue were exempted, the record evidence indicates that Hsue worked a regular work schedule and was only classified as a per diem because he worked a full-time job elsewhere and did not need the medical benefits. [GCX-202(a)-(c)]. Although Dr. Rimmer testified that he promoted Hsue to a part-time supervisor position, the record evidence shows this occurred only after Bodalia was laid off. That Hsue became a part-time supervisor yet worked the same hours reveals Respondent's charade. Under the circumstances, Dr. Rimmer's conduct circumvented the contract language to arrive at his desired outcome.<sup>12</sup>

After Bodalia's layoff, Respondent hired several new med techs and laboratory techs. Dr. Rimmer provided vague testimony that the med techs and laboratory techs hired after Bodalia were more qualified than her and that is why she was not recalled. Respondent proffered no documentary evidence to corroborate Dr. Rimmer's testimony. Rather, the record contradicts

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<sup>12</sup> Respondent contends that it had a "sound arguable" argument to interpret the contract as it did. Although the ALJ summary rejected this argument, it does not mean that there was no support for it. It is probable that the ALJ did not articulate his reasoning because the record evidence showed that Dr. Rimmer's unlawful conduct was clear and that his testimony was discredited by Respondent's laboratory attendance records.

his testimony and shows that Respondent replaced Bodalia with less senior Camilla De Andrade, who performed identical microbiology job functions and was trained on the same laboratory equipment as Bodalia. [GCX-161, 165, Tr. 2030, 2062-3, 2074, 2077].

## **2. Owen Newby**

The record evidence reveals that Owen Newby was hired on February 3, 2013 and worked as a per diem Med tech in LAB-Administration. Dr. Rimmer testified that Newby was a per diem evening shift employee and after he had a discussion with Newby about his hours, Newby voluntarily resigned, rather than be laid off.<sup>13</sup> While Respondent contends that the ALJ erred in not crediting Dr. Rimmer's testimony, Respondent's exception is a misreading of the ALJ's decision. The ALJ specifically indicated that Dr. Rimmer's testimony was contradicted by General Counsel's computerized record which listed Newby as a per diem employee who was laid off, rather than resigned. He also noted that Respondent's assertion that per diem employees were not entitled to bumping rights and thus, Dr. Rimmer had no obligation to give Newby a right to bump another employee, defeats Dr. Rimmer's testimony. [ALJD 91:7:16]. Such evidence clearly supports the ALJ's finding that Dr. Rimmer's testimony is unreliable.

Respondent also contends in its exceptions that the ALJ erred by finding that Newby could bump other employees. Respondent repeated the mantra that per diem employees, like Newby, did not have bumping rights. Respondent's contention is incorrect. Under the Technical contract, per diem employees are afforded seniority rights, but only within their job classification. As such, the ALJ properly concluded that since Newby had more seniority than the three other per diem employees identified in the ALJ decision, the fact that he was not

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<sup>13</sup> Respondent presented a Notice of Termination which indicated that Newby's position was eliminated. At the hearing, Dr. Rimmer attempted to explain the reason for such a designation on the Notice of Termination, but his testimony was not credible.

afforded the opportunity to bump less senior per diem employees is contrary to the contract language and clearly supports the ALJ's finding.<sup>14</sup>

### **3. Yesenia Ortiz and Barbara McCoy**

The record evidence reveals that Yesenia Ortiz and Barbara McCoy were laid off on April 23, 2012 and each was qualified to perform other OR tech positions in the hospital. However, Yesenia Ortiz and McCoy were not advised about their bumping rights and were not subsequently recalled. Respondent's records show that Yesenia Ortiz and McCoy should have been allowed to bump less senior full-time OR tech Carmen Giron. [GCX-160, Tr. 768-9, 1526-9]. Respondent did not contest General Counsel's contentions.

Although Respondent proffered Karsos and Dr. Rimmer's testimony to contradict employees' accounts, their testimony was filled with inconsistencies and is not trustworthy. Thus, the ALJ properly found that when employees were laid off, Respondent was obligated to provide them an opportunity to exercise their bumping rights and subsequently recall these employees within 6-months if there were positions available for which they were qualified. By failing to do so, Respondent violated Section 8(a)(5) of the Act.

#### **POINT XI. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT UNLAWFULLY IMPLEMENTED NEW EMPLOYEE MEDICAL PLANS THAT WERE NOT SUBSTANTIALLY COMPARABLE TO ITS FORMER MEDICAL PLANS IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

Health benefit plans are a mandatory subject of collective bargaining. They may not be altered or eliminated without bargaining to mutual agreement or to a good-faith impasse on such

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<sup>14</sup> Under the Technical contract, it is clear that per diem employees have seniority in their job classification. This is reasonably clear since Respondent has argued this elsewhere in their exception brief. That Respondent here argues that there is a "sound arguable" argument for a reasonable different interpretation is preposterous. The ALJ rightly saw through Respondent's argument and did not credit it.

action. *NLRB v. Katz*, 369 U.S. 736 (1962); *The Geweke Company d/b/a Larry Geweke Ford*, 344 NLRB 628 (2005); *Coastal Derby Refining Co.*, 312 NLRB 495, 497 (1993).

In 2013, Respondent changed the medical benefit plan by offering different medical benefit options or by changing copay or deductibles for the unit employees. The record evidence is clear that the Union was not notified of these changes prior to their implementation. In fact, the Union was never formally notified of the 2013 changes. It became aware of them only when it learned that Respondent had posted a notice announcing the enrollment period (January 3, 2013 to January 10, 2013). Levine immediately sent Garrity an email requesting information regarding the new plans. In response, Garrity provided Levine with a short summary of the new medical plan. Upon review of these materials, Levine determined that the new medical benefit plan was not “substantially comparable” to the old plan because the new plan eliminated benefits, increased deductibles exponentially, and reduced out-of-network access and affordability. The ALJ correctly found that Respondent was obligated to bargain with the Union.

Similarly, effective January 1, 2014, Respondent changed the medical plan to a multi-employer welfare arrangement (“MEWA”) called TruPlan. Respondent changed to the TruPlan without notifying or bargaining with the Union. On April 3, 2013, the Union and Respondent attended a mediation meeting with the Department of Health. It is noteworthy that at this meeting, Dr. Lipsky and Duneav claimed that Respondent had a right under the contracts to increase employees’ contributions and change the providers. It is undisputed that Levine demanded to bargain the new medical plans before each was implemented, and Respondent refused this request.

In its exceptions, Respondent contends that the Union waived both its right to object to the decision to change medical plans and its right to bargain about the change. Respondent also

contends based on the express language in the RN and Technical unit contracts, Section 24.1 of the RN contract and Section 21.1 of the Technical contract state:

The Employer has the unilateral right, in its sole discretion to make change in the insurance program, including changes in benefits, carriers, or third party administrators at any time. The Employer will maintain benefits at *substantially comparable* levels with the understanding that “comparable” does not mean “identical.”

Respondent argues that it was permitted to unilaterally change the unit employees' health benefits because it followed the requirements of Section 24.1 and Section 21.1 in continuing to offer the unit employees medical benefits. It contends that it could unilaterally make such changes as long as the changes in the medical plan were comparable, but it did not have to be identical.

National labor policy disfavors waivers of statutory rights by unions and a union's intention to waive a right must be clear before a claim of waiver can succeed. *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2<sup>nd</sup> Cir. 1982). A clear and unmistakable waiver may be found in the express language of the collective-bargaining agreement; or it may even be implied from the structure of the agreement and the parties' course of conduct. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). However, no waiver will be implied “unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them. We will not thrust a waiver upon an unwitting party.” *NLRB v. New York Telephone*, 930 F.2d 1009, 1011 (2<sup>nd</sup> Cir. 1991). In *Carrier-Journal*, 342 NLRB 1093 (2004), the Board states:

The [health care] changes were implemented pursuant to a well-established past practice. For some 10 years, the Respondent had regularly made unilateral changes in the costs and benefits of the employees' health care program, both under the parties' successive contracts and during hiatus periods between contracts. In each instance, the Union did not oppose the Respondent's changes. Like the previous changes, the Respondent's January 2002 changes for unit employees were identical to

- those for unrepresented employees, consistent with the “same benefits-as” clause of the parties' successive contracts.

Thus, unlike this case, the contract in *Carrier-Journal* provided that the employer could unilaterally change health insurance benefits for unit employees so long as such changes were identical to those for the employer's unrepresented employees. Additionally, the employer regularly exercised this particular contract provision without objection from the union for 10 years. Here, however, Respondent and the Union have no past bargaining relationship and no past practice of permitting Respondent to take such unilateral action regarding the medical plans.

Rather, this case is analogous to *United Hospital Medical Center*, 317 NLRB 1279, 1283 (1995). Like here, in *United Hospital Medical Center*, the parties' contract also contained “substantially comparable” contract language. There, the employer changed its medical plan from a three option choice to a single option plan without first bargaining with the Union. This changed did not impact benefits or co-pays, but it did increase employees' deductibles and premium costs. The Board found an 8(a)(5) violation because “the changes in the plan, which affected the 300 unit employees, were not *de minimus*,” and noted that “changes affecting deductibles and contribution rates are substantial, important matters, and are of great concern to employees.” Thus, the employer in *United Hospital Medical Center* had an obligation to bargain with the Union.<sup>15</sup>

Here, the ALJ correctly found that Respondent's new 2013 PPO plan increased the cost of MagnaCare and Out-of-Network coverage drastically. For example, the MagnaCare network and out of network deductibles both increased from \$500 to \$3,000 for individuals and from \$1,500 to \$9,000 for families. The MagnaCare network co-insurance limit also increased from

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<sup>15</sup> Similarly, in *Heartland Human Services*, 360 NLRB No. 47 (2014), the Board found a 8(a)(5) violation where an employer increased the plan deductible from \$1,500 to \$5,000 and required employees to seek reimbursement for their out-of-pocket expenditures from a third-party administrator without prior notice to the Union and without affording the Union an opportunity to bargain. See also *Cofire Paving Corp.*, 359 NLRB No. 10 (2012).

\$2,000 for individuals and \$3,000 for families to \$6,000 for individuals and \$9,000 for families. Plus, the ALJ properly found that the 2013 MagnaCare PPO plan reduced coverage in many other respects for MagnaCare network and out of network care.

The 2013 changes to the EPO plan were even more dramatic than the PPO plan. The EPO plan network changed from a nation-wide provider network of hospitals and doctors to only Meadowlands and a handful of affiliated doctors. Under this new EPO plan, employees could only access the broader network of MagnaCare providers for services not provided by Meadowlands or its affiliate doctors, or in case of emergency. Even when a participant required care outside of Meadowlands' network, he/she did not receive the same level of coverage under the new plan. For example, in-patient admission for surgery was covered 85% after the deductible under the 2011-2012 MagnaCare plan, but only 60% after the deductible under the 2013 MagnaCare plan. Moreover, under the 2013 MagnaCare EPO plan, the annual deductible was increased from \$500 to \$1,500 for individuals and from \$2,000 to \$6,000 for families.

In 2014, Respondent further changed from a self-insured medical plan to a multi-employer welfare arrangement called TruPlan without bargaining with the Union. The TruPlan eliminated the PPO option, eliminated any coverage for out of network providers, and eliminated access to the MagnaCare network. Rather, the TruPlan network was reduced to "domestic health benefits" for care at Meadowlands and a small group of affiliated doctors. Non-domestic health benefits from participating providers outside of the Meadowlands network were only available in extremely limited circumstances.

Respondent's drastic cuts in benefits and increases in deductibles are confirmed by Respondent's own records. [GCX-27, 28, 35, 40, 48, 110, 165]. The analysis of the medical plans prepared by Respondent's expert witness DiBella estimates that Respondent's 2012 PPO plan paid 91% of the cost of care while the 2013 PPO paid only 80% of the cost. Although

DiBella estimated that the 2014 plan would pay for 97% of employees' out-of-pocket expenses, he admitted that the estimate assumed zero participants would obtain healthcare from MagnaCare and out-of-network providers (a right employees enjoyed in 2011-2012). Moreover, as the ALJ correctly found, Respondent presented no evidence that, as DiBella speculated, the 2014 plan administrator could opt at his/her discretion to cover the costs that were incurred for anything other than the very limited domestic and non-domestic care. It is noteworthy that DiBella is not the TruPlan administrator and his firm did not design it.

Moreover, Respondent concedes in its brief that DiBella assumed facts about Respondent's actual claim history in order to determine Respondent's Utilization Assumption in this case. Since Respondent did not have the required claim history, DiBella estimated Respondent's values in line with the industry standard. However, DiBella failed to testify that Respondent's plans (i.e. coverage, physician networks, etc.) were comparable to similarly situated medical benefit plans. Rather, as the ALJ correctly found, DiBella acknowledged that the location and number of network providers are not considered in determining benefit levels and that Respondent reduced the physician network. [ALJD 25:14-19]. Despite these undeniable facts concerning what the actuarial values were based on (generalized values rather than true values), Respondent audaciously contends that the ALJ erred in not relying on them. Respondent's claims are more offensive because Respondent presented no evidence that DiBella prepared the actuarial values prior to Respondent's decision to implement new pension plans in 2013 and 2014. Thus, Respondent's claims that the ALJ erred in rejecting DiBella's testimony are outrageous.<sup>16</sup>

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<sup>16</sup> The record evidence is clear that DiBella prepared the actuarial values prior to the litigation. Given this fact, Respondent's reliance on *US Generating Company*, 341 NLRB 1127 (2004) is inapposite. In *US Generating Company*, the employer made the changes using the actuarial values as a guide. There is no such evidence in this case.

Despite the obvious deficiencies in DiBella's testimony, Respondent's exception attempts to paint the ALJ as having committed a reversible error based on his treatment of Respondent Exhibit 81. Respondent's exception is a blatant attempt to drum up an exception based on a minor error regarding DiBella's revised actuarial numbers. Although DiBella updated his actuarial numbers, it produced no effective change to the ALJ's assumptions that:

The impact on the actuarial figures is one thing. The impact on the user, the employees, is quite another. Thus, according to DiBella, TruPlan did not provide any benefits for such important care as ancillary skilled nursing care, hospice/home healthcare and durable medical equipment.

There is no dispute that the TruPlan still did not provide for such important medical benefits. Thus, the ALJ's minor error did not cause a substantive change to his conclusion that Respondent's reliance on actuarial valuation of the plans proved it provided substantially comparable benefit level as the original plan. [ALJD 27:9-15]. Thus, Respondent's claims that ALJ erred in rejecting DiBella's testimony is disingenuous.

Thus, relying on *United Hospital Medical Center*, there is no plausible way Respondent's medical plan changes here can be labeled "de minimus." In its brief, Respondent correctly argues that it was obligated to provide "substantially comparable" benefits. But the ALJ correctly concluded that there is no conceivable way that Respondent could have interpreted the drastic reductions in the medical benefits to be "de minimus." To find otherwise would presume that the "sound arguable" doctrine extends to the "off base and unreasonable." *Plain Dealer Publishing Co.*, NLRB Case No. 8-CA-38315 (Div. Advice October 27, 2009).<sup>17</sup> Thus,

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<sup>17</sup> There is no mistake that Respondent's disdain for the Union's public campaign served as a backdrop for its unilateral changes to the medical benefit plans. Although the ALJ failed to find that Respondent's animus served as the basis for its conduct, the overwhelming record evidence proves that Respondent sought to undermine the Union with the bargaining unit. This is clearly shown in Duneav's threat to close the Rehabilitation Unit if the Union continued with its plan to release the White Paper (as shown above). Moreover, although the ALJ found that Dr. Lipsky's unlawful threat was not disseminated to bargaining unit employees, he still found that the statement was unlawful. That these threats occurred before Respondent's unilateral actions is not coincidental. Given the above, there is a causal connection between Dr. Lipsky's statement that "everything would go to the NLRB" if the Union continued its public campaign and the changes to the medical benefits plan. In this case, the cases cited by

Respondent's unilateral changes gave rise to a bargaining obligation and the ALJ correctly found that Respondent violated Section 8(a)(5) of the Act by failing and refusing to notify the Union of changes in medical benefits, and failing and refusing to bargain with the Union concerning changes in its unit employees' medical benefit plan.

**POINT XII. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT UNLAWFULLY REFUSED TO APPLY THE SERVICE UNIT CONTRACT TO NA INTERNS IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

Respondent claims that it began the NA Internship program after interviewing NA applicants and finding that these applicants did not have the requisite experience to work in a hospital. Although Respondent regularly recruited NAs, Kharonow contends he came up with the idea for the NA Internship program. However, Respondent produced little or no evidence to substantiate Kharonow's claims. Nor did Respondent's witnesses (Director of Education Joseph Crouchman and Arthur Kharonow) corroborate each other as to who actually came up with the NA internship program concept, its purpose and objectives. Thus, Respondent's evidence is "uncorroborated, undocumented, very loose, conclusionary and generalized testimony." *Systems Management*, 292 NLRB 1075, 1097 (1989).

Rather, the overwhelming record evidence demonstrates that the purpose of the NA internship program was not education, but rather it was on-the-job training to build a pool of per diem NAs to replace bargaining unit NAs. The Service contract in Section 1.2 requires that "students who are performing their clinical or whose performance of work with the Employer is part of the educational course of study that such students are pursuing. " Nowhere in the contract is such on-the-job training orientation interchangeable or synonymous with the term "education course of study." Respondent also produced no record evidence showing that its

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Respondent are instructive in dealing with Respondent's animus directed at the Union's actions. *Dynamic Energy, Inc.*, 201 NLRB 418 (2011); *Yellow Freight Systems, Inc.*, 1993 NLRB 135 (1993). Based on the above, Respondent's animus further undermines its "sound arguable" argument.

interpretation of the contract language was considered during negotiations or that it pertained to the on-the-job training orientation given by Respondent. As such, Respondent's contract interpretation is self-serving and does not fit within a common sense understanding of "education course of study."<sup>18</sup>

**1. The substantial record evidence supports the ALJ's decision that the NA Internship is similar to orientation training received by bargaining unit NAs.**

Although Respondent contends that it developed an NA Internship program from scratch, the evidence demonstrates that Respondent used Department of Health guidelines to put together Respondent's program. Crouchman himself readily admitted that he consulted with and followed the Department of Health orientation guidelines. [Tr. 2097]. Although Respondent claims that the NA interns were "students," it is noteworthy that Respondent adjusted the Department of Health's guidelines to add significantly more clinical time rather than education time to the NA interns' orientation. [Tr. 1702, 1704-5, 2098]. This makes complete sense given Respondent did not pay the NA interns and wanted to squeeze as much work for free as it possibly could. It further confirms the ALJ's conclusion that the work performed "by the nursing assistant interns was not incidental to their educational objectives." [ALJD 103:34-36].<sup>19</sup>

Although Respondent attempts to distinguish its internship program from other orientation programs by contending it was heavy on classroom instruction and teaching, the

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<sup>18</sup> In its exceptions brief on page 104, Respondent chastises the ALJ for concluding that the NA interns were not "in any traditional sense, pursuing an 'educational course of study'" because there was no record evidence for such a conclusion. This is another example of Respondent trying to drum up exceptions where there is no substantive reason for it. It is undisputed that Respondent was not certified by the State of New Jersey to run such a NA internship program and that it did not issue any degrees to the participants. Instead, as the ALJ implicitly found, if an NA intern wanted to be certified, they would have to pursue their education elsewhere rather than at the Hospital. [ALJD 103:34-37]. Unlike Respondent's suggestion, Crouchman confirmed that the supposed educational component of the NA internship was not formal, but rather 90% of the clinical was "self-taught." This falls far short of any definition of "educational course of study."

<sup>19</sup> In its brief on page 105, Respondent contends that the ALJ erred by concluding that NA interns "did not return to their educational course of study after their training ended." It is noteworthy that Respondent added "clinical" in front of training, but Respondent's reading of the ALJD is a misunderstanding of the ALJ's conclusion. [ALJD 103:36-37].

evidence contradicts this assertion. Crouchman testified that the classroom experience was 90% self-taught and focused heavily on learning essential NA skills. [Tr. 1707-8, 1735]. Respondent entered into evidence a manual which consisted of quizzes, modules and assignments to support its contention, but Crouchman noted that students went through the manual independently outside of the classroom. [Tr. 1735]. This evidence sufficiently supports the ALJ's conclusion that (1) the foregoing does not constitute an "educational course of study" contemplated by the parties; or (2) that the parties intended "educational course of study" to refer only to education "given in a vocational school" that results in a state-issued certification. [ALJD 103:31-33].

The record demonstrates that Kharonow recruited NA Garvin to be a preceptor for the NA interns. Kharonow did not give her different instruction other than the routine NA orientation nor was she provided with any training or materials. Rather, Garvin testified that Kharonow asked her to teach the NA interns how to do her job. Garvin had the NA interns shadow her as she did the job and when she felt comfortable that the NA interns could perform the duties independently she let them work alone. [Tr. 1145-6, 1168-9]. Although Kharonow testified that he perceived the NA interns in the morning and never allowed them to work independently, his testimony is unreliable. Kharonow testified that he was both the supervisor for 3 West (on the 3<sup>rd</sup> floor) and the emergency room (1<sup>st</sup> floor) and had oversight functions that routinely took him away from the emergency room. [Tr. 2137-45]. This would explain why Kharonow did not approve any of the NA interns' performance evaluations. Instead, Garvin approved some of them attesting that the NA interns completed certain job functions.

Most significantly, Garvin's recitation of the orientation is identical to the record evidence concerning RN orientation at Meadowlands and other healthcare facilities. She indicated that NA interns shadowed her for two to three weeks before they worked independently. [Tr. 1145-6, 1168-9]. NA interns Jennifer Garcia and Alexandra Montes'

evaluations confirm that they performed different clinical procedures on patients that were approved by Garvin. [R-21, R-25 pg. 133-134]. Confronted with this evidence, Crouchman had to admit the NA interns actually provided patient care. [Tr. 1738]. It is worth noting that the evaluations are dated May 30, 2013 – about four weeks after the start of the program – and during the period that Garvin testified NA interns worked independently. [R-22 through R-26]. Although Respondent tries to paint Garvin’s testimony as unreliable, such an objection is frivolous. Kharonow admitted that he recruited Garvin to serve as a preceptor, and as such, she had first-hand knowledge of the orientation process. Thus, as the ALJ properly found, Respondent failed to show the NA internship program is an “educational course of study” rather than an orientation program.

**2. The substantial evidence supports the ALJ’s conclusion that the NA Internship experience is for the benefit of Respondent and added NAs into the job pool.**

While Respondent presented Kharonow to testify about the impetus for the NA Internship program, he could not provide a cogent explanation for the start of the program or even what was Respondent’s thinking about the benefit of the program. As a key member of Respondent’s hierarchy and the brains behind the program, it is surprising that he could not definitively testify to the intended benefits of the program. There is no mistake that Kharonow was in a position to be aware of it, but he nonetheless offered vague and uncorroborated testimony.

The record is also clear that after the interns 1-2 week orientation with Garvin, they actually provided productive work. NA performed all of the duties that regular NAs were supposed to perform. As such, Respondent reaped the benefit of five to six NA interns working for free rather than paying full-time NAs.

Although Kharonow and Karsos denied that NA interns were guaranteed jobs after the program, every NA intern who “graduated” from the NA internship program received a job offer.

[Tr. 1418]. This undercuts Kharonow and Karsos' testimony, and instead confirms that Respondent had an obvious demand for new hires and intended to hire the NA interns when they were accepted into the program. Thus, Respondent's assertion in its exception brief that the ALJ erred when he concluded that all the students were offered jobs because only five of the eight interns were hired is misleading. To that end, the record evidence shows that three NA interns dropped out of the program for reasons unrelated to the job and thus, the remaining five NA interns received job offers. [Tr. 1716, ALJD 102:43-45 and 103:36-37]. Despite Respondent's attempts to mislead, this evidence strongly points to the fact that there is no other logical reason for the NA interns to have worked for free for five-weeks if they did not have at least an impression that Respondent would hire them.

Accordingly, NA interns participated in an orientation identical to the orientation offered to full-time NAs and Respondent should have been included them in the Service unit, but failed to do so. Respondent's exception that the ALJ erred when he cited to representational cases in which the Board recognized NA interns as part of the bargaining unit clearly shows it misinterpreted why the ALJ cited to these Board cases. The ALJ's point here was that there is Board precedent that determined NA interns in similar circumstances to be employees under the Act. Thus, the ALJ indicated that the NA interns were not "students" but rather "employees." Even still, the ALJ noted that even if NA interns were students Respondent's level of control and the work performed by NA interns would justified them being recognized under the contract.<sup>20</sup> Consequently, the evidence supports the ALJ's finding that Respondent violated of Section 8(a)(5) of the Act.

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<sup>20</sup> Similarly, the ALJ rejected the Respondent's "sound arguable" argument finding that there is no basis for finding that the NA interns fit in any category within the contract especially when the NA internship program was not an educational program but rather a regular NA orientation performed by the Hospital's staff. For the above reasons, Respondent's exceptions should be rejected.

**POINT XIII. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE  
ALJ'S CONCLUSION THAT RESPONDENT UNLAWFULLY  
REFUSED TO APPLY THE RN UNIT CONTRACT TO RN  
INTERNS IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

Respondent claims that it began the RN Internship program after interviewing RN applicants and finding that the applicants who applied were recent RN graduates who did not have the requisite work experience. Karsos testified she came up with the idea for the RN internship program. However, Respondent produced little or no evidence to substantiate Karsos' claim. Nor did Respondent's witnesses corroborate each other as to who actually came up with the RN internship concept, its purpose and objectives. Respondent's evidence is "uncorroborated, undocumented, very loose, conclusionary and generalized testimony." *Systems Management*, 292 NLRB at 1097.

While Respondent argues that the ALJ erred in not understanding that Meadowlands' RN internship program was tailored to make new RNs marketable candidates for jobs after completion, the overwhelming record evidence demonstrates this so-called RN internship program had little educational component, but rather was synonymous to industry-wide RN orientations. Respondent's exceptions to the ALJ's decision boil down to unsustainable explanations of the RN internship's purpose. Such explanation clearly flies in the face of generally recognized industry-wide RN orientation programs.

**1. The RN Internship is similar to orientation training  
received by bargaining unit RNs.**

Although Respondent contends that it developed its RN internship program from scratch, the record evidence demonstrates that RN interns did not receive anything different than an on-the-job training that is reminiscent of the RN orientation. Several RN witnesses provided uncontroverted testimony about their experience in RN orientation at Meadowlands and facilities other than Meadowlands. RN Barbara Rosen testified that she is an RN educator and has

conducted RN orientations for many years. Her description of the RN orientation process was a spot-on description of Respondent's RN internship. Her testimony demonstrates that RN orientees, like Respondent's RN intern, are assigned to work with a preceptor, but are not assigned their own patients and are not counted towards the staff ratio. At the start of orientation, RN orientees shadow and observe what the preceptor is doing and do not perform any tasks. The RN orientee works with his/her preceptor and is allowed to work with patients as the preceptor gains confidence in their skills. The preceptor will allow the RN orientee to work on his/her own with the preceptor present and the preceptor is there as a resource. When it is determined that the orientee is ready, he/she graduates from orientation and is allowed to function independently as a staff nurse.

While Karsos notified the Union that Respondent would be implementing an RN internship program, Karsos assured the Union that the interns would merely be observing nursing work, but would not be performing any nursing work of their own. This is similar to the type of clinical experience or externship that RNs often participate in while during nursing school. However, Karsos admits that Respondent does not operate a nursing school and that the interns are not students. RN interns also did not receive any specialized certification or degree as a result of their participation in the RN internship program. Rather, like RN orientees, RN interns were required to have RN licenses before they were hired.

The RN internship is virtually indistinguishable from the industry-wide RN orientation. Unlike other hospitals, Respondent did not give preceptors any special training to work with RN interns or instructed them to work differently with the RN interns. Rather, the preceptors utilized their experience training RN orientees and taught them similarly.<sup>21</sup>

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<sup>21</sup> In its exception brief, Respondent suggests that the ALJ missed the mark when he found that RN Interns Dombrowski, Gordon, Carullo, Cabera and Moser's testimony about receiving orientation at other nursing facilities after leaving their positions at Meadowlands was instructive. Respondent's exception is a misreading of the ALJ's

- Although Karsos assured the Union that RN interns would not be assigned to perform nursing duties, RN interns testified that they performed the full range of nursing tasks on their own outside the presence of a preceptor. RN interns administered medication, including narcotics; were given access to secure lock boxes and pyxis machines where narcotics are kept; participated in the counting of narcotics to confirm inventory; dressed wounds and hung intravenous bags; took vital signs, moved patients, bathed patients and administered pregnancy tests; prepared rooms for surgery and assisted doctors with operations.

Like new RN orientees, RN interns did not work with preceptors for any pre-determined period of time. Rather, Karsos admits that the length of the internship varied based on the RN intern. In her affidavit, Karsos further described the process by which an RN intern completes the internship and is ready to assume a permanent position with Respondent that is identical to RN orientees. Thus, Respondent's exception claiming that ALJ rested his conclusions on faulty premises is simply an attack on the ALJ's credibility resolution. Although Respondent's exceptions list several contentions about the RN Internship program which were supposedly overlooked or not considered by the ALJ, this is untrue. The ALJ considered the entirety of the evidence, both testimony and documentary evidence, to properly conclude that he could not credit Karsos' testimony. [ALJD 62:3-9].

**2. Respondent Presented No Evidence to Rebut RN Interns' Testimony About the RN Internship Program**

While Respondent argues that the RN internship program was educational and in turn, that the RN interns did not perform the same functions as bargaining unit RNs, it failed to present credible witnesses to contradict the testimony of interns who actually went through the

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finding. The ALJ clearly found that the internship program at Meadowlands was identical to the orientation period and type of orientation received, including classroom training and clinical work received by RN interns after they left Meadowlands for jobs at other nursing facilities. [ALJD 61:4-14]. As such, Respondent's attempt to re-invent the purpose of the RN internship program as an "educational" training program is a sham.

program. Respondent called four witnesses who purported to testify about the RN internship program and newly hired RN orientees: Donna Ortiz, Felicia Karsos, Deborah Deering, and Arthur Kharanov. Ortiz never precepted any RN interns or newly hired RN orientees. [Tr. 1865-66]. Although Ortiz purported to describe the RN intern program on direct examination, she was subsequently compelled to admit that she did not participate or oversee the process by which the RN interns were precepted. [Tr. 1867-76, 1879-80, 1899]. As an example of Ortiz's unreliable testimony, she was adamant in her original testimony that interns who worked in the ICU performed no charting after she took over as the manager of that unit. [Tr. 1850, 1901, 1905-6]. Subsequently, upon a review of the actual charts, Respondent was forced to stipulate that RN interns did perform charting in the ICU both before and after Ortiz took over responsibility for that unit. [Tr. 1905-6, 2368]. It is not surprising that Ortiz was wrong about the work that was performed by RN interns since Ortiz did not spend any significant amount of time observing them.

The testimony of Kharanov was equally deficient and unreliable. Kharanov did not testify that he ever precepted any of the RN interns. Kharanov instead offered rambling testimony without foundation that he observed a few RN interns working in 3 West. However, he does not indicate who, when, how often or how long he saw the RN interns working. [Tr. 2096]. His testimony is entirely unreliable.

Karsos testified that she only precepted the first three interns for a week in 3 West, and her testimony detailing this experience was categorically rebutted by the RN interns' credible testimony. Her testimony about how she came up with the idea about the RN internship program in light of Meadowlands' documented capacity to find per diem nurses, is disingenuous. She further denied that the purpose of the RN internship program was to cut down on the use of agency and RN overtime even though there was clear record evidence to the contrary.

Finally, Deering's testimony largely confirmed the testimony of the RN interns and other evidence presented by the General Counsel. Deering did not receive any training to precept the RN interns in a manner that was different than newly hired RN orientees. [Tr. 1819-20, 1826]. Like newly hired RN orientees, the duration of the internship depended on the background and ability of the individual RN intern. [Tr. 1823-24]. And like RN orientees, RN interns were allowed to work alone without the preceptor present once the RN intern demonstrated the ability to do so. [Tr. 1829-31]. Deering was not aware of any nurse who was denied, a per diem position after completing the intern program. [Tr. 1830]. Deering did not offer any testimony which would suggest that there was any difference between an RN orientation and an RN internship other than their respective wages.

**3. The Department of Labor Investigation Rebuts Respondent's Argument that the RN Interns Are Not Employees**

Respondent excepts to the ALJ's reliance on the Department of Labor's settlement agreement and narrative report as inappropriate hearsay and contrary to the federal rules of evidence. Such argument is unpersuasive. First, it is noteworthy that the Department of Labor investigated Respondent's RN internship and concluded that RN interns worked as staff nurses performing nursing tasks independently, and as a result the RN internship did not meet the educational training standard. Second, while Respondent entered into the settlement agreement to resolve wage claims related to its RN internship program, the settlement agreement and narrative report were not entered into evidence to show that Respondent violated wage and hour laws, but rather that RN interns had filed a claim over their employment status, which led to a settlement of those allegations. Under the circumstances, the introduction of the settlement agreement and narrative report does not fall under the penumbra of Federal Rule of Evidence 408. Rule 408 provides in its entirety:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Although Rule 408 broadly declares that “[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible,” courts have held that Rule 408 is inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions; e.g., libel, assault, breach of contract, *unfair labor practice*, and the like. Rule 408 does not prevent the plaintiff from proving his case; wrongful acts are not shielded because they took place during compromise negotiations. Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* Section 5314 (1st ed. 1980) (emphasis added). The inapplicability of Rule 408 to suits seeking to vindicate wrongs committed during settlement discussions derives from the more general principle that “Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, not some other claim.” *Id.* at fn. 25. Evidence of the compromise of a claim different than the claim currently in dispute therefore is admissible unless “the compromise evidence require[s] an inference as to the offeror’s belief concerning the validity or invalidity of the compromised claim.” See *Id.* at § 5308; *Sysco Food Services of Cleveland, Inc.*, 347 NLRB 1024, 1033 (2006) (Federal Rule of Evidence 408 prohibits admission of settlement discussions only to prove liability for the matter being settled, not for an alleged wrong committed in the course of settlement discussions).

Unlike Respondent's contention, the settlement agreement and narrative report here were not offered as evidence to prove any of the complaint allegations. Rather, the settlement agreement and narrative report were introduced to demonstrate that Respondent had settled a wage and hour claim about whether RN interns were employees under the Fair Labor Standards Act. While the Board recognizes that evidence of conduct or statements made in compromise negotiations is not admissible to prove the merits of matters in issue, Board law unequivocally establishes that, where otherwise relevant, such evidence may be admitted without restriction. Thus, evidence of settlement negotiations is limited in its use under Rule 408, but is not rendered inadmissible for other purposes. *Jennmar Corporation of Utah, Inc.*, 301 NLRB 623, 631, fn.6 (1991); *Cirker Morning & Storage Co.*, 313 NLRB 1318, 1326 (1994). Similarly, although Respondent claims that the narrative report was inadmissible hearsay because the investigator did not testify, such a claim is misleading. Rather, it is undisputed that Ms. Yookyung Hwang's narrative report was entered through her direct supervisor, who testified she reviewed and approved it and later signed off on the settlement agreement. Thus, the Board case in *Staffing Network Holdings, LLC*, 362 NLRB No. 12 (2015) cited by Respondent is inapposite. Additionally, the narrative report is not hearsay evidence given that it was not introduced for the truth, but rather only that the narrative report to confirm that Respondent entered into a settlement to resolve the wage claims.<sup>22</sup>

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<sup>22</sup> Similarly, contrary to Respondent's exception to the ALJ's failure to rely on *Brevard Achievement Center*, 342 NLRB 982, 984-85 fn. 13 (2004) citing *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999), the ALJ rightly distinguished *Brevard* from the facts in this particular case. In *Brevard*, the Board found that disabled workers in a primarily rehabilitative relationship with their putative employer were not statutory employees. As the ALJ held, the difference between the type of workers and the type of work is obvious. [ALJD 61:31-35]. Although *Brevard* has nothing whatsoever to do with this case, Respondent insists that the ALJ erred when he relied on the Department of Labor settlement agreement to find RN interns were employees. Respondent's exception argument is a mischaracterization of the ALJ's decision. Instead, the ALJ reasoned that RN interns were initially paid, but later were unpaid interns. Yet, the ALJ cites the Department of Labor settlement agreement to simply state that the unpaid RN interns based on their class-action wage and hour charge were paid for their hours worked as RN interns. As such, Respondent's argument that RN interns did not have a "primary economic relationship" with Meadowlands is not true. In actuality, after the settlement agreement, all of the RN interns were paid at least minimum wage for their work performance as interns, and therefore, clearly fit as "employees" under Section 2(3) of the Act.

- 4. The RN Internship experience is for the benefit of Respondent and added RNs to the per diem pool

Felicia Karsos testified about the impetus for the RN Internship program, but she could not provide a cogent explanation for the start of the program or even what was Respondent's thinking about the benefit of the program. As a key member of Respondent's nursing department and the brains behind the program, it is surprising that she could not definitively testify to the intended benefits of the program. There is no mistake that Karsos was in a position to be aware of it, but she nonetheless offered vague and uncorroborated testimony. However, Karsos' email to Human Resources confirms that cost reductions were the true reason for the RN internship program.

Here, as the ALJ rightly found, RN interns performed RN functions and handled their own patients within days of joining the RN internship program. As noted above, RN interns performed all of the duties that regular RNs were supposed to perform. Even though Respondent argues that only 9 RN interns testified to their internship experience, this exception is spurious. Although there were slight differences between RN interns' testimony, the testimony was consistent that they performed RN job functions independently after a few days in some cases and in others within weeks.<sup>23</sup> Thus, Respondent reaped the benefit of more than 150 RN interns, many who worked for minimum wage or for free.

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<sup>23</sup> Respondent resurrects its argument that RN interns constituted a "new job" under the contract. This argument was properly rejected by the ALJ. Although Respondent's contract allows it to establish new job titles in consultation with the Union, Respondent presented no evidence that the RN internship was a "new job" or that it discussed it with the Union. Notwithstanding the above, the record evidence clearly shows that the RN internship was nothing more than a new name for RN orientation given that RN interns did substantially the same work as the bargaining unit RNs, as the ALJ concluded. [ALJD 62:10-16]. In a similar vein, Respondent's argument that the ALJ erred by concluding that Respondent violated Section 8(a)(5) of the Act by failing to get the consent of the Union for the mid-term modification is meritless. The ALJ properly found the RN interns are not a "new job" or "temporary workers," but rather they are RNs who were intentionally misclassified by Respondent to avoid putting them in the bargaining unit. In fact, RN interns testified that Karsos removed them from per diem jobs because the Union was arguing that interns should be included in the RN bargaining unit. Thus, the facts clearly show that this is not a unit scope issue. Rather, like the ALJ concluded, the RN interns should have been included in the RN bargaining unit. Although Respondent objected to the ALJ citing to representational cases, it is abundantly clear that the ALJ cited such cases to find that RN interns in similar situations have been included in RN bargaining units.

While Respondent now asserts that it incurred costs by retaining RN interns, Karsos' email explains why the interns were recruited on a monthly basis: "the goal of [hiring interns] was to cut all agency and OT." [GCX-187 pg. 1 6:22 PM email]. The evidence in GCX-204 further shows that Respondent started hiring newly graduated RNs, putting them through a lengthy orientation paying them minimum wage and then retained the RN interns as staff nurses particularly as per diems. As gleaned from GCX-204, Respondent hired 153 per diem nurses as compared to 33 full-time and 7 part-time nurses from May 2, 2011 to January 11, 2014. Many of the per diems, full-time and part-time nurses participated in the RN internship program [GCX-128, GCX-156]. Thus, unlike Respondent's exception, the record evidence demonstrates that the ALJ was correct in finding that the RN interns economically benefited Meadowlands because they were replacing members of the nursing staff who were costing Meadowlands the most money.

Although Karsos denied that RN interns were guaranteed jobs after completion of the program, the record is replete with examples from employment applications, cover letters and resumes indicating that RN interns were actually seeking permanent RN positions and human resource records referred to them as RNs. The RN interns' personnel files also show that interns were provided with RN job descriptions, employee handbooks, participated in orientation where hospital policies and procedures were discussed, and were generally treated as employees. Respondent failed to provide any evidence that the hospital had the RN interns complete different paperwork after they completed the RN internship program. Instead, the record evidence demonstrates that Respondent relied on the same forms and paperwork routinely completed by new hires. RN interns' personnel file further reflect Respondent's intention to

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The Board cases prove beyond a shadow of a doubt that RN interns here were inappropriately excluded from the RN bargaining unit. Consequently, the ALJ properly concluded that Respondent's failure is a clear modification of the RN contract. [ALJD 62:1-23].

recruit RN “interns” for staff nurse positions and demonstrates that Respondent’s witnesses’ were flagrantly disingenuous in denying it.

The record of RN hires further dispels any notion that RN interns were not guaranteed permanent positions. Of the 34 paid interns who were hired from October 2011 to July 2012, all but seven were retained in staff nurse positions. Of the seven RN interns who did not transition to staff nurse positions, three were discharged for misconduct and two resigned. According to the list of unpaid RN interns from July 2012 to 2014, there were 62 unpaid interns. [GCX-223]. Of the 62 unpaid RN interns, all but 20 interns were hired by Respondent. Of the 20 interns who were not hired, 13 of the them did not return after the first day orientation, 5 stayed only less than a week and 2 completed the internship program but declined job offers. This undercuts Karsos’ testimony and confirms that Respondent had an obvious demand for new hires and intended to hire the RN interns when they were accepted into the program. There is no other logical reason for the RN interns to have worked for minimum wage or free for up to several months if they did not have at least an impression that Respondent would hire them.

RN interns further provided uncontested examples of working per diem shifts while they participated in the internship program. While Respondent attempted to downplay this evidence, it mostly confirmed that several RN interns did work per diem shifts. This further confirms that hospital supervisors were not aware of any difference between RN interns and full-time RNs. The confusion of these RN supervisors is most probably attributed to the uncontroverted evidence that RN interns functioned fully as full-time RNs.

Accordingly, the record is clear that RN interns participated in an RN orientation similar to full-time RNs. Respondent put newly graduated RNs through a lengthy RN internship program, paid them minimum wage or sometimes nothing and then these same RN interns stayed

on staff. As such, the ALJ properly concluded that Respondent violated Section 8(a)(5) of the Act by failing to include RN interns in the RN unit.

**POINT XIV. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING TO CLOSE THE REHAB UNIT AND THREATENING TO REFUSE TO MAKE AGREEMENTS WITH THE UNION IF THEY ENGAGED IN PROTECTED ACTIVITY**

**1. Duneav Threatens to Close the Rehab Unit if Union Holds October 2, 2012 Press Conference**

In September 2012, the Union published a lengthy white paper concerning Respondent's history of state licensing violations, financial reporting irregularities, and violations of the conditions set when it purchased Meadowlands. [GCX-11]. The Union subsequently scheduled a press conference for Tuesday, October 2, 2012 to publicize the white paper's findings.

On September 28, 2012, Dudsak and Levine met with Karsos to discuss Respondent's change from 12-hour to 8-hour shifts. Shortly after the meeting began, Duneav joined the meeting. At some point in the meeting, Duneav complained about "the media thing on Tuesday" and stated that Respondent's census falls every time the Union goes to the press. She then said that the rehab unit, which only has 5 patients and 20 union employees, would close if the Union went forward with the Tuesday event.

The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) said that:

A prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. [citation omitted]. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

Here, Duneav's statement about closure of the rehabilitation unit was not objectively true. As the ALJ properly concluded, Respondent presented no evidence to establish any correlation between the fall in rehabilitation unit census and the union's media campaign. Rather, Duneav's statement was a threat of adverse consequences for engaging in protected activity. Her statement was directed towards the Union's scheduled press conference and suggested that Duneav would be personally responsible for closing the rehabilitation unit. Duneav was not responding to questions or comments when she spontaneously raised "the media thing on Tuesday," and assumed that the press conference would lead to falling patient census.<sup>24</sup>

More importantly, even if the Union going to the press could reasonably be connected to a fall in patient census, as the ALJ found, Respondent did not establish a direct link between the patient census and the need to close the rehabilitation unit. See *Pilot Freight Carriers, Inc.*, 223 NLRB 286 fn. 1 (1976) (finding an 8(a)(1) violation where the employer told employees, without any objective evidence, that \$10,000 spent to counter the union's campaign would have gone directly to employees' compensation but for the union, and that any money spent in the future to fight the union would come directly out of employees' paychecks).

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<sup>24</sup> Respondent's exceptions are a rehash of its arguments in its post-hearing brief. Those arguments were specifically rejected by the ALJ. Although Respondent contends that Levine and Dudsak's testimony were contradictory, the overwhelming record evidence supports the ALJ's credibility resolutions. Contrary to Respondent's assertion on page 27 of its brief, Duneav's statement did not just convey a "reasonable prediction as to the probable consequences of further negative publicity by the union on the decline in patient census," but rather like the ALJ concluded, she tied the closure of the rehabilitation unit to the Union's publicity campaign. [ALJD 10:23-24]. While Respondent asserts that the ALJ erred in crediting Levine and Dudsak over Duneav, it is noteworthy Respondent did not address Karsos' testimony at all. This obvious omission is clearly intentional because Karsos' testimony made it clear that Duneav connected the decline in census and the rehabilitation unit closing to the publicity campaign as the ALJ properly held. [ALJD 10:25-27]. When Respondent later closed the rehabilitation unit within weeks of the October 2, 2012 press conference, Duneav's threat was not just words but actual evidence of the threat. That the ALJ stated that Duneav's subsequent actions supported his finding is a matter of stating the obvious, not an analytical flaw. Thus, since the overwhelming evidence demonstrates Duneav's statement were not proper predictions, the ALJ rightly rejected the cases relied on by Respondent for its "reasonable prediction" theory. Even if the ALJ erred in crediting Levine and Dudsak's testimony over Duneav, Respondent did not present any evidence that the hospital had actually moved to close the rehabilitation unit prior to the October 2, 2012 press conference. Rather, the record evidence shows that Respondent notified the Department of Health after October 2, 2012 press conference of its intention to close the rehabilitation unit. As such, the ALJ's reliance on *Daikichi Corp.*, 335 NLRB 622 (2001) is proper. Thus, Respondent's exceptions should be rejected.

Lastly, Duneav's testimony was vague and lacking credibility. At the hearing, Duneav feigned ignorance about the Union's October 2, 2012 press conference. However, Dr. Lipsky unwittingly dealt her credibility a fatal blow when he testified that in September 2012, Duneav "was loudly complaining that the Union prepared some defamatory documents." As the ALJ corrected surmised, the Union's white paper irritated Duneav, was the impetus for her unlawful outburst and she threatened to close the rehab unit if the Union continued with the October 2, 2012 press conference. Therefore, the record evidence supports the ALJ's finding that Duneav violated Section 8(a)(1) of the Act by threatening to close the rehab unit if the Union went forward with the press conference.

**POINT XV. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT THE UNILATERAL CHANGE AND OTHER SECTION 8(a)(5) ALLEGATIONS IN THE COMPLAINT FAIL TO MEET THE COLLYER DEFERRAL FACTORS**

Under *Collyer*,<sup>25</sup> the Board considers the following six factors in determining whether to defer a dispute to arbitration: (1) whether the dispute arose within the confines of a long and productive collective bargaining relationship; (2) whether there is a claim of employer animosity to the employees' exercise of protected rights; (3) whether the agreement provides for arbitration in a very broad range of disputes; (4) whether the arbitration clause clearly encompasses the dispute at issue; (5) whether the employer asserts its willingness to resort to arbitration for the dispute; and (6) whether the dispute is eminently well-suited to resolution by arbitration.<sup>26</sup>

Deferral is not appropriate where the evidence shows that the parties' own machinery is "not functioning fairly and smoothly." *United Aircraft Corp.*, 204 NLRB 879, 879 (1972), *enfd.* sub. nom *Machinists Lodges 700, 743, 1746 v. NLRB*, 525 F.2d 237 (2<sup>nd</sup> Cir. 1975). Additionally, in cases concerning the failure to provide information, the Board does not

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<sup>25</sup> *Collyer Insulated Wire*, 192 NLRB 837 (1971).

<sup>26</sup> *San Juan Bautista Medical Center*, 356 NLRB No. 102, slip op. at 2.

traditionally defer the charge to arbitration. *Hospital San Cristobol*, 356 NLRB No. 95, slip op. at 1, fn. 3 (2011). See also *Rochester Gas & Electric Corp.*, 355 NLRB No. 86, slip op. at 13 (2010)(“deferral not appropriate as the [c]omplaint alleges violations of Section 8(a)(5) of the Act for failing and refusing to provide information.”).

Although the parties’ contracts provide for arbitration in a broad range of disputes, and there is a contract clause broad enough to embrace the dispute before the Board, numerous other factors militate against deferral. First, the disputes do not arise within the context of a long and productive bargaining relationship. While Respondent contends that there is no record evidence to support that deferral would be futile, and that the parties have processed more than 44 grievances, many of those grievances are still unresolved, and in turn, this same evidence demonstrates that the grievance-arbitration process is inundated and inefficient. Consequently, the overwhelming record evidence shows that since Respondent purchased the hospital on December 7, 2010, the Union has filed 46 grievances and 16 unfair labor practice charges.<sup>27</sup> That Respondent has processed 44 grievances does not mean that the grievance-arbitration process is working. Instead, like the ALJ properly concluded, the parties’ brief but contentious relationship is properly “characterized by disagreements and legal wrangling.” [ALJD 115:8-17]; *San Juan Bautista Medical Center*, 356 NLRB at slip op. at 2 (“We are unaware of any decision finding that a relationship as new and contentious as the one at issue here can be considered “long and productive”). See also *Beverly Enterprises*, 310 NLRB at 257-58, enforced in relevant part sub. nom *Torrington Extend-A-Care Employee Ass’n v. NLRB*, 17 F.3d 580 (2<sup>nd</sup> Cir. 1994)(relationship was less than 2 years old and the employer committed four violations during that time).

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<sup>27</sup> Of the 16 unfair labor practice charges, 10 unfair labor practice charges are part of these proceedings. [GCX-1].

Second, Respondent has failed to schedule or respond to scheduling requests for multiple grievance meetings; denied the Union its contractual right to meet with employees in the cafeteria to discuss grievances<sup>28</sup>; and on two different occasions on December 4, 2012 and on April 4, 2013, Garrity and Mulligan announced that they lacked the authority to address the substance of or to settle the approximate 10 outstanding grievances because they had to check with Respondent's ownership group. *Beverly Enterprises*, supra (deferral not appropriate where there was no long and productive relationship, the Employer refused to meet and discuss grievances with the Union, and the Employer denied the Union access to the breakroom); *Paragon Paint*, 317 NLRB 747, 770 (1995)(deferral not appropriate where the employer's conduct, including assigning a grievance representative without authority to settle grievances, demonstrated that the grievance procedure was not functioning fairly and smoothly). Further, Respondent's Chairman of the Board Dr. Lipsky threatened not to resolve any disputes with the Union unless the Union stopped talking to the media. Respondent excepts to the ALJ's finding arguing that Dr. Lipsky and Duneav's statements were isolated and were not significant. Respondent's exception boil down to minimizing the seriousness of Duneav's and Dr. Lipsky's threats as isolated findings. But there is no denying that Dr. Lipsky's threats strike at the heart of the grievance-arbitration process. That is, Dr. Lipsky threatened to stop meeting with the Union to resolve contractual issues through the parties' grievance-arbitration mechanism, and instead

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<sup>28</sup> In its exceptions on page 24, Respondent contends that the ALJ overstated the Union's ability to investigate grievances. Respondent highlights the ALJ's supposed overstatement, but it fails to properly show that the ALJ qualified his statement in the next sentence when he stated, "the cafeteria was a place designated in the contract where union activities were permitted." [ALJD 115:34-35]. That Respondent unilaterally changed the contractual language by limiting the Union's meeting with employees to (a) every other week, (b) for one hour, (c) with no more than two employees present at the same time and (d) specified that Respondent had the right to cancel the use of the room at any time upon 30 day notice does not, like Respondent suggests, remove the sting of its unlawful conduct. [ALJD 116:4-7]. Rather, the record evidence shows that Respondent placed limits on the Union's ability to meet with employees to discuss grievances in order to frustrate the grievance-arbitration process – a fundamental element of the Union's ability to investigate employee's grievances as concluded by the ALJ. [ALJD 116:8-11]. In fact, the ALJ thoroughly dealt with Respondent's same arguments in the ALJD. Since Respondent presented no new evidence to support its contentions, the ALJ's conclusion must be upheld.

forced the Union to utilize the National Labor Relations Board processes to resolve them. The ALJ properly did not perceive this threat as isolated, but rather as acrimonious to the employees' exercise of their Section 7 rights. [ALJD 115:18-24].

Third, Respondent has failed to provide the Union with requested information. *United States Postal Service*, 276 NLRB 1282, 1285 (1985) (Board maintains a policy against deferral to arbitration in refusal to provide information cases because deferral can result in a "two-tiered" process that may cause delay in resolving the underlying dispute and undue expense for the parties involved, and because the bargaining representative has a statutory right to relevant information that is independent of rights accorded under the contract). Further, since a hearing on the allegations in the complaint has already concluded, piecemeal deferral of the unilateral change allegations would run against Board policy to resolve an entire dispute in a single proceeding. See *15<sup>th</sup> Avenue Iron Works*, 301 NLRB 878, 879 (1991), *enfd* 964 F.2d 1336 (2<sup>nd</sup> Cir. 1992).

Thus, Respondent's failure to cooperate with the parties' grievance-arbitration procedure has frustrated the Union's ability to effectively represent the employees. Respondent's conduct also demonstrates a disregard for the grievance and collective-bargaining processes and highlights that the current dispute is not well-suited for arbitration because the grievance process is not "functioning fairly and smoothly." Accordingly, the ALJ properly concluded that the underlying complaint Section 8(a)(5) allegations are not appropriate for deferral to the parties' contractual grievance and arbitration procedure under *Collyer*.

**POINT XVI. THE SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT FAILED TO ESTABLISH THAT THE UNION'S COMMUNICATIONS WITH GOVERNMENTAL AGENCIES, LEGISLATORS, THE MEDIA AND HEALTHCARE ADVOCACY GROUPS PRIVILEGED THEM TO SUSPEND BARGAINING IN GOOD FAITH WITH THE UNION**

While it is undisputed that the Union engaged in communications with government regulatory agencies, legislators, media and healthcare advocacy groups, these communications did not breach Article 7.1 of the contracts. The Union was merely exercising its privilege to administer the contract and compel regulatory agencies to ensure Respondent's compliance with the CHAPA and CN conditions established during the approval of the sale of Meadowlands.

**A. The Union has not violated the Strike and Lockout Provision of the CBA**

Respondent asserts that the Union's communications with media, state and local governmental officials, regulatory agencies and healthcare advocacy groups is evidence of a breach of Article 7.1 of the contract that permits it to make unilateral changes and suspend its bargaining obligation. It argues that the no strike clause's inclusion of "other economic pressure activity" envisioned the type of conduct that the Union engaged in would obviate its bargaining obligation.

In its exception brief, Respondent contends that the ALJ erred by failing to consider or note that the language in Article 7.1 is not included in other Union contracts. During the hearing, Respondent presented 22 other contracts between the Union and other entities. The No-Strike clause varied from one contract to another. Even though Respondent argues that Article 7.1 was vastly unique because it included "and any other economic pressure activities," this is not strong evidence. But rather it is a desperate attempt to attack the ALJ's decision by a contrived exception. In the 22 contracts placed into evidence by Respondent, most of the No-Strike

clauses are similar, but use different verbiage. If Respondent's logic is extended, it would make every phrase or word used in one contract clause and not in another "unique." Respondent's argument is made even more ridiculous when Dr. Lipsky and Duneav readily admitted that Article 7.1 is a carry-over from the Liberty contract with the Union and that they each were not highly involved in bargaining. That is, although Dr. Lipsky testified that he bargained for Article 7.1 to guarantee 5 ½ years of labor peace, this testimony is highly prejudicial and is starkly different than the reality of the bargaining. Given the above, it is no wonder why Respondent refused to call Respondent's counsel Michael Miller to testify. While Respondent argues that the ALJ made an adverse inference concerning Miller, this is the farthest thing from the truth. In discussing hearing testimony to illuminate the parties' intent with the disputed language, the ALJ simply noted that Miller did not testify. [ALJD 132:35-41]. Even if the ALJ had found an adverse inference, the burden of proof for the affirmative defense lies with Respondent and thus it would have been appropriate for the ALJ to draw it here.

Contrary to Respondent's exceptions, the parties' contract is clear that a violation of Article 7.1 exposed the Union to a lawsuit for damages or an injunctive action. At hearing, Respondent presented no evidence that it attempted to void its bargaining obligation or the collective bargaining agreements on the grounds of a material breach. Instead, Respondent admitted that it did not file a lawsuit for damages or sought injunctive relief. Since the parties have an agreed-upon contractual provision that purports to resolve this dispute and Respondent has not sought recourse under it, Respondent should not be allowed now to use the Board's processes in place of its negotiated contractual mechanism.

**B. The No Strike Clause is Not a “Clear and Unmistakable” Waiver of the Union’s Right to Engage in Protected Conduct**

Respondent next argues that the Union explicitly waived its ability to engage in the type of communications that the Union engaged in that was critical of Respondent’s management of the hospital. However, Respondent produced little or no evidence to prove that the language had this intended purpose when the contract was signed. Notably, the ALJ rightly concluded that Respondent’s interpretation flies in the face of the Union’s right to petition government officials and regulatory agencies to ascertain Respondent complied with state and federal laws.

**1. Board law is clear that waivers must be “clear and unmistakable”**

It is well-settled that waivers of rights under the Act must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 NLRB at 708; *Pennsylvania American Water Co.*, 359 NLRB No. 142 (2013). The burden to prove a waiver is placed on the party making the claim. *Smurfit-Stone Container Enterprises*, 357 NLRB No. 144 (2011); See *Wayne Memorial Hospital Ass’n*, 322 NLRB 100, 104 (1996). Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter. *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982). Thus, any doubts about the scope of the no-strike clause are “insufficient to meet the standard of a ‘clear and unmistakable waiver.’” See *Intersystems Design Corp.*, 278 NLRB 759 (1986); *Pinewood Care Center*, 242 NLRB 816, 822 (1979); *Caravelle Boat Co.*, 227 NLRB 1355, 1358 (1977).

Respondent failed to produce credible evidence (documentary or testimony) about the 2010 negotiations to prove that the Union waived its right to engage in protected activities. As noted *supra*, Respondent’s chief negotiator Michael Miller failed to testify. Respondent failed to

explain why Miller could not appear and testify and failed to produce any notes, contemporaneous correspondence, emails or documentation that would prove Respondent's assertion. Rather, Respondent called Dr. Lipsky and Duneav, who offered self-serving and vague testimony about the negotiations. Their testimony is noteworthy because they each testified that they played minimal roles in bargaining. Thus, their testimony about bargaining history is unreliable and must not be credited.

Additionally, Respondent's interpretation of "other economic pressure activity" defies contract interpretation logic. Each of the nine strike activities listed in the contract refers to job actions at the workplace: strikes, sympathy strikes, boycotts, picketing, work stoppages, slowdowns, sit-ins, and other interference with the operations of the Hospital. The enumerated acts all reference acts which cause interruptions to the hospital's operation. There is nothing in the language which indicates that the parties meant anything different when "other economic pressure activities" preceded it. Simply put, the language speaks solely about job actions at the hospital not lawful protected conduct by the Union.

Respondent's interpretation of the phrase "other economic pressure activity" is condemned by the Board. In *Mental Health Services*, 300 NLRB 926, 927 (1990), the employer proposed management rights language that prevented the Union and employees from engaging in protected activities with government offices that controlled the employer's revenue funding. The Board found that the employer's insistence on the management rights language to impasse was unlawful. While *Mental Health Service* is a refusal to bargain case, it is very instructive. Unlike *Mental Health Service*, the no-strike language here does not specify the Union's political activities. If Respondent wished to encompass political activism it had to negotiate a more explicit waiver than the one in the contract. The contract language is too ambiguous and unclear to have encompassed what Respondent says it does. This is especially true when the "other

economic pressure activity” language is a holdover from the Liberty contracts, there was little discussion about the language at negotiations and there is no extrinsic evidence produced by Respondent that would clear up the ambiguity.

The Board further has found no “clear and unmistakable waiver” in identical contract language. In *Englehard Corporation*, 342 NLRB 46, 46-47 (2004), the Union informed the employer that it intended to picket at the employer’s shareholder’s meeting away from the plant. The employer advised the Union that the picket would contravene the parties’ no-strike language, but the Union disagreed. In *Englehard*, the Board held that “no-strike” language was intended to prohibit conduct that would reasonably lead to the suspension of work and did not constitute a waiver of other protected activity. Unlike Respondent’s suggestion that *Englehard* is inapposite to the facts here, the Board in *Englehard* reasoned that the lack of extrinsic evidence, as here, to explain what the parties meant made “it is hard to see how a waiver can be based, as it must, on the parties’ mutual consent.” Given that Respondent cannot point to anything in the record to indicate this was the parties’ intended purpose, the ALJ correctly relied on *Englehard* to find that Respondent cannot establish that the language waived its right to engaged in protected activities, and instead noted that “it is impossible to believe that the Union intended, in agreeing to the no-strike clause, to give up its constitutional right to advocate with government authorities in behalf of its views, communicate with the press as to its dispute with the Respondent or to join with advocacy groups in support of its positions.” [ALJD 132:45-46 and 133:1-4].

**2. Respondent’s interpretation of the no strike clause tramples on the Union’s right to petition government**

The Union engaged in advocating for healthcare legislation and monitored hospital compliance starting in 1999. In 2010, Ann Twomey and other Union officials publicly supported

the sale while Appleseed's Executive Director Steinhagen warned State officials that MHA ownership group's track record of quality, safety and accessibility to needed hospital services posed significant risks to quality patient care delivered at Meadowlands. DOH and the Attorney General's office approved the sale of Meadowlands to MHA under certain conditions.

The Union has also advocated for financial reporting legislation for "for-profit hospitals" for many years. On February 22, 2010, Union supported re-introduced financial reporting legislation in the New Jersey Senate.<sup>29</sup> The financial reporting legislation passed in the New Jersey Senate on January 6, 2011. Twomey's remarks about the Union's role in getting the financial reporting legislation passed were not directed at Respondent given that MHA had just recently purchased Meadowlands.

The Union did not communicate with regulatory agencies until sometime in June 2011 due to Respondent's disregard for compliance with its sale approval conditions. Thereafter, the Union assigned staff to engage in ordinary research, and like other hospital assignments, it filed Open Public Records Act ("OPRA") requests with DOH and the Attorney General's office to obtain Respondent's audited financial reports and other public documents in order to review and analyze if Respondent was meeting the CHAPA and CN conditions. Starting on August 1, 2011, the Union commenced urging the Department of Health to appoint a monitor to oversee operation at the hospital given the serious deficiencies cited in the DOH's July 2011 Inspection report of Meadowlands and Respondent's demonstrated failure to comply with CN conditions. It

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<sup>29</sup> In its exception brief on page 18-19, Respondent asserts that the ALJ committed prejudicial error when he found that attorney Kenneth Pringle's communication with the union qualified for an "implied attorney-client relationship" and thus, making the three emails privileged. Although Respondent claims that the ALJ ignored the overwhelming evidence did not occur with the attorney-client relationship, the ALJ clearly outlines the steps he took to investigate whether there was an appropriate attorney-client relationship established by the Union. The Respondent highlights that the emails are dated January 5, 2011 and that the retainer agreement is dated August 9, 2012 to presume that it was impractical that the "attorney-client" privilege protected these communications. Yet Respondent conveniently leaves out that the ALJ performed an in-camera inspection of the emails in relations to the "implied attorney-client relationship" cases presented by the Union to determine whether the communications were privileged documents. [ALJD 118:1-41]. Thus, Respondent's exception is meritless.

also address the need for DOH to take immediate action in appointing a “temporary manager” and affiliated healthcare advocacy groups circulated a petition and newspaper articles and editorials<sup>30</sup> each sought to get DOH to appoint the temporary manager.

The record is unclear if the Union contacted newspaper reporters, but Harriet Rubenstein testified without contradiction that she had a very stringent practice of not contacting newspaper reporters first and she only responded to their inquiries with approval from Jeanne Otersen. These newspaper articles, however, convinced the Union to continue its efforts to advocate for the DOH to appoint a temporary manager due to the growing evidence that Respondent’s financial condition was worsening and the quality of patient care at the hospital was in jeopardy. The Union confirmed its suspicions in an in-depth analysis of Respondent’s operations and shared their preliminary findings with legislator’s staffs and several healthcare advocacy groups to strategize how to convince the DOH and the Attorney General’s office to enforce the state laws governing CHAPA and CN processes despite their lack of responsiveness to the Union’s complaints.<sup>31</sup>

In rejecting Respondent’s mischaracterization of the Union’s communications, the ALJ found that the overwhelming record evidence supports that the Union communication with

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<sup>30</sup> At the hearing, Respondent insinuated that the media outlets received information from the Union and did not do their own independent investigations. However, the record evidence adduced at the hearing undermines Respondent’s contention. In fact, Star Ledger reporters sent Respondent’s spokesman an email asking him for Respondent’s position on the \$2 million tax liens and the sale-lease back agreement. [R-172].

<sup>31</sup> In its brief on pages 15-18, Respondent argues that the ALJ committed reversible error by refusing to issue subpoenas to David Knowlton and Adrian Dumoulin-Smith. Respondent’s claim here is disingenuous. In fact, Respondent issued subpoenas to David Knowlton and Adrian Dumoulin-Smith and appropriate petitions to revoke were filed. At hearing, Respondent argued that it was necessary to question Knowlton and Dumoulin-Smith to ask them specific questions concerning a October 18, 2012 email from Wardell Sander, the meeting indicated in the email and other relevant information regarding the Union’s communications with advocacy groups, governmental agencies and the legislative bodies. During the hearing, the ALJ indicated to Respondent that they had received subpoenaed documents from David Knowlton and had questions several Union witnesses about the meeting in question and that further questioning was “cumulative and duplicative.” Although Respondent continued to insist it needed to question such individuals, it failed to present any further substantive legal or factual argument for this need. In light of the Board’s Rule and Regulations which confers on an ALJ to responsibility to manage the administrative proceedings properly, the ALJ ordered that Motions to Quash the Subpoenas be granted. In this instance, the ALJ re-affirmed his rulings which were upheld by the Board denying Respondent’s Request for Permission to Appeal the ALJ’s Orders. [ALJD 117:18-30]. Thus, Respondent’s arguments here have been thoroughly dealt with by both the ALJ and the Board and must be rejected.

legislators, regulatory agencies, healthcare advocacy groups and media related directly to its effort to get DOH to appoint a temporary manager to oversee hospital operations and to assure compliance with all state and federal laws. Respondent produced no evidence that the Union's petitioning of government officials and regulatory agencies directly or through its healthcare advocacy group network is equivalent to a job action. Nor did it produce evidence that would substantiate its claim that the Union's activity is akin to economic pressure activity.<sup>32</sup> In *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 536-537 (2002), the Court held that an employer's petitioning of government, even when motivated by a desire to retaliate against an opponent in a labor dispute, is not interference within the meaning of the NLRA. The Court recognized that although such lawsuits may impede union organizing, the NLRA may not be construed to extend the statutory proscription of interference to reasonably-based lawsuits filed with such a retaliatory purpose. *Id.* at 536-537.

Moreover, the Court in *BE & K* relied on an earlier decision in *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 580 (1988) to support its conclusion. Relying on *DeBartolo*, the Court held that peaceful appeals to customers in leaflets are akin to persuasion and are not coercive even where they induce customers not to patronize the employer. *Id.* at 535. The Court clearly distinguished public appeals to customers from inducements to employees to undertake a work stoppage. Like *BE & K*, nowhere in the record

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<sup>32</sup> Respondent's exceptions exaggerate the Union's activity by contending that it ordered researchers to "dig up dirt" about Dr. Lipsky's personal finances, divorce and other unrelated matter as well as other hospital investors. The record evidence shows that a Union researcher did try to get this type of information, but Union researcher Harriet Rubenstein testified that the Union researched the background of Hospital investors because the contract Meadowlands signed with the DOH had certain requirements which pertained to the character of the owners and to determine whether Meadowlands' funds were inappropriately being "diverted" to those investors. [ALJD 136:35-39]. As such, the purposes of the Union's investigations were clearly aimed at protecting employees and trying to make sure Meadowlands remained open for business. That the Union may have broached on an inappropriate area of inquiry was addressed by the ALJ, but this one occasion does not completely taint the entirety of the Union's investigation into the Hospital owners and investors' activities which might have an impact on the finances of Meadowlands. Here, Respondent points to a few emails and postulates that this proves the Union engaged in a nefarious scheme. The ALJ properly rejected Respondent's arguments previously and Respondent posited nothing new which would warrant a different conclusion.

did Respondent show that employees were in any way induced to strike or take a job action. Rather, the record evidence demonstrates the communications were directly targeted at getting regulatory agencies to appoint a temporary monitor based on insurmountable proof from public filings, State inspection reports and newspaper reporting that Respondent had failed to comply with state and federal laws.

3. Respondent's interpretation of the "no-strike" clause infringes on the Union's right to protected activity

Respondent finally asserts that it negotiated the language in the no-strike clause to ensure labor peace. However, the record is devoid of any evidence that Respondent had this intended purpose. Rather, other than self-serving and general testimony from Respondent's representatives, Respondent did not adduce any substantive evidence that this was the parties' mutually agreed-upon interpretation. It is noteworthy that Respondent claims that it always intended this purpose for the language, but Respondent made no mention of the supposed material breach in any of Respondent's correspondence with the Union.

Rather, as the ALJ properly found Respondent's interpretation of the "no strike" clause is unlawful and is not recognized by the law. It is well-settled that parties cannot insist on infringing on parties' political activity in bargaining.<sup>33</sup> *Mental Health Services*, 300 NLRB at 927. The record is also clear that the Union did not agree for the "no strike" clause to forbid it from engaging in protected activity. Twomey's proposals, notes, a clarification memo circulated by the parties, post-negotiation correspondence, a tentative agreement that was ratified by unit members and the contracts themselves confirm that this was not the parties' intended purpose for the "no-strike" clause. Despite the overwhelming record evidence, Respondent would want us to

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<sup>33</sup> By Respondent's Motion to Dismiss, in part, the Consolidated Amended Complaint [R-190], Respondent asserts that if the Union can waive its right to strike it can agree in a "no strike" clause to waive other protected conduct. Respondent cites *DTM Corp.*, 358 NLRB No. 112 (2012) to support this proposition, but it is inapposite to this situation.

believe that it was the Union's intentions to not only agree to not engage in job actions, but also to limit its ability to engage in political activity. Nowhere in the record is this indicated and Respondent's contention cannot be gleaned from any other evidence.

Most significantly, the timing of Respondent's pronouncement of the material breach just happens to fall immediately after the complaint issued. This is no coincidence as Respondent's material breach scheme stands as its best chance to justify its unlawful unilateral changes. Not surprisingly, Respondent's scheme is exposed by its own representatives. Dr. Lipsky and Duneav had separate encounters with the Union and neither announced the Union's violation of Article 7.1. For example, in Duneav's letter to Twomey which purportedly centered on the language of Article 7.1, she *only* mentioned that Respondent believed the Union's website "contain[ed] inaccurate information and incorrect assumptions concerning [the hospital] and the manner in which it is operated," [CP-2] but this is a far cry from what Respondent believes it says. This point is further proved unpersuasive when Duneav failed to respond to Twomey's response in order to address her assertions. [CP-3]. Further, the parties met for an April 3, 2013 mediation meeting, but Dr. Lipsky failed to address the Union's supposed breach there. Dr. Lipsky and Duneav would clearly be in a position to be aware of Respondent's claims. Instead, they both failed to address the Union's supposed breach of the Article 7.1 of the contract.

**4. Respondent's Reliance on *Arundel*, *United Elastic*, *Carrol Contracting*, *Laura Modes* and *Pirelli* is Misplaced and it does not support Respondent's affirmative defense.**

At the hearing, Respondent did not dispute that the Union's protected activities were reasonably confirmed by its public filings and other accessible information, but rather argues that the Union's protected activities entitled it to suspend its bargaining obligation during a strike or slowdown relying on *Arundel Corp.*, 210 NLRB 525 (1974), *United Elastic Corp.*, 84 NLRB

768 (1949), *Carroll Contracting & Ready-Mix*, 247 NLRB 890 (1980), *Laura Modes Co.*, 144 NLRB 1592 and *Pirelli Cable Corp.*, 2003 NLRB LEXIS 191 (April 21, 2003). However, Respondent's reliance on these cases is misplaced.

Even though Respondent points to *Arundel*, *United Elastic*, *Carroll Contracting*, *Laura Modes* and *Pirelli* for legal authority, the ALJ properly found that each is inapposite and distinguishable from the facts in the instant matter. With the exception of *Pirelli*, the ALJ found that all of the cases involved violence or a job action at the employer's facility. Unlike in *Arundel*, *United Elastic*, *Laura Modes* and *Carroll Contracting*, there is no record evidence that employees engaged in violence, a strike or slow-down. Neither is there evidence that the Union encouraged employees not to apply for jobs at the hospital. Nor is there evidence that the Union told patients not to use the hospital's services. Rather, the record is clear that there was no job action or activity that can be even viewed similarly as the strikes in *Arundel*, *United Elastic*, *Laura Modes* and *Carroll Contracting*.

Like *Arundel*, *United Elastic*, *Laura Modes* and *Carroll Contracting*, the Respondent's reliance on *Pirelli* is also distinguishable. In *Pirelli*, the ALJ dismissed a 8(a)(5) allegation reasoning that the employer was privileged to take unilateral action because the Union's behavior "jammed up the arbitration system" with excessive grievances. Unlike *Pirelli*, the ALJ rightly found that the record evidence shows that Respondent engaged in wide-spread unilateral changes that affected employees' terms and conditions of employment as well as trampled on the Union's rights as the collective bargaining representative. Similarly, unlike *Pirelli*, Respondent here did not make an effort to try to resolve the dispute before it made unilateral changes or that the unilateral changes were directed to resolve the cause of the problem. Further, unlike *Pirelli*, Respondent's unilateral changes failed to address any Union unlawful actions and were not limited, but rather eviscerated the parties' collective bargaining relationship, nor did Respondent

give the Union an opportunity to address its breach, if any, by making them aware of any misconduct.

Thus, the record in this instant matter clearly demonstrates that the Union was trying to administer its bargaining relationship with Respondent and urged government officials with some help from healthcare advocacy groups to ensure Respondent's compliance with state and federal law. Therefore, the ALJ rightly concluded Respondent's reliance on *Arundel*, *United Elastic*, *Carroll Contracting* and *Pirelli* to assert it was privileged to take its unilateral actions is unpersuasive.

**POINT XVII.        THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE  
ALJ's CONCLUSION THAT GENERAL COUNSEL'S  
PROPERLY ISSUED COMPLAINT AND THAT  
RESPONDENT'S MOTION TO DISMISS IS DENIED**

**A. The Complaint Was Validly Issued**

Respondent erroneously asserts that Mr. Solomon's appointment was in violation of the Federal Vacancies Reform Act ("FVRA," 5 U.S.C. § 3345, et seq.). Mr. Solomon was lawfully serving as Acting General Counsel pursuant to a valid designation under that statute when he issued the complaint in this case. *See Benjamin H. Realty Corp.*, 361 NLRB No. 103, slip op. 1 (Nov. 13, 2014). The General Counsel recognizes that the D.C. Circuit recently held that Mr. Solomon's appointment under the FVRA in June 2010 was lawful, but that he could not continue serving after the President nominated him to be General Counsel. *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 78 (D.C. Cir. 2015), *petition for reh'g filed* (Oct. 5, 2015). However, the D.C. Circuit's holding that the President's nomination precluded further service repudiates a longstanding and consistent interpretation of the FVRA on which every President since its enactment has relied and that the Senate has accepted without recorded objection. Accordingly, contrary to Respondent exceptions that the Courts have definitively ruled on this issue, on October 5, 2015,

the General Counsel, on behalf of the Board and with the support of the Department of Justice, filed a petition for rehearing in *SW General*. Petition for rehearing en banc was denied Case No. 14-1107 (January 20, 2016) and petition for cert. granted 136 S.Ct. 2489 (2016). As the petition demonstrates, the D.C. Circuit's conclusion is based on a misreading of the FVRA and is pending in front of the Supreme Court.

**B. In any event, the current General Counsel Is Able to Properly Ratify the Issuance of the Complaint and the Continued Prosecution of this Case**

Even if Mr. Solomon's appointment was not valid, there is no basis for dismissing the complaint. While Respondent suggests that General Counsel Richard Griffin, who was appointed by the President and confirmed by the Senate in November 2013, is unable to ratify Mr. Solomon's actions in this case in a Notice of Ratification, such assertion has been rejected by the Board. See *The Arbit Company*, 364 NLRB No. 130 (October 27, 2016). In *Arbit Company*, while the Board acknowledged that the decision in *SW General*, it held:

We find that subsequent events have rendered moot the Respondent's argument that Solomon's alleged loss of authority after his nomination precludes further litigation in this matter. Specifically, on October 23, 2015, General Counsel Richard F. Griffin Jr. issued a Notice of Ratification. In view of the independent decision of General Counsel Griffin to continue prosecution in this matter, we reject the Respondent's affirmative defense challenging the circumstances of Solomon's "appointment" as Acting General Counsel as moot. 364 NLRB slip op. at \*10 fn. 4.

Since Respondent raised this same argument at the end of the proceedings, Counsel for the General Counsel had no other choice but to petition for the ratification after the hearing closed.<sup>34</sup> The General Counsel petition for ratification citing Section 3348(e)(1) of the FVRA, which exempts the Board's General Counsel from the FVRA provisions that would otherwise

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<sup>34</sup> In its exceptions, Respondent contends that the ALJ inappropriately re-opened the record in order to deal with the General Counsel's Notice of Ratification. The record evidence is clear that Respondent filed its Motion the next to the last day of the proceedings. The General Counsel requested a leave from the ALJ to address Respondent's Motion which was granted. [Tr. 3774]. Thus, this is another example of Respondent trying to drum up exceptions where none exists.

preclude ratification of persons found to have served in violation of the FVRA and thus, the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act. As the ALJ found Respondent's claims that the ratification is invalid ignore the express provisions of the FVRA.

Congress enacted the FVRA in 1998 to bring a halt to the perceived erosion of the Senate's advice and consent powers through the indefinite filling of vacant offices requiring Presidential nomination and Senate confirmation. S. Rep. No. 105-250, 105th Cong., 2d Sess. 4-8 (1998). The FVRA prescribes who may fill such offices in an acting capacity and the length of time a designee may serve. *See* 5 U.S.C. §§ 3345-47. To enforce these new restrictions, Section 3348(d) of the FVRA renders of "no force or effect" actions taken in the performance of the functions or duties of a vacant office performed by a "person who is not acting under section 3345, 3346, or 3347," and further specifies that such actions "may not be ratified." 5 U.S.C. § 3348(d)(1) and (2). Persons who are subject to Section 3348 are by this means stripped of the ratification defense that, under the law in effect at the time of the FVRA's enactment, had often been used to defeat statutory challenges to the actions of Executive acting officers. *See* S. Rep. No. 105-250, 105th Cong., 2d Sess. 6-8.<sup>35</sup>

Although Respondent may interpret Section 3348 to challenge General Counsel's Griffin's ability to ratify this complaint, that would be a refusal to accept that Section 3348(e)(1) explicitly provides that "[t]his section shall not apply to the General Counsel of the National Labor Relations Board." Thus, by the plain terms of that section, the NLRB General Counsel is

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<sup>35</sup> *See Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 212, 214 (D.C. Cir. 1998) (rejecting statutory challenge brought under the prior Federal Vacancies Act (which the FVRA superseded), because the temporary director of OTS, who was validly seated, ratified the earlier decision to initiate the enforcement proceeding); *Cf. FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 n.6 (D.C. Cir. 1996) (rejecting constitutional separation of powers challenge brought against congressionally appointed FEC members in an enforcement action because, after it was reconstituted, the FEC ratified its earlier decision to proceed with litigation).

exempt from all the provisions of Section 3348, including the provisions of Section 3348(d) that render actions taken by officers who were not designated in compliance with the FVRA of no force and effect and incapable of ratification.

Because the NLRB General Counsel is expressly exempted from Sec 3348, the traditional ratification defense remains available. Contrary to Respondent's exception, the General Counsel's ratification of the complaint and prosecution, based on a review of the case record and consultation with staff, is in accord with judicial precedent. *See cases cited above n. 1, see also Laurel Bay Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009) (in holding that the Board, with only two members, lacked quorum, Court suggested that "a properly constituted Board may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating previous decisions"); *Combat Veterans for Cong. Political Action Comm. v. Fed. Election Comm'n*, 795 F.3d 151, 158 (D.C. Cir. 2015) (any prejudice Combat Veterans might have suffered from FEC using improper voting procedures was rendered harmless by the Commission's subsequent ratification). Thus the unfair labor practice complaint is properly pending before the Board.

Respondent also asserts that Section 3348(e)(1) exempts the General Counsel only to preserve the separation between the General Counsel's prosecutorial role and the Board's adjudicatory role by preventing the "Head of the Agency" from performing the General Counsel's role pursuant to Section 3348(b) of the FVRA.<sup>36</sup> From that premise, Respondent's reasons that Section 3348(e)(1) "was never intended to exempt" the General Counsel from Section 3348(d)'s no-ratification provision. Congress' intent is manifestly to the contrary. As shown, Section 3348(e)(1) categorically exempts the General Counsel from all subsections of

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<sup>36</sup> Section 3348(b) of the FVRA provides that, absent designation of an acting officer, "the office shall remain vacant" until the President appoints someone to the office, and, in that circumstance, only the head of the agency "may perform any function or duty of such office." 5 U.S.C. § 3348(b)(1) and (2). See S. Rep. No. 105-250, 105<sup>th</sup> Cong., 2d Sess. 20 (1998).

Section 3348, including Section 3348(d). Congress' recognition that because of the NLRA's separation of prosecutorial and adjudication functions, members of the Board, unlike the heads of other Executive departments, could not themselves perform the General Counsel's essential duties when that office was vacant<sup>37</sup> does not limit the categorical exemption of the General Counsel from the entirety of Section 3348.

Respondent's argument that a properly appointed General Counsel may have taken different and "unknowable" actions in this case would not undermine the ratification, but rather supports it. Here a confirmed General Counsel undertook a review of the investigation of the charge and prosecution, consult with staff, and determine whether the "issuance of the complaint in this case and its continued prosecution" is proper. The General Counsel's ratification of all prosecutorial actions, and not just the initial issuance of the complaint, will redress the precise harm complained of by Respondent. Significantly, if the ratification of a 2013 complaint occurs, Respondent makes no claim that the ratification process denied it a full opportunity to litigate its case.

As the ALJ properly concluded the General Counsel's ratification of the issuance and continued prosecution of the complaint, based on his independent review of the case record, redresses any defect stemming from Acting General Counsel Solomon asserted invalid service under the FVRA. Accordingly, Respondent's exceptions must be rejected.

### **III. CONCLUSION**

The entire record, a preponderance of the credible evidence, and the applicable case law prove that Respondent violated Sections 8(a)(1) and (5) of the Act, as found by the ALJ. General Counsel respectfully requests that the Board issue a broad order, with traditional notice

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<sup>37</sup> See S. Rep. No. 105-250, 105th Cong., 2d Sess. 18-19, 20 (1998).

and make whole remedies although Respondent excepts to the ALJ's decision, and for Respondent to comply with any other remedies requested above and deemed appropriate.

## CERTIFICATION

This is to certify that copies of the foregoing Answering Brief In Response to Respondent's Exceptions to the Decision of the Administrative Law Judge Steven Davis have been duly served on the Executive Secretary, Respondent's counsels and Charging Party on February 10, 2017 as follows:

### BY ELECTRONIC FILING

Gary W. Shinnars  
Executive Secretary  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, DC 20570

Honorable Mindy Landow  
Associate Administrative Law Judge  
National Labor Relations Board  
Division of Judges  
Jacob K. Javits Federal Building  
26 Federal Plaza – Suite 1703  
New York, NY 10278-0214

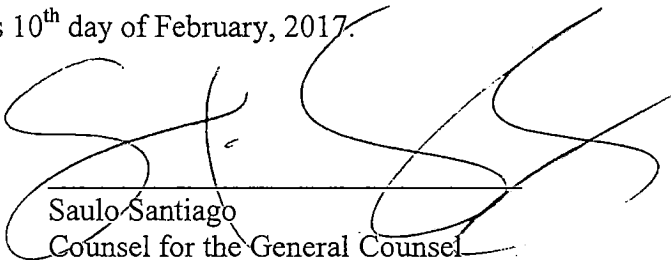
### BY ELECTRONIC MAIL

Jeffrey J. Corradino, Esq.  
Richard W. Schey, Esq.  
Jackson Lewis, P.C.  
220 Headquarters Plaza  
East Tower, 7<sup>th</sup> Floor  
Morristown, NJ 07960  
[CorradiJ@jacksonlewis.com](mailto:CorradiJ@jacksonlewis.com)

Robert Mulligan, Esq.  
Hartmann Doherty Rosa Berman & Bulbulia, LLC  
65 Route 4 East  
River Edge, NJ 07661  
[rmulligan@hdrbb.com](mailto:rmulligan@hdrbb.com)

Emma Rebhorn, Esq.  
General Counsel  
Health Profession & Allied Health Employees  
110 Kinderkamack Road  
Emerson, NJ 07630  
[erebhorn@hpae.org](mailto:erebhorn@hpae.org)

Dated at Newark, New Jersey this 10<sup>th</sup> day of February, 2017.



Saulo Santiago  
Counsel for the General Counsel