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**Opal Care LLC and Ruby Care LLC d/b/a Emerald Nursing and Rehabilitation Center and 1199 SEIU United Healthcare Workers East. Case 03–CA–225611**

October 25, 2019

**DECISION AND ORDER**

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. 1199 SEIU United Healthcare Workers East (the Union) filed a charge and an amended charge on August 15 and October 17, 2018, respectively, alleging that Opal Care LLC (Respondent Opal Care) and Ruby Care LLC (Respondent Ruby Care), a single employer, d/b/a Emerald Nursing and Rehabilitation Center (collectively, the Respondent), violated Section 8(a)(5) and (1) of the National Labor Relations Act.

Subsequently, the parties executed a bilateral informal settlement agreement, which the Regional Director for Region 3 approved on January 14, 2019.<sup>1</sup> Among other things, the settlement agreement required the Respondent to: (1) make the bargaining unit employees whole (in an amount to be determined by the Regional Director) for financial losses suffered as a result of the unilateral changes to their health insurance, plus interest; (2) provide records to the Region relevant to calculating this make-whole remedy; (3) make all required past due and currently due payments, with interest and penalties, to the Union Pension Fund; (4) make all required past due and currently due payments, with interest and penalties, to the Union Education fund; and (5) post at its facilities the notice for 60 consecutive days and comply with all provisions in the notice.

The settlement agreement also contained the following provision:

The Charged Party agrees that in case of non-compliance by the Charged Party with any of the terms of this Settlement Agreement . . . , and after 14 days' notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue a Complaint that includes the allegations covered by the Notice to Employees, as identified above in the Scope of

Agreement section, as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of the Complaint. The Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to such Complaint. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement described above. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon Charged Party at the last address provided to the General Counsel.

On January 14, by email and letter, the Region's compliance officer sent the Respondent's counsel a copy of the conformed settlement agreement, with a cover letter advising the Respondent to take the steps necessary to comply with the settlement agreement.<sup>2</sup> Also enclosed were copies of the Notice to Employees (sent by mail only), to be posted by the Respondent, and a Certification of Compliance form. On January 22, the compliance officer emailed the Respondent's counsel requesting a copy of the signed and dated Notice to Employees as well as the Certification of Compliance form. By email and letter dated January 24, the compliance officer notified the Respondent's counsel that the Respondent had failed to comply with the terms of the settlement agreement, and that, unless the Respondent fully complied within 14 days, the Region would consider it to be in default and proceed according to the default provision set forth in the settlement agreement. The compliance officer spoke with Respondent's counsel on February 5, reminding him of the 14-day deadline for compliance, and emailed him again on

<sup>1</sup> All subsequent dates are in 2019 unless otherwise indicated.

<sup>2</sup> The Respondent was also copied on the compliance letter dated January 14.

February 7. The Respondent failed to respond or cure its lack of compliance.

Accordingly, on February 8, pursuant to the terms of the noncompliance provision of the settlement agreement, the Regional Director issued a complaint based on breach of affirmative provisions of settlement agreement (the complaint). On February 28, the General Counsel filed a Motion for Default Judgment with the Board. On March 5, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response. The allegations in the motion are therefore undisputed.

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

#### Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the Motion for Default Judgment, the Respondent has failed to comply with any of the terms of the settlement agreement. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that all of the allegations in the complaint are true. Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, Respondent Opal Care has been a limited liability company with an office and place of business located at 1175 Delaware Avenue, Buffalo, New York (Respondent Opal Care's facility), and has been operating a nursing home providing inpatient medical care.

At all material times, Respondent Ruby Care has been a limited liability company with an office and place of business located at 1205 Delaware Avenue, Buffalo, New York (Respondent Ruby Care's facility), and has been operating a nursing home providing inpatient medical care.

Annually, in conducting their business operations described above, Respondent Opal Care and Respondent Ruby Care derive gross revenues in excess of \$100,000 and purchase and receive at their facilities goods valued in excess of \$5000 directly from points outside the State of New York.

At all material times, Respondent Opal Care and Respondent Ruby Care have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have interrelated operations with common payroll and employee health benefits; and have held themselves out to the public as a single-integrated

business enterprise.

We find that Respondent Opal Care and Respondent Ruby Care constitute a single-integrated business enterprise and a single employer within the meaning of the Act, and are an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and have been a health care institution within the meaning of Section 2(14) of the Act.

We find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

At all material times until about September 21, 2018, Darell Sokol held the position of the Respondent's regional administrator and was a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

At all material times since about September 22, 2018, Scott Wheeler has held the position of the Respondent's regional Administrator and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

At all material times, Heather Edwards has held the position of Respondent Opal Care's administrator and has been a supervisor of Respondent Opal Care within the meaning of Section 2(11) of the Act and an agent of Respondent Opal Care within the meaning of Section 2(13) of the Act.

At all material times, David Goldman has held the position of Respondent Ruby Care's administrator and has been a supervisor of Respondent Ruby Care within the meaning of Section 2(11) of the Act and an agent of Respondent Ruby Care within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurse staff, service and maintenance employees (including activity aides, laundry aides, van drivers, unit clerks, certified nurses' aides including ambulatory aides, range of motion aides, physical therapy aides, housekeeping aides, cooks, dietary aides, maintenance aides and floor technicians) employed at the Respondent's facilities at 1205 Delaware Avenue, Buffalo, New York 14209 and 1175 Delaware Avenue, Buffalo, New York 14209, excluding all office clerical employees, technical employees, resident care coordinators, wound care nurses, guards and supervisors as defined in the Act.

At all material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has been embodied in a collective-bargaining agreement which is effective from August 1, 2016, to August 1, 2019. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

1. (a) About June 20, 2018, the Respondent cancelled unit employees' health insurance through Nova.

(b) About August 1, 2018, the Respondent implemented new unit employee health insurance through Blue Cross Blue Shield.

(c) The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

(d) The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct or the effects of this conduct.

2. (a) Since about April 10, 2018, the Respondent failed to continue in effect all the terms and conditions of the collective-bargaining agreement described above by failing to make required payments to the Union Education Fund.

(b) Since about August 1, 2018, the Respondent failed to continue in effect all the terms and conditions of the collective-bargaining agreement described above by failing to make required payments to the Union Pension Fund.

(c) The terms and conditions of employment described above are mandatory subjects for the purposes of collective bargaining.

(d) The Respondent engaged in the conduct described above without the Union's consent.

#### CONCLUSIONS OF LAW

1. By the conduct described above in paragraph 1(a), (b), and (d), the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive

<sup>3</sup> The settlement agreement states that interest shall be computed "in accordance with the standard Board formulae, using the procedure set forth below," citing *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), and the agreement further clarifies that "[i]nterest will be calculated at a rate of 5% per annum."

<sup>4</sup> As set forth above, the settlement agreement provided that, in case of noncompliance, the Board could "issue an [o]rder providing a full remedy for the violations found as is appropriate to remedy such violations."

<sup>5</sup> See, e.g., *Benchmark Mechanical, Inc.*, 348 NLRB 576 (2006). In his Motion for Default Judgment, the General Counsel specifically requested that the Board order the Respondent to "comply with the terms of the Settlement Agreement." In these circumstances, we construe the

collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

2. By the conduct described above in paragraph 2(a), (b), and (d), the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.

3. The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to comply with the terms of the settlement agreement approved by the Regional Director for Region 3 on January 14.

Accordingly, we shall order the Respondent to make the unit employees whole for the losses they suffered because of the unlawful unilateral changes to their health insurance in the manner prescribed in the settlement agreement,<sup>3</sup> and to provide to the Region the records necessary to analyze the amount of backpay due. We shall also order the Respondent to make payments in the amounts set forth in the settlement agreement to the Union Pension Fund and the Union Education Fund, plus interest and penalties accrued to the date of payment in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Finally, we shall order the Respondent to post the settlement agreement's incorporated Notice to Employees.

In limiting our affirmative remedies to those enumerated above, we are mindful that the General Counsel is empowered under the default provision of the settlement agreement to seek "a full remedy for the violations found as is appropriate to remedy such violations."<sup>4</sup> However, in his Motion for Default Judgment, the General Counsel has not sought such additional remedies and we will not, *sua sponte*, include them.<sup>5</sup>

General Counsel's motion as a request to enforce the unmet terms of the settlement agreement, and not as a request for a "full remedy." See, e.g., *Perkins Management Services*, 365 NLRB No. 90 (2017). Further, although the settlement agreement requires the Respondent to provide limited records for the purpose of calculating backpay, in its Motion for Default Judgment the General Counsel requests an order that includes standard language requiring the Respondent to preserve and provide records generally. Here, the records are necessary to enforce the unmet make-whole provision of the settlement agreement. Accordingly, the Order includes the Board's standard language requiring the Respondent to provide such records. See *Comprehensive at Orleans, LLC*, 367 NLRB No. 70 (2019).

## ORDER

The National Labor Relations Board orders that the Respondent, Opal Care LLC and Ruby Care LLC, a single employer, d/b/a Emerald Nursing and Rehabilitation Center, Buffalo, New York, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

1. Make whole, with interest, the bargaining unit employees affected by the Respondent's unilateral changes to the health insurance plan.

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

3. Make all required past due and currently due payments, with interest and penalties, to the Union Pension Fund.

4. Make all required past due and currently due payments, with interest and penalties, to the Union Education Fund.

5. Post at its facilities located at 1175 Delaware Avenue and 1205 Delaware Avenue, Buffalo, New York, copies of the attached notice marked "Appendix."<sup>6</sup> The notice shall be posted in the same manner as agreed to in the settlement agreement.

6. Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 25, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

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

1199 SEIU United Healthcare Workers East (the Union) is the employees' representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit (the unit):

All full-time and regular part-time licensed practical nurse staff, service and maintenance employees (including activity aides, laundry aides, van drivers, unit clerks, certified nurses' aides including ambulatory aides, range of motion aides, physical therapy aides, housekeeping aides, cooks, dietary aides, maintenance aides and floor technicians) employed at our facilities at 1205 Delaware Avenue, Buffalo, New York 14209 and 1175 Delaware Avenue, Buffalo, New York 14209, excluding all office clerical employees, technical employees, resident care coordinators, wound care nurses, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change unit employee health insurance without giving the Union notice and a meaningful opportunity to bargain.

WE WILL NOT fail to make contractually-required payments to the Union Pension Fund.

WE WILL NOT fail to make contractually-required payments to the Union Education Fund.

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

WE WILL make all unit employees whole, with interest, for any financial losses suffered as a result of our unlawful unilateral changes to unit employee health insurance.

WE WILL make all required past due and currently due payments, with interest and penalties, to the Union Pension Fund.

WE WILL make all required past due and currently due payments, with interest and penalties, to the Union Education Fund.

OPAL CARE LLC AND RUBY CARE LLC D/B/A  
EMERALD NURSING AND REHABILITATION  
CENTER

QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



The Board's decision can be found at <https://www.nlr.gov/case/03-CA-225611> or by using the