UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

ALAMEDA CENTER FOR REHABILITATION AND HEALTHCARE, INC.	Cases: 22-CA-180564 22-CA-188462

and

1199 SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS EAST, NEW JERSEY

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS

David F. Jasinski, Esq
JASINSKI, P.C.
Attorneys for Respondents
Sixty Park Place, 8th Floor
Newark, New Jersey 07102
(T) 973-824-9700
(F) 973-824-6061

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1
PROCEDURAL HISTORY 1
FACTS 2
LEGAL ARGUMENT 5
POINT 1 THE ALJ IMPROPERLY REWROTE THE AGREEMENT BETWEEN THE PARTIES. 10
POINT 2 THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE ALJ'S REMEDY 12
POINT 3 THE ALJ'S REMEDY IS PUNITIVE AND BEYOND THE AUTHORITY OF THE ACT 14
CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Chem Fab. Corp.,
275 NLRB 21 (1985)..... 8
Cruden v. Bank of New York,
957 F.2d 961 (2d Cir. 1992)..... 10
Employing Lithographers of Greater Miami, Fla. v. N. L. R. B.,
301 F.2d 20 (5th Cir. 1962)..... 10
Hoffman Plastic Compounds, Inc. v. N.L.R.B.,
535 U.S. 137 (2002)..... 15
In Re Oil Capitol Sheet Metal, Inc.,
349 NLRB 1348 (2007)..... 13
In Re Webco Indus., Inc.,
340 NLRB 10 (2003)..... 9, 10
In Re Webco Indus., Inc., No. 17-CA-19047,
2001 WL 1682465 (Dec. 28, 2001)..... 12
Local 60, Carpenters v. NLRB,
365 U.S. 651 (1961)..... 14
Lou's Transp., Inc. & T.K.M.S., Inc. & Michael Hershey,
366 NLRB No. 140 (July 24, 2018)..... 8, 9, 11
Quick v. N.L.R.B.,
245 F.3d 231 (3d Cir. 2001)..... 11
Raleigh Manor, Ltd. P'ship d/b/a Care Haven of Raleigh & Dist. 1199, the Health Care & Soc. Serv. Union, Seiu, Afl-Cio, No. E NOS. 9-CA-32596,
1996 WL 33321597 (June 6, 1996 N.L.R.B. Div. of Judges)..... 5, 6, 7
Republic Steel Corp. v. NLRB,
311 U.S. 7 (1940)..... 14
Republic Windows and Doors,
356 NLRB No. 175 (2011)..... 11
Sure-Tan, Inc. v. NLRB,
467 U.S. 883 (1984)..... 13
UAW v. Russell,
356 U.S. 634 (1958)..... 14
United Steelworkers of Am. v. Enter. Wheel & Car Corp.,
363 U.S. 593 (1960)..... 12

PRELIMINARY STATEMENT

On March 20, 2020, Administrative Law Judge Benjamin W. Green issued a decision following a compliance hearing in which he completely granted General Counsel's request for remedy for 10 employees, without modification, providing the employees be made whole by the Respondent being ordered to make the employees contributions to the 401(k) plan for a period of 8 months, as well the Respondent's matching contribution, interest and lost rate of return. The decision was crafted in an attempt to deliver industrial justice at the cost of following the law. As will be set forth more fully below, the decision was entered in spite of the entirety of the evidence being based solely upon speculation and assumption, ignoring the plain and unambiguous terms of the collective bargaining agreement ("CBA"), and the outcome being a windfall to the employees and punitive to the Respondent.

PROCEDURAL HISTORY

On October 26, 2017 a decision was entered by ALJ Chu, finding among other things, that Respondent violated Section 8(a)(5)(1) by failing to immediately upon purchase of the AristaCare at Alameda to implement a 401(k) program. The NLRB adopted the decision on December 11, 2017. The matter was appealed to the Third Circuit, which upheld the decision on August 10, 2018. The matter was then set down for a compliance hearing, which took place on January 7, 2020 before ALJ Green. The only testimony being provided by Rhonda Fricke, a compliance officer for the NLRB. The testimony was admitted over objection by Respondent of it being both speculative and hearsay. Both objections were overruled. The matter was briefed and ALJ Green issued a decision on March 20, 2020. In his decision, ALJ Green order that Respondent make 10 employees whole by the Respondent making the employee contributions and matching contributions from

May 5, 2016 and January 12, 2017 utilizing the calculations submitted by the NLRB compliance officer.

FACTS

Alameda Center for Rehabilitation and Healthcare, Inc., is a long term care facility located in Perth Amboy, New Jersey. Respondent purchased the facility from AristaCare on April 21, 2016. 1199 Service Employees International Union represents LPN's who work at the facility. This compliance hearing was brought on behalf of 10 LPNs as the presumptive injured parties and the Union sought to make whole.

There are no disputed facts is in this matter. The negotiated collective bargaining agreement provides in pertinent part:

> Article 31 401(k) Savings Plan
>
> Each employee who has completed at least one (1) years (sic) of continuous service and worked 1,000 hours the previous year shall be eligible to participate in the 401(k) Plan. Employer shall match 50% of each employee's contributions, up to a maximum of 3% of the employee's gross salary. (GC Ex.3)

In May, 2016, the current operator purchased the Facility and was forced to establish and implement its own 401(k) Plan. It could neither adopt nor continue the previous 401(k) plan since the prior owner's plan was not portable and the new owner did not have a plan of its own. As a result, it necessitated the creation and implementation of a 401(k) savings plan by the new owners.

A 401(k) Plan (Defined contribution Plan) is different from a Pension Plan (Defined Benefit Plan). Under a defined benefit plan, the Employer makes mandatory contributions into Pension Plan. By its definition, the 401(k) Plan is a voluntary savings vehicle. Employees have the freedom to participate, or not participate, and elect the amount of contribution based on their financial situation and interest in sheltering a portion of their paycheck. Here, the 401(k) plan

establishes the predicate to Employer contribution, if any, is the voluntary contribution by the eligible employee. Until and unless the employee contributed into the 401(k) Plan, the employer had no obligation to contribute into the 401(k) Plan on behalf of the employee. As discussed herein, the majority of employees elected not to participate in the plan. Those who participated, did so at different contribution levels and at different times.

There is no claim that the new operator failed and/or refused to honor the other terms of the collective bargaining agreement including, inter alia, the Union Security Clause. It took eight (8) months, however, the 401(k) Plan was ultimately implemented on or about the first full payroll in January, 2017. Under the policy, eligible LPNs were entitled to voluntarily participate and elect to voluntarily contribute a portion of their salary into the 401(k) Plan. The individual's contribution triggered the Employer to match $0.50 of every dollar contributed by the employee up to 3.0% of employee's gross payroll.

It is undisputed the Employer did not keep any money deducted from the employees pay intended for 401(k) contributions. It is undisputed that once the 401(k) was resumed, the Employer made the matching contribution.

In support of its claim, General Counsel, through Compliance Officer Fricke, established three (3) categories to establish who was and was not eligible. Relying on "reasonable to assume" burden of proof, the categories of eligible employees were:

1. Employees who participated in the prior plan;
2. Individuals who were unable to contribute during the relevant period, who immediately signed up for the 401(k) plan once it became available; and
3. The Regional Director defined the third category who were not eligible. It was those individuals who did not participate in the prior plan, did not participate

> immediately upon the new plan becoming available, but only signed up a few months later. General Counsel admitted the Regional Director decided those individuals should not be included because there was no reasonable basis to conclude that they would have participated in the 401(k) plan had it been available. (Tr. 23.)

Ms. Fricke testified that she made calculations of what she believed each employee would have contributed based on past payroll records (Tr. 41-42.) She further testified that her calculations were based on "hypotheticals" (Tr. 43-44.) In fact, she admitted that she had no evidence of whether any of the employees would have made the voluntary contributions to the 401k plan. (P. 44). Ms. Fricke also testified she had no knowledge about why employees percentage of contribution changed or why employees delayed in resuming contributions. (P. 47-49).

As for the presumptive class of employees ALJ Green alleges to be making whole, only **one,** Nidhi Patel, out of the 10 employees who was contributing on May 5, 2016 began contributing again in the first eligible pay period January 26, 2017 at the identical percentage of employee contribution. 5 of out of the 10 employees, Maribel Gonzalez, Faimy Louis Jean, Gilma Rivera, Alucienne Sainte, and Lamercie St. Juste, who were contributing on May 5, 2016 began contributing again in the first eligible pay period January 26, 2017 but **reduced** their percentage of contribution upon electing to utilize the new 401(k). One employee of the ten, Guernelle Modesir, who previously contributed, never resumed contribution to the plan after its implementation. One employee of the ten, Enid Rivera, never made voluntary contribution to the old 401(k) plan and only commenced contribution in January 2017. Two employees of the ten who were contributing as of May 5, 2016 did not immediately participate on January 26, 2017: Margaret

Ogundare started to participate July 27, 2017 and Neha Patel started to participate April 19, 2018. (See Attachment "B" to the March 20, 2002 decision). ALJ Green ordered the Respondent to pay all the employees presumed contributions from May 5, 2016 through January 16, 2017 at the May 5, 2016 rate of contribution, plus Respondent's matching obligation and the lost rate of return.[1] (See revised Attachment "A") without any distinctions.

LEGAL ARGUMENT

Substantial evidence is required to prove the claims in this case. Here, the allegations in the case amounts to complete reliance on standard of proof that it is "reasonable to assume." By admission, General Counsel admitted "reasonable to assume" is a legal determination. (Tr.42) "Reasonable to assume" is not the standard of proof in a 401(k) plan because by its definition any obligation to contribute stems from the threshold requirement that solely relies on the voluntary decisions by the employees. It must be grounded in facts and supported by credible evidence. Here, the ALJ relied on sheer conjuncture and speculation by Ms. Fricke, the compliance officer, that 10 employees would have contributed to a 401(k) program at a certain rate of contribution on the first day it was available solely though analysis, which as discuss below was faulty analysis, of payroll records. As succinctly found by the ALJ in Raleigh Manor, Limited Partnership O/B/d HAVEN at Raleigh, WL 33321597 speculation is simply unacceptable. Raleigh Manor, Ltd. P'ship d/b/a Care Haven of Raleigh & Dist. 1199, the Health Care & Soc. Serv. Union, Seiu, Afl-Cio, No. E NOS. 9-CA-32596, 1996 WL 33321597 (June 6, 1996 N.L.R.B. Div. of Judges). In that matter, the employer only offered a 401K program to bargaining unit members who were nonunion. The A.L.J. found a violation of the Act, but rejected General Counsel's contention that the remedy

[1] Enid Rivera, because she did not contribute prior to January 26, 2017, was calculated based on her 3% contribution rate.

should be the employer retroactively enrolling all the union employees in the 401K program and making all matching contributions it would have made to plan. The ALJ determined that "I am not convinced that enrollment in the 401(k) Plan would have been a desirable option for all unit employees, and to order the Respondent to enroll all unit employees in the Plan and make them whole by submitting matching contributions on their behalf, as the General Counsel suggests, would clearly be inappropriate as it would be based on nothing more than sheer speculation, and further would result in a windfall to unit employees. Rather, I find that in the circumstances of this case, the more appropriate remedy would be to require that Respondent make the Plan available to all unit employees regardless of their Union membership." 1996 WL 33321597 (June 6, 1996). The windfall to the employees rejected by the Raleigh Manor A.L.J. was magnified several times by ALJ Green's method of remedy calculation.

Here the ALJ awarded far beyond the proposal rejected by the A.L.J. in Raleigh Manor by insisting that the Employer make all contributions historically made by the employees, plus the Employer contribution along with the prospective loss of investment return. In order to achieve that remedy, the ALJ accepted the following premise: All employees who were contributing to the 401(k) program offered by AristaCare would have automatically re-enrolled in a 401(k) plan in May 2016 had it been made available and would have continued to contribute at the same rate. Analysis of the only evidence presented by General Counsel, review of the payroll records, reveal that premise to be unquestionably false. Of the 10 individuals the ALJ awarded compensation, only one (1) out of ten immediately began contributing to the 401(k) plan on the first day it was offered at the same contribution rate. One of ten employee's conduct became the unquestionable rule to apply to all 10 employees. However, using that same logic, it would be equally "reasonable to assume" that Guernelle Modesir, who previously contributed, but never resumed contribution

to the plan after its implementation should be the measuring stick. Under that scenario, all ten employees would not have elected to participate in a 401(k) plan when initiated and the employees would not be entitled to any award. It would equally "reasonable to assume" the rule should be based upon the 5 of 10 employees who reduced their contributions after the new plan was implemented and the employees should be based upon the May 2017 contribution rate. Likewise it is "reasonable to assume" that Enid Rivera would not have immediately elected to participate in the 401(k) program, but could have waited until a later date to begin contributing as Ms. Ogundare and Neha Patel commenced participation many months after it was offered and not immediately. These examples evidence that there is nothing "reasonable to assume" with regards to their participation. If anything, the empirical data the General Counsel presented and the ALJ relied upon shows the unpredictable nature of participating in the plan and nothing is "reasonable to assume except that the General Counsel concocted a scenario to the maximum dollar figure sought from the Respondent.

The same deficiencies the ALJ in Raleigh Manor found and reluctance to mandate contributions to a voluntary 401(k) Plan are readily apparent in this proceeding. With neither explanation nor defense, the General Counsel refused to call any of the employees necessary to explain their conclusions and the ALJ excepted the alleged as evidence as meeting the evidentiary standard. No explanation for the varying dates the employees chose to participate in the 401(k) or the amount. No testimony explaining the change in voluntary contributions. No testimony to explain any steps initiated to explain any attempt to mitigate. No testimony that the employees could have indeed created their own savings vehicle. All of these questions are unanswered. There was no uniformity and no explanations for the different decisions.

The ALJ attempts to rationalize this decision by relying upon the proposition that "the General Counsel need show only that the gross backpay amounts contained in the specification were reasonable and not an arbitrary approximations. (P. L16-24) Chem Fab. Corp., 275 NLRB 21, 21 (1985). This however is not a backpay analysis. None of the employees are owed any backpay regardless of the ALJ's attempt to classify it as so. In this case, there was no a vehicle for the employees to contribute to a 401(k) plan for a period of 8 months. The employees received full pay, without deduction for the 8 month time period. What the holding in Chem Fab. Corp did preclude was "arbitrary approximations". As set forth above, guessing what people would do based on the past performance of one out of 10 individuals does not even rise to the level of an arbitrary approximation.

While acknowledging the uncertainty and unscientific nature of the General Counsel's proposal, the ALJ further attempted to justify the speculative standard applied. The ALJ's solution was give the General Counsel the benefit of the doubt by resolving the matter "in favor of the injured party and against the respondent." (P. 4 L 24-29) citing to Lou's Transp., Inc. & T.K.M.S., Inc. & Michael Hershey, 366 NLRB No. 140 (July 24, 2018). In Lou's Transp., there was one individual who was determined to be the recipient of an unfair labor practice when he was discharged. Notably, the employee testified in the proceeding and there was not complete reliance on the testimony of a compliance officer. In crafting a remedy for **backpay** for the time the employee was terminated, the respondent challenged several issues, including but not limited to the speculative nature of the continuing participating in the 401(k) program, the calculation for rate of return, the rate of pay the employee was entitled to, and whether or not the employee had rejected reinstatement. While acknowledging there was some speculation as the calculation, the Board found that based on the past history of contribution, (which unlike here was the only data

available to consider and was unique to one individual and not 10), the Board resolved the dispute in favor of the employee. This was not a case in which a formula was applied across the board to maximize the award to a class of employees. This is not a case where post termination data to examine when calculating a remedy. This is not a case where the ALJ granted a financial windfall to the employee by ordering the respondent to pay full salary plus an additional 5% to the employee for what should have, but was not, taken from his salary and given that to the employee. In fact, there is no semblance of a resemblance between this matter and Lou's Transp. The reference to the case by the ALJ is purely in an effort to back into a determination that was a forgone conclusion- Alameda technically violated the Act and now they must pay, and the matter needs to be resolved against the "wrongdoer" by any means possible and in the grandest fashion. As argued more fully below, the Act is not intended to be punitive but this is how in this case it's undoubtedly being applied.

Likewise In Re Webco Indus., Inc., 340 NLRB 10, 11 (2003) there was a **backpay** calculation for one employee. The Board in that case resolved some speculative issues regarding possible bonus earnings by referring to that **individual's** past performance as to whether the possibility of performance bonus should be included in the **backpay** award. As the Board noted the performance bonus was completely within the control of the employee, and whether or not he would have earned it during the wrongful termination period. The Board resolved the issue in the employee's favor after a careful analysis of the data, and not blindly rely upon the General Counsel's proposal. Unlike in this case, there was not a cookie cutter formula applied across the board to 9 other individuals. Also unlike in this case, the result was not a windfall to the employee granting both full backpay, plus what the employee would have contributed to his 401(k). The

matters are unquestionably distinguishable and Webco does not justify the unjust decision rendered here.

As the only evidence presented by the General Counsel was baseless speculation and assumptions, the ALJ wrongly concluded that the burden of presenting substantial evidence was met and the Board should reject the ALJ's conclusions and overturn the award.

POINT 1
THE ALJ IMPROPERLY REWROTE THE AGREEMENT BETWEEN THE PARTIES.

The 401(k) Plan negotiated by the parties allows the employee to make voluntary contributions into the 401(k) Plan. Article 31 401(k) Savings Plan states: "Each employee who has completed at least one (1) years (sic) of continuous service and worked 1,000 hours the previous year shall be eligible to participate in the 401(k) Plan. Employer shall match 50% of each employee's contributions, up to a maximum of 3% of the employee's gross salary." (GC Ex.3). The Employer then, and only then, matches the contributions by 50%. The law is well established that a contract is not to be rewritten by the Court, even where the Court may think the outcome is inequitable. "A court may neither rewrite, under the guise of interpretation, a term of the contract when the term is clear and unambiguous nor redraft a contract to accord with its instinct for the dispensation of equity upon the facts of a given case." Cruden v. Bank of New York, 957 F.2d 961, 976 (2d Cir. 1992). (internal citations omitted); The Circuit Courts have struck down similar attempts by the Board to have language plain and unambiguous either rewritten or crowbarred into a twisted interpretation. "It is a familiar rule that courts will not rewrite contracts for parties and we know of no authority for the Board to do so." Employing Lithographers of Greater Miami, Fla. v. N. L. R. B., 301 F.2d 20, 28 (5th Cir. 1962). "However, the Union negotiated this clause with the Company, and that is the bargain it struck. Perhaps the Union agreed to this language because it assumed it could retain new members. It may also be as we surmise above, that the language is

simply the result of poor drafting. However, it is not for us to say. It is not for this court to interpret the language in a manner that rewrites the CBA. Inasmuch as § 2.2 [of the contract] is plain on its face, we are bound by this interpretation." Quick v. N.L.R.B., 245 F.3d 231, 248 (3d Cir. 2001).

Here the ALJ rewrote the contract to require the employer to make the contributions on behalf of the employees. There is no other interpretation of the award. In denying he did so, the ALJ again attempts to rely upon Lou's Transp. to justify his decision. Again, Lou's is a backpay analysis, which this case is not. The Board in Lou's did not order the employer to pay full back, **plus the percentage the employee would have contributed to the 401(k)**, the employer's required match, plus loss of profits on the missing 401(k) investment all to the employee. While the Board had to calculate what the complete amount that should have been contributed to the 401(k), that figure was used to calculate the loss profits. There is no holding or even dicta in Lou's Transp. or any other case or decision that gives an ALJ, the Board or any Court the right to modify the terms and conditions of a CBA to require the employer to pay what would have been a voluntary contribution amount on behalf of employees who have already been fully paid for the time worked.

The ALJ's decision is nothing but a windfall to the employees, which he acknowledges. However, in a desperate attempt to justify the windfall, the ALJ relied upon Republic Windows and Doors, 356 NLRB No. 175 (2011). However, in Republic Windows, **the employer had deducted the money from the employees' pay and failed to remit it to the 401(k) program**. Naturally if the employer took the money for the contribution and kept it, it would be part of a make whole award. Unquestionably that did not happen here, the employees were paid their full earnings without deduction. Likewise, the determination in Webco is misread. The ALJ there determined that the employee "shall be paid on the basis of his 12% rate of contribution as set

forth in the Compliance Specification" In Re Webco Indus., Inc., No. 17-CA-19047, 2001 WL 1682465 (Dec. 28, 2001). Again there was a need to determine what was owed to the employee based on whether or not he would have contributed 12% of his earning to a 401(k) plan so that matching and potential profits from the investment based upon average rate of return could be calculated and paid. Nowhere in Webco does it say the employee is entitled to full pay plus the additional amount the employee would have contributed to the 401(k).

As the Supreme Court held in United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597, (1960) when faced with an arbitrator attempting to rewrite a contract, "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." Here as well the ALJ is powerless to rewrite the clear and unambiguous terms of the CBA which state the employee is eligible to contribute and the employer will then be required to make a contribution based upon the agreed upon formula. By doing so, the ALJ exceeded his authority and the award should be invalidated.

POINT 2
THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE ALJ'S REMEDY.

As argued above, there is no provision in the Agreement requiring the Employer to make the initial contributions on behalf of the employee or for the employee to make any contributions at all to a 401K plan. In fact, there is no evidence that any of the employees attempted to make any contributions to the 401(k) during the open period, inquired about making contributions to the 401k, sought an alternative retirement contribution option, escrowed the money in a bank account

or event that employees set the money under their mattress until the succeeding 401(k) plan was set up. Instead, the Board presented testimony from one individual, Ms. Fricke, an NLRB compliance officer. Ms. Fricke testified that she made calculations of what she believed each employee would have contributed based on past payroll records (Tr. 41-42.) She further testified that her calculations were based on "hypotheticals" (Tr. 43-44.) In fact, she admitted that she had no evidence of whether any of the employees would have made the voluntary contributions to the 401k plan. (P. 44). Notably absent was any testimony, affidavits or even discussions with the employees allegedly adversely effected that they would have utilized the replacement 401k plan or that they would have continued to contribute at the same rate. The record consists solely of a formulaic assumption based upon payroll records that every employee who previously contributed to the 401(k) would have continued to contribute and at the same rate if a plan had been implemented immediately upon the purchase by Alameda. Additionally, one other assumption was made that the one employee who began contributing when the new plan was implemented in January 2017 would have undoubtedly began contributing on May 2016 had she had the option.

The Supreme Court has struck down speculative damage calculations sought by the Board. Remedies "must be sufficiently tailored to expunge only the actual, and not merely speculative consequences of the unfair labor practices." Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 900, 902-904 (1984). It remains a cardinal, albeit frequently unarticulated assumption, that a back pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices. Id. at 900–01. Although under slightly different circumstances, this Board has also rejected speculative damage calculations. See In Re Oil Capitol Sheet Metal, Inc., 349 NLRB 1348, 1351 (2007). As argued more fully above, the formula used by General Counsel and adopted by the ALJ can not withstand even the most cursory examination. The analysis of the

data the General Counsel placed into the record illustrates that the only one person out of 10 individuals behaved in the way the General Counsel set forth as the formula. Yet without question, the ALJ accepted this speculative theory and awarded damages.

POINT 3
THE ALJ'S REMEDY IS PUNITIVE AND BEYOND THE AUTHORITY OF THE ACT.

It is well settled that the remedy for a successful unfair practice charge is limited to making the employees whole. It is equally well settled that the remedy cannot be punitive in nature because it is beyond the authority of the Act and the Board. "Though the Board's remedial authority under the Act is quite broad, it does not encompass punitive measures." Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940); see also *UAW v. Russell*, 356 U.S. 634, 643 (1958); *Local 60, Carpenters v. NLRB*, 365 U.S. 651 (1961). We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 11–12, 61 S. Ct. 77, 79, 85 L. Ed. 6 (1940). The ALJ, in his effort to resolve the matter in favor of the injured party, crafted a remedy that goes far beyond making the employees whole. The results are a punishment for the Respondent and in a windfall for the employees. All ten employees will receive an additional 4% to 10% of their salaries, plus matching and alleged loss of value of returns. The money is not even required to be paid into the 401(k). Requiring the employer and not the employees to make the contributions to the 401k allows the employees to keep what would have been deducted from their pay and reap the reward of not only the percentage match set forth in the

CBA but also the required contribution to trigger the match. This is designed to be a punishment for the Employer to go beyond what would have been required in the CBA and would serve as what could only be described as a fine. The ALJ as much as admits that this is punishment when he initially refers to resolving issues "in favor of the injured party and against the respondent." (P. 4 L 24-29) and that the remedy is a "windfall". The ALJ sought to craft a remedy that financially rewarded the employees for a technical violation of the agreement for which the true remedy lies in the hands of the employees by virtue of the employees making the contribution. The Supreme Court weighed in on a similar predicament in which an employer was accused of violating the act, but was unable to award back pay because of the illegal status of the employee. The Supreme Court held "Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman—sanctions Hoffman does not challenge. These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA" Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 151–52, (2002).

The ALJ may not utilize the Act to punish Alameda by ordering it to pay the employee portion of the contributions to the 401(k) and the award should be vacated.

CONCLUSION

As set forth above, the ALJ based his decision on pure speculation. In this proceeding, the "reasonable assumptions" are not supported by any credible evidence. The record instead necessitates a singular conclusion that is in direct opposition to the remedy General Counsel sought and the ALJ granted- the empirical data is inconsistent and unsubstantiated. At best, it required the ALJ to guess who would have made voluntary contributions. Based on this hollow record, it is

impossible to establish with any degree of certainty that the identified employees would continue to contribute at the same level and without delay to the successor 401-K if it were immediately implemented. Furthermore, after relying upon the faulty proofs and speculation, the ALJ sought to rewrite the CBA and implement a punitive award which would require the Respondent to pay the employees 4% to 10% above their earnings plus matching contribute and loss of return on the money as punishment for failing to timely implement a successor 401(k). This extraordinary remedy has never been implemented in the many thousands of cases in the history of the Board's enforcement of the Act and must not be upheld.

Dated: April 17, 2020

Respectfully submitted,

JASINSKI, P.C.
Attorneys for Respondent
Alameda Center for Rehabilitation
and Healthcare, Inc.

By: /s/ *David F. Jasinski*
DAVID F. JASINSKI

CERTIFICATE OF SERVICE

The undersigned certifies he caused and a true and accurate copy of the foregoing Brief to be served on April 17, 2020 via electronic mail upon:

William S. Massey, Esq.
Gladstein, Reif & Meginniss, LLP
817 Broadway, 6th floor
New York, NY 10003-4709

Sharon Chau, Esq
National Relations Board
20 Washington Street
Newark, New Jersey

Dated: April 17, 2020

/s/ *David F. Jasinski*
DAVID F. JASINSKI