

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

SOUTHERN OCEAN MEDICAL CENTER,  
JERSEY SHORE UNIVERSITY MEDICAL  
CENTER, PALISADES MEDICAL CENTER  
AND THE HARBORAGE, A DIVISION OF  
HMH HOSPITALS CORP.

and

Case 22–CA–223734

HEALTH PROFESSIONALS AND ALLIED  
EMPLOYEES

ANSWERING BRIEF ON BEHALF OF THE GENERAL COUNSEL IN  
RESPONSE TO THE RESPONDENT’S EXCEPTIONS TO THE  
DECISION OF ADMINISTRATIVE LAW JUDGE BENJAMIN W.  
GREEN

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## **I. SUMMARY OF THE ARGUMENT**

The record evidence adduced at the hearing before Administrative Law Judge Benjamin W. Green clearly supports his finding that Southern Ocean Medical Center, Jersey Shore University Medical Center, Palisades Medical, and the Harborage nursing facility, a division of HMH Hospital Corp. (collectively “HMH” or “the Respondent”) have engaged in direct dealing in violation of Section 8(a)(5) of the Act.

Judge Green correctly found that in May 2018, Harborage and Palisades were engaged in bargaining with the Union for successor collective bargaining agreements. Harborage and Palisades refused to tender economic proposals to the Union at the bargaining table and instead, announced directly to employees via emails, YouTube videos, flyers, and a harmonization website changes to unit employees’ retirement plans, health insurance, sick leave accrual, holidays, and PTO accrual. This unlawful direct dealing impacted approximately 3,000 bargaining unit employees.

Judge Green also correctly concluded that these communications constituted unlawful direct dealing because they were made to the exclusion of the Union. In this regard, Harborage’s union was not given a copy of the harmonization presentation prior to the website release and the Union was afforded an insufficient amount of time to process and digest Harborage’s announced changes prior to the release of the TeamHMH.com harmonization website.

Judge Green also properly found that Palisades engaged in unlawful direct dealing because it failed to tender proposals over the subjects of the announced changes, and additionally because Palisades did not offer its union a preview of the website’s announced changes until after HMH released this information directly to unit employees.

Finally, Judge Green also correctly concluded that Southern Ocean and Jersey Shore also engaged in unlawful direct dealing because they refused to schedule bargaining sessions prior to the release of the harmonization materials and because these employers never included their union's lead negotiator and local union officials in the previews of the harmonization website.

## **II. STATEMENT OF FACTS**

In July 2016, Hackensack University Medical Center merged with Meridian Health to form Hackensack Meridian Health. (Tr. 178). The new HMH entity consisted of at least 10 hospitals (Hackensack, JFK, Jersey Shore, Ocean, Riverview, Bayshore, Southern Ocean, Raritan Bay Perth Amboy, Raritan Bay Old Bridge, and Palisades Medical Center), 1 nursing home (the Harborage), and a collection of network offices. (GC 7, page 2). Over 33,000 employees worked for the newly merged organization. (Tr. 207, GC 7, page 3).

Health Professionals and Allied Employees ("the Union") represents registered nurses that work at Respondent's Southern Ocean Medical Center ("Southern Ocean") in Manahawkin, New Jersey and Jersey Shore University Medical Center ("Jersey Shore") in Neptune, New Jersey. The Union also represents service and maintenance employees that work at the Harborage nursing facility in North Bergen, New Jersey, as well as service and maintenance employees, LPNs, technical employees, and registered nurses that work at Palisades Medical Center ("Palisades") in North Bergen. Collectively, these four different Union locals represent about 3,000 employees who work in six distinct bargaining units. Each bargaining unit is a different size and reflects different classifications of employees. Consequently, separate collective bargaining agreements

have memorialized a smorgasbord of terms of conditions of employment pertaining to these units.

Local 5138 represents about 250 registered nurses working at Southern Ocean. The parties’ most recent collective bargaining agreement ran from July 31, 2017 through July 31, 2018. Union staff representative Djar Horn is the lead negotiator for Local 5138. (Tr. 18-19, GC 3). The following chart identifies certain relevant terms and conditions of employment reflected in the parties’ 2017-2018 CBA:

Issue	Page	Article	Term/Cond. of Employment
Paycheck Day	17	9.03 (pay period)	Paychecks are issued on Thursdays
PTO Accrual	47	15.03 (PTO accrual)	Maximum PTO accrual is 240 hours
ESL Accrual	48	15.05 (ESL accrual)	Max. earned sick leave accrual is 56 hours/year
Retirement	53	18 (Pension/403b)	After 2012, transition to 403b plan, automatic 3% contribution by ER, up to 6% max with 50% match ER, up to a max. of 6%

Local 5058 represents about 1,300 registered nurses working at Jersey Shore. The parties’ most recent collective bargaining agreement ran from July 31, 2017 through July 31, 2018. (GC 2, Tr. 19-21). Djar Horn is also the lead negotiator for Local 5058. The following chart identifies certain relevant terms and conditions of employment reflected in the parties’ 2017-2018 CBA:

Issue	Page	Article	Term/Cond. of Employer
Paycheck Day	32	7.03 (pay period)	Paychecks are issued on Thursdays
PTO Accrual	40	8.06 (PTO accrual)	Maximum PTO accrual is 240 hours
ESL Accrual	41	8.08 (ESL accrual)	Max. ESL accrual is 56 Hours/year
Retirement	48	10.07 (pension plan)	ER will continue pension plan

Local 5097 represents approximately 140 service and maintenance employees that work at the Harborage. There are no registered nurses in this bargaining unit. The parties' most recent collective bargaining agreement ran from May 18, 2015 through May 17, 2018. Union staff representative Richard Halfacre is the lead negotiator for this Local. (GC 12, Tr. 97, 99).

The following chart identifies certain relevant terms and conditions of employment reflected in the parties' 2015-2018 CBA:

Issue	Page	Article	Term/Cond. of Employer
Holidays	19	18.1 (Holidays)	8 holidays/year including MLK Day and Columbus Day
Sick Leave	21	19.1 (Sick Leave)	Employees receive 4 sick days in January and 4 more days in June. Employees may receive a refund for the leftover balance on Dec 25
Health Insurance	27	30 (Health Insurance)	The Employer can change

			carriers as long as there is no increase in deductibles or co-pays
			Dental coverage is 100% paid by the Employer
			The Employer will pay a stipend of \$250/quarter to those individuals that do not enroll in the Employer's insurance plan because they are covered under another plan.
Retirement	28	32 (pension/retire)	The Employer will match 75% of employees' contributions up to a maximum of 5%. This is a 401(k).
Health Insurance		Side letter 4	See for specifics regarding plan details.

Local 5030 represents approximately 1,300 employees of Palisades split into three separate bargaining units- RN/professional (900 employees); LPN/technical (230 employees); and service/maintenance (200 employees). (Tr. 98). Each bargaining unit has its own CBA, and the most recent CBAs for all three bargaining units ran from June 1, 2017 through May 31, 2018. (GC 13-15). Richard Halfacre is also the lead negotiator for all three Palisades bargaining units. To be clear, the bargaining units sit at one bargaining table to negotiate with Palisades, but employees from all three bargaining units are represented on the Local's bargaining committee. (Tr. 121). The following chart identifies certain relevant terms and conditions of employment reflected in the parties' 2017-2018 CBAs:

Issue	Page	Article	Term/Cond. of Employmen
Vacation	23 (LPN)	18	3 weeks of vacation up to 5 years of service, 4 weeks of vacation for more than 5 years of service. At 18 years, get 1 extra day/year. Can also get vacation payout for employees with 2-10 years/service up to 10 days at 75% salary.
	22 (SM)	18	Full-time ees get 2 weeks paid vacation after 1 year; 3 weeks after 5 years; and 4 weeks after 10 years. Can also get vacation payout for ees with 2-10 years/service up to 5 days at 75% salary.
	30 (RN)	18	Full-time ees get 4 weeks vacation after 1 year of service, etc.
Holidays	(LPN,SM,RN) 19		8 holidays (including either MLK or Presidents Day and Columbus Day);
			Full-time employees with more than 6 months of service get 4 personal days/year.
Sick Time Accrued	26 (LPN)	20	Full-time ees hired before June 2011 get 1 day/month and may accrue up to 960 hours; those hired after June 2011 get ¾ day/month.
Retirement	34 (LPN)	25	Defined benefit formula for ees with 25 years/service as of Jan. 1, 2010; Different formula for those ees with less than 25 years; Defined contribution participants Will have 2% gross payroll

			Contributed by ER each year; ER will match 50% of ees' contribution up to a maximum of 3%.
Health Insurance	35 (LPN)	26	Two-tiered health plan
Prescription Drug	36 (LPN)	26.3	Three-tiered plan based on salary (less than \$40k, \$40-80k, and more than \$80k).
Dental Plan	45 (RN)	26.4	Through Prudential- three different levels of premium share

**A. Joint Bargaining Session on March 29, 2018.**

During 2017 contract negotiations, HMH agreed to hold joint bargaining sessions with all four facilities in the runup to the 2018 negotiations. The purpose of these joint sessions was to discuss mutual areas of interest like proposed policy changes or system-wide changes that would impact all four of the Union-represented facilities. (Tr. 22-23, 103-104). Consequently, on March 29, 2018<sup>1</sup>, Horn, Halfacre, Union director of member representation Fred DeLuca, and the local union presidents met with HMH lead negotiator Joseph Ragaglia, HMH vice-president of HR operations Barbara Powderley, as well as the principals from the four facilities. (Tr. 25, 176). Among the topics of discussion was health insurance. The Union knew that after the merger, HMH was looking to standardize insurance offerings and therefore, this seemed like the most likely subject for joint bargaining when negotiations began. No formal bargaining proposals were exchanged by the parties that day, although the Union made clear that it wished to

<sup>1</sup> All dates refer to 2018, unless otherwise noted.

keep the status quo in terms of insurance offerings to bargaining unit employees. (Tr. 104-105). Ragaglia informed the Union that he was open to the idea of a common table over health insurance, his side would caucus, and let the Union know. (Tr. 105). Djar Horn testified without contradiction that HMH did not reference its harmonization plan or the TeamHMH.com rollout at this meeting. (Tr. 26).

**B. The Union Offers Copious Bargaining Dates in April 2018, but HMH Ignores the Union.**

On March 29, the parties discussed future bargaining dates, but no agreement was reached. (Tr. 26). Horn then diligently followed up with Ragaglia on April 4 and April 10 to propose one April bargaining date for Palisades, two April bargaining dates for Harborage, bargaining dates for Jersey Shore/Southern Ocean as a joint table, as well as two April dates for all four facilities to resume joint bargaining. In the same emails, Horn also proposed five May bargaining dates for Palisades, five May bargaining dates for Harborage, six May bargaining dates for the Jersey Shore/Southern Ocean joint table, and two more May dates for all four facilities to jointly bargain. Ragaglia ignored Horn's April 4 and April 10 entreaties. (GC 5, Tr. 27). On May 10, Horn reiterated her request for Jersey Shore/Southern Ocean bargaining dates in May (offering four possible dates), but Jersey Shore and Southern Ocean refused to meet and bargain with Locals 5058 and 5138 until June 14. (Tr. 29).

**C. Bargaining Begins at the Harborage and Palisades in May 2018, But HMH Refuses to Make Economic Proposals.**

The first Harborage bargaining session took place on May 9. Richard Halfacre led the negotiations for Local 5097 along with a team of bargaining unit employees.

Horn did not attend this bargaining session.<sup>2</sup> Ragaglia led the negotiations on behalf of Harborage. (Tr. 29, 106-107). Halfacre testified without contradiction that on this day, Ragaglia asked the Union to hold off on making its economic proposals until Harborage first presented its economic proposals. Ragaglia clarified that Harborage was not yet prepared to make its economic proposals at this time, and therefore, the parties should begin with the exchange of non-economic proposals.<sup>3</sup> Halfacre agreed to Ragaglia's request. (Tr. 109). At this meeting, Harborage presented Local 5097 with a "non-economic proposal discussion" which outlined the existing contract articles and Harborage's "points of discussion" regarding these items. (GC 17). Regarding vacation (Article 17), holidays (Article 18), time accrued for illness/injury (Article 19), health insurance (Article 30), and pension/retirement accounts (Article 32), Harborage's proposal just said, "on hold for economic discussion." (GC 17, Tr. 109). In accordance with Harborage's wishes, Local 5097 only tendered proposals regarding non-economic items such as leaves of absence, non-discrimination language, protocols for filling vacant positions, composition of a labor-management committee, and parameters for the operation of a joint health and safety committee. (GC 16, Tr. 108).

Harborage and Local 5097 next met for bargaining on May 17. (Tr. 111). At this meeting, Local 5097 presented a series of non-economic proposals covering subjects like the designation of union representatives, work schedules and time off requests, labor-management cooperation and employer neutrality in union organizing, and the onboarding of new employees. (GC 18). Harborage's first non-economic proposal package

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<sup>2</sup> Horn did not attend any of the Harborage or Palisades bargaining sessions. (Tr. 29).

<sup>3</sup> HMM stipulated that it did not tender any economic proposals at the Harborage bargaining session on May 9. (Tr. 110).

offered on this date addressed union security and dues check off, the parties' grievance procedure, filling vacant positions, etc. (GC. 19, Tr. 112).

Also, on May 17, Ragaglia told Halfacre that Harborage was still vetting its economic proposals and wasn't prepared to make any economic proposals that day. Halfacre testified without contradiction that Ragaglia again asked Local 5097 to hold off on presenting its economic proposals until Harborage first presented its economic proposals. (Tr. 113).

**D. Bargaining for Palisades Began on May 10, 2018, But Palisades Told Local 5030 on This Date That It Was Not Prepared to Make Economic Proposals.**

Bargaining for the three Palisades successor CBAs commenced on May 10. Halfacre negotiated on behalf of the Local 5030 bargaining units, accompanied by employees from all three units. Ragaglia led negotiations on behalf of Palisades. Like with Harborage, Ragaglia informed Halfacre that Palisades was not ready to make its economic proposals, and asked that Local 5030 hold off on making its economic proposals until Palisades was ready to table its economic proposals. Halfacre acceded to this request. (Tr. 123-125).

At the May 10 bargaining session, Palisades presented Local 5030 with a "non-economic proposal discussion" document which outlined the existing contracts' articles and Palisades' "points of discussion" regarding these items. (GC 21). This paper was nearly identical in content and design to the "non-economic proposal discussion" document Harborage distributed to Local 5097 at its first bargaining session. Regarding vacation (Article 18), holidays (Article 19), time accrued for illness/injury (Article 20), health insurance (Article 26), and pension/retirement accounts (Article 25), Palisades'

points of discussion form indicated that these subjects were “on hold for economic discussion.” (GC 21, Tr. 124). Also, on this date, Local 5030 presented non-economic proposals covering compensation for conducting union business, investigative interviews, and shift differential pay for RNs. (GC 20, Tr. 123).

The parties’ next Palisades bargaining session took place on May 15. (Tr. 127). Halfacre’s unrebutted testimony confirmed that Ragaglia again requested that Local 5097 hold off on presenting its economic proposals because Palisades still was not ready to present its economic proposals. Halfacre once more agreed to wait. (Tr. 129). On this date, Local 5097 tendered proposals regarding the filling of vacant positions, work schedules, the circumstances under which employees could float to other departments, and the union recognition clause. (GC 22, Tr. 127). Palisades then tendered its non-economic proposals covering union recognition, union shop and dues check off language, etc. (GC 23-25, Tr. 126). Palisades did not make any economic proposals at the May 15 bargaining session.

**E. Ragaglia Notifies DeLuca on May 19 That TeamHMH Harmonization Materials Will Be Shared With HMH Employees on May 22, But Doesn’t Offer Specifics.**

Union director of member representation Fred DeLuca had not attended any of the first four Harborage and Palisades bargaining sessions, but on May 19, Ragaglia emailed him about HMH’s upcoming harmonization rollout. Notably, Ragaglia did not include Halfacre or Horn, the Union’s two lead negotiators, on this email. In this email, Ragaglia stated that on Tuesday, May 22, HMH would be sharing updated information on its harmonization effort with all 35,000 team members. Ragaglia wrote that the released information would impact unit employees’ terms and conditions of employment.

Ragaglia then wrote “these changes will not go into effect until January 1, 2019 or later.” In this email, Ragaglia did not identify what specific changes would be forthcoming. Although Ragaglia went on to say that “it is impossible...to segregate out your members from receiving this information,” Barbara Powderley directly contradicted this statement when she testified that HMH had the power to filter its email communications by facility such that Harborage need not receive emails intended only for Palisades and Southern Ocean need not receive emails intended only for non-union facilities like Raritan Bay. (GC 26, Tr. 210-211). Ragaglia went on to say that HMH wanted to preview this information for “you and your team” on Monday afternoon, May 21 (during the next Harborage bargaining session). Although Ragaglia sent this email directly to DeLuca, he did not invite Horn or any of the local union officials from Southern Ocean or Jersey Shore to the May 21<sup>st</sup> presentation. (Tr. 32).

In his May 19 email, Ragaglia informed DeLuca that the release of information to HMH employees on the 22<sup>nd</sup> would contain “appropriate disclaimers and acknowledgement that for all union represented team members ‘HMH is legally required to bargain with the union regarding mandatory subjects and it will continue to do so.’” Ragaglia testified that the disclaimer he highlighted in his email was the standard disclaimer he had used since 1996. But the disclaimer released to team members on May 22<sup>nd</sup> was notably more vague than the language supplied to DeLuca. (GC 7, GC 10). In this regard, the disclaimer released to employees on May 22 substituted “deal” for “bargain” and omitted the reference to “mandatory subjects.” The new disclaimer read: “We are required by law to deal with the unions on behalf of unionized employees and

we will continue to do so. We will only negotiate with the unions, not with individual unionized employees.” (GC 7, GC 10).

In his May 19 email reply, DeLuca warned Ragaglia that managers were already telling unit employees about HMH’s proposed changes prior to informing the respective bargaining teams of the detailed changes. (GC 26, page 2).

F. **Harborage Displays Screenshots of the TeamHMH Website at its May 21 Bargaining Session, But Refuses to Provide Local 5097 With Copies of This Presentation.**

Harborage and Local 5097 next met for negotiations on May 21. Halfacre led the talks on behalf of the Local, along with the employee bargaining committee. Fred DeLuca also attended this session. Horn was not invited to this session nor did she attend. Ragaglia represented Harborage. During negotiations, Ragaglia asked to speak with Halfacre privately and informed him that Harborage wished to make a presentation to Local 5097’s bargaining team regarding the harmonization of HMH employee benefits. By this point in negotiations, Harborage still had not tendered any economic proposals to the Union. Halfacre testified without contradiction that he told Ragaglia he wasn’t going to bargain or negotiate over a website (referring to the TeamHMH.com website) and that he wanted proposals presented across the table. Ragaglia told Halfacre that there would be no proposals that day, but he still wanted to make his harmonization presentation. Halfacre testified without contradiction that he asked Ragaglia for a hard copy of the harmonization presentation, but Ragaglia refused this request. (Tr. 113-114).

Ragaglia made his harmonization presentation using screenshots of selected portions of the TeamHMH.com website that were projected on a wall of the meeting room. (Tr. 228). Although Ragaglia testified that he did not use the actual

TeamHMH.com website during the May 21 presentation, Respondent's email records show that Ragaglia received the link to the TeamHMH.com developmental website at 10:31pm on Sunday, May 20. (R 5). It is undisputed that Ragaglia did not share this website link with the Union on Monday, May 21.

Ragaglia's harmonization presentation consisted of about 45 pages of screenshots that reflected far less than the totality of the TeamHMH.com website. (GC 8). In this regard, page 5 of GC-8 has dropdown menus under the "Who We Are" tab that covers "Our Journey, Our Culture, Our Accomplishments, and Team HMH Quiz." None of these four subject areas were covered in Ragaglia's presentation. Additionally, pages 32 through 34 of GC-8 reference HMH policies covering a panoply of employment-related issues (e.g. flex work arrangements, work breaks and meal breaks, dispute resolution, etc.), but Ragaglia did not provide the Union with copies of the actual policies referenced on the website. Furthermore, on page 26 of GC-8, the screenshot addressing retirement plans says: "The following pertains to the new Defined Contribution plan. For team members currently participating in the Defined Benefit and/or Defined Contribution plans at Hackensack University Medical Center and Palisades Medical Center, PLEASE CLICK HERE." No explanation was provided in GC-8 or during the May 21 presentation as to what HMH was proposing for the Palisades retirement plan. Finally, Ragaglia showed the Union five pages of frequently asked questions that appeared on the TeamHMH.com website. But Ragaglia did not supply the Union with the answers to any of these 35 questions.

What Ragaglia did present to the Union bargaining team on May 21 was a series of changes to Harborage employees' terms and conditions of employment. These

changes involved retirement benefits, prescription drug costs, health insurance costs, earned sick leave, etc. (GC 8).<sup>4</sup> Ragaglia said that these changes would take effect on January 1, 2019. (Tr. 119). His presentation also included a disclaimer referencing that HMH was required by law “to deal with the unions on behalf of unionized team members, and we will continue to do so. We will only negotiate with the unions, not with individual unionized team members.” (GC 8, page 4, Tr. 195, 229).

Halfacre testified without contradiction that at the conclusion of Ragaglia’s presentation, Ragaglia said that the TeamHMH.com website would be rolled out to employees the next day. Ragaglia, however, did not specify the time of the rollout. Halfacre again asked for a hard copy of the harmonization presentation (GC-8), but Ragaglia refused to provide one. (Tr. 115). Halfacre also told Ragaglia that what he presented included mandatory subjects of bargaining and he had to bargain over these items. (Tr. 116).

As noted earlier, it is undisputed that Harborage had not tendered economic proposals covering the subjects in GC-8 by the May 21 bargaining session. Halfacre presented un rebutted testimony that Harborage waited until the end of July 2018 to make its economic proposals to the Union. (Tr. 120). Neither Ragaglia nor Powderley explained why Harborage waited over two months after the TeamHMH.com rollout to tender economic proposals covering these same subjects at the bargaining table.

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<sup>4</sup> GC-8 and the TeamHMH.com website also directed employees with questions about the harmonization materials to submit those questions to HMH without mentioning the Union or its role as exclusive collective-bargaining representative of the six bargaining units.

**G. HMM Notifies the Union that the TeamHMM.com Website is Live Shortly Before Releasing Information Directly to Bargaining Unit Employees.**

At 9:41am on the morning of May 22, Respondent official Victoria Riveracruz e-mailed Horn and the local presidents for Jersey Shore and Southern Ocean to let them know that “HMM will be sharing updated information on the harmonization with all of its 35,000 team members starting sometime later today. This information will include a number of topics, some of which include the proposed harmonization of a number of areas that touch on terms and conditions of employment...it is anticipated these changes will not go into effect until January 1, 2019 or later...The website is now live and you can view the information first hand at [www.TeamHMM.com](http://www.TeamHMM.com)...” (GC 6). That afternoon, Horn responded to Riveracruz via email with the following: “Neither I nor the Local Union Presidents from 5138 and 5058, Barbara Bosch and Kendra McCann, were invited to the presentation you gave yesterday. If you intended to present important information about bargaining proposals, we would have appreciated dates well in advance. To that point we have not received firm dates for joint bargaining for 5058 and 5138. We sent you the initial dates for bargaining on April 10, 2018. We expect the harmonization program to be rolled out to the JSUMC and SOMC leadership as soon as possible so that we can accurately represent the employer’s position to our members<sup>5</sup> and fully consider the proposals for bargaining.” (GC 6).

At 10:00am on May 22, Ragaglia emailed Halfacre with the TeamHMM website address and the fact that he could access the website now. (R 3). Ragaglia neglected to

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<sup>5</sup> Local 5058 had notified its members via Facebook post on the morning of May 22 that an announcement from HMM was expected that day regarding changes to terms and conditions of employment. Nothing definitive had been announced by HMM at that point in time and consequently, Local 5058 could not share any accurate, specific information with its membership that day. (R 1).

mention that the website was already live for any member of the public to see. Ragaglia also noted that the website address would be released to team members that morning, but he did not specify the time. (R 3). Ragaglia sent the same email to DeLuca at 10:27am.

At 11:06am, HMM sent an email to all 33,000 of its employees notifying them of the next phase of its harmonization initiative, attaching a letter from HMM chief experience and human resources officer Nancy Corcoran-Davidoff, and embedding a YouTube video in Corcoran-Davidoff's message. (GC 10). Corcoran-Davidoff's letter read in part: "We are previewing a series of policy and benefit changes. While most of these changes will not go into effect until January 1, 2019, we felt it was important to share the information as soon as we were able...These changes will bring us closer to operating as one team, while also presenting new benefits and opportunities for growth across the network. They will affect all of us, and there is some give-and-take from everyone...In the meantime, please visit the new and improved [www.TeamHMM.com](http://www.TeamHMM.com), where you'll find additional details about these enhancements and have the opportunity to submit questions...Please remember, most of these changes don't take effect for more than six months, on January 1, 2019." The letter makes no reference to unions or bargaining obligations, but does suggest that employees speak with their managers or human resources representatives if they have questions or need help. There is no disclaimer on the bottom of the letter or on the YouTube video embedded in the letter. There is also no disclaimer on pages 2 through 5 of Corcoran-Davidoff's letter. On the bottom of page 6 (the last page) of the email, there is a tiny disclaimer in 5-point font which contains the "We are required by law to deal with the unions" language contained in GC-8.

Embedded in the email sent to all HMH employees at 11:06am on May 22 was a link to a YouTube video featuring a roundtable discussion with Corcoran-Davidoff and HMH’s co-CEOs Bob Garrett and John Lloyd. During this discussion of the harmonization website release, Lloyd said that “you are going to see some changes in the harmonizing policies and benefits and want you to keep a real open mind and there is a lot of change all over this world and a lot of change within Hackensack Meridian.” Corcoran-Davidoff then emphasizes that “many things are going to change,” including health plan offerings, PTO, etc. At Lloyd’s urging, Corcoran-Davidoff labels HMH’s harmonization plan as an “extreme makeover.” Lloyd also addressed anticipated employee anxiety over these changes and in response, Corcoran-Davidoff counseled employees to go to the new website and see the information that is available. She concluded by reminding employees that these benefit changes would take effect on January 1, 2019. At no time during this 8-minute video is there a reference to unions, negotiations with unions, or dealing with unions. (GC 11).

By 12:00pm on May 22, between 4,000 and 6,000 HMH employees visited the TeamHMH website. (R 8).<sup>6</sup>

The following table shows the differences between the terms and conditions of employment set forth in the Harborage CBA and the new terms and conditions of employment proposed on the TeamHMH website on May 22:

Employment Term	Harborage CBA	Team HMH Website
<b>Holidays</b>	8 holidays	6 Holidays (See R-7)
<b>Sick Leave</b>	4 in Jan. + 4 more in June	5 days (GC-8, pg. 21)

<sup>6</sup> It is unclear from R-8 how many of these employees were part of union-represented bargaining units.

<b>Dental Coverage</b>	100% paid by Harborage	3 options, PPO w/deductibles
<b>Health Insurance</b>	ER cannot increase co-pays or deductibles	3 options w/ varying amounts of co-pays and deductibles
<b>Retirement</b>	ER will contribute 75% of up to a max. of 5%	1.5% core contribution, next 2% is 100% match, next 3% is 50% match
<b>Tobacco Surcharge</b>	None	\$15/paycheck
<b>Other Insurance Coverage</b>	\$250/quarter for ees who get coverage from spouse	\$30/paycheck for ees who take coverage through HMH but could get coverage through spouse.



Assuming that Horn and Halfacre were checking their e-mails in real time on May 22, HMH gave them access to the TeamHMH website a little over an hour before employees were notified of the harmonization changes. As Horn testified, the website did not read like a book where it could be read and digested in sequential order. Instead, the website contained tabs and links that would lead you to additional pages containing different tabs and links. (Tr. 51). For Halfacre, HMH gave him 66 minutes to read through the entire website, verify what information was different than the previous day's presentation,<sup>7</sup> comb through all of the additional information (e.g. FAQ answers) that had not been shared with the Union the day before, and digest how the website's proposed changes differed from the existing Harborage CBA, as well as confirm whether any terms

<sup>7</sup> Ragaglia had told Halfacre on May 21 that the information contained on the website was still being vetted. (Tr. 115).

and conditions were customized for the Harborage bargaining unit (like GC-8's reference to Palisades' retirement plan).

**H. Ragaglia Gives a Harmonization Presentation to the Palisades Bargaining Units After Unit Employees Received Notification from HMH That the TeamHMH.com Website was Live.**

Corcoran-Davidoff's email, letter, and video were sent to HMH employees at 11:06am on May 22. Later that afternoon, the Palisades bargaining units met with Ragaglia for their bargaining session. To be clear, only Halfacre was a holdover from the Harborage bargaining session the day before. No Harborage employees attended the May 22 bargaining session and no Palisades employees attended the May 21 bargaining session. (Tr. 131).

At the Palisades bargaining session, Ragaglia requested time to make his harmonization presentation to this bargaining team. Unlike the day before, Ragaglia did not have a projector. Instead, he walked the Union through the website using the actual website (that was now live). The content of the presentation was similar to what Ragaglia had presented to the Harborage team the day before, but not identical. Halfacre testified without contradiction that at the conclusion of the presentation, he told Ragaglia that he was not going to bargain over a website and that he wanted proposals from Palisades tendered at the bargaining table. Halfacre asked for a copy of the Palisades harmonization presentation, but Ragaglia refused this request. Ragaglia then told Halfacre that he did not have any economic proposals for the Union that day and that he would have Palisades' economic proposals to the Union by June 1.<sup>8</sup> This did not happen

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<sup>8</sup> Ragaglia and Halfacre discussed on May 22 the need for disclaimers on every page of the website referencing HMH's obligation to bargain over the proposed changes. (R 4).

as Palisades first tendered its economic proposals to the Union at the end of July or beginning of August. (R 4, Tr. 130-132).

The following table shows the differences between the terms and conditions of employment set forth in the Palisades LPN, service and maintenance, and RN CBAs<sup>9</sup> and the new terms and conditions of employment announced on the TeamHMH website on May 22:

Employment Term	Palisades LPN, SM, and RN CBAs	Team HMH Website
<b>Holidays</b>	8 holidays	6 Holidays (See R-7)
<b>Prescription Drugs</b>	3-tiered plan based on salary	Different levels of co-pays but no reference to different costs based on salary
<b>Retirement</b>	Defined Benefit Plan For ees w/ 25 years	Defined benefit plan remains in place per the FAQs (GC 28)
	If hired before 2006, 401k With 2% contribution from ER, 50% match up to 3%	1.5% core contribution, next 2% matched at 100%, next 3% is 50% match
	If hired after 2006, 401k With 1% ER contribution And 50% match up to 2%	1.5% core contribution, next 2% matched at 100%, next 3% is 50% match
<b>Sick Leave</b>	1 day/month (or .75/month) up to 960 hours	5 days each year up to 40 hours
<b>Tobacco Surcharge</b>	None	\$15/pay period

<sup>9</sup> Each of the three Palisades CBAs contained varying amounts of vacation time to be accrued in the course of a year. None of the CBAs contained a cap of 80 hours to carryover from year to year.

I. **Ragaglia Does Not Make Harmonization Presentation to the Union's Jersey Shore and Southern Ocean Principals, But HMH Distributes Flyers Promoting the Website at These Hospitals.**

In April and May, Ragaglia neither responded to Djar Horn's request for bargaining dates nor did he make a harmonization presentation for either of these bargaining units. Ragaglia also did not furnish Horn with a hard copy of his harmonization presentation. (Tr. 47). Instead, Southern Ocean and Jersey Shore managers distributed flyers promoting the harmonization effort directly to bargaining unit employees. In this regard, Powderley and Jersey Shore registered nurse Nancy Gannon both testified that in about late May, Jersey Shore labor relations official Katie Luciani distributed copies of the "One Special Edition" newsletter to employees as they entered the hospital. (GC 7, Tr. 63-64, 191-192). This flyer, which was nearly identical to the email distributed at 11:06am on May 22, referenced the policy and benefit changes announced in the Corcoran-Davidoff email and invited employees to go to [www.TeamHMH.com](http://www.TeamHMH.com) for additional details about these changes. Similarly, Southern Ocean registered nurse Milena Buckley testified without contradiction that she received the same flyer from Southern Ocean manager Jill Ashman as she walked into work on May 23. Buckley asked Ashman what the flyer was for and Ashman said that it provided basic information about the new benefit changes HMH was implementing. That evening, Buckley's colleagues in the critical care unit received the same flyer and expressed concerns that the cost of employee benefits was going to increase and HMH was not providing enough information about the anticipated changes. (Tr. 83-87).

Union members reported to Horn that managers were handing out the GC-7 flyers to unit employees, and that these flyers were causing great confusion. In response, Horn

emailed Ragaglia on May 25 stating that: “Local 5058 and 5138 are in agreement with Local 5030 and Local 5097 on the position they took at the table yesterday. We want HMH to send emails to our bargaining unit members stating clearly and unequivocally that all of the items in the harmonization notices are mandatory subjects of bargaining and will be proposed in upcoming negotiations. The 5pt font at the bottom of the notices is insufficient, especially given there were team leaders walking around on Thursday and Friday telling bargaining unit members that this is a done deal. Further, HMH made the decision to send this communication and walk the floors with these notices during negotiations. We think it is reasonable to make equal effort to clarify the legal obligations of the employer to bargain over these issues.” (GC 9, Tr. 34).

Bargaining began at Southern Ocean and Jersey Shore on June 14 and the two hospitals first tendered contract proposals covering economic items to the respective unions in July. (GC 9, Tr. 33).

The following table shows the differences between the terms and conditions of employment set forth in the Jersey Shore CBA and the new terms and conditions of employment proposed on the TeamHMH website on May 22:

<b>Employment Term</b>	<b>Jersey Shore CBA</b>	<b>Team HMH Website</b>
<b>Payday</b>	Thursday	Friday
<b>PTO</b>	max. accrual of 240 hours	max. carryover of 80 hours
<b>Sick Leave</b>	Up to 56 hours/year	Up to 5 days or 40 hours/year
<b>Pension Plan</b>	Continuation of pension plan	Shift to 401(k) plan
<b>Tobacco Surcharge</b>	None	\$15/pay period

The following table shows the differences between the terms and conditions of employment set forth in the Southern Ocean CBA and the new terms and conditions of employment proposed on the TeamHMH website on May 22:

Employment Term	Southern Ocean CBA	Team HMH Website
<b>Payday</b>	Thursday	Friday
<b>PTO</b>	max. accrual of 240 hours	max. carryover of 80 hours
<b>Sick Leave</b>	Up to 56 hours/year	Up to 5 days or 40 hours/year
<b>Pension Plan</b>	403(b) plan with automatic ER contribution of 3-6%, 50% match by seniority up to 4%	1.5% core contribution, 100% match of next 2%, and 50% match of next 3%
<b>Tobacco Surcharge</b>	None	\$15/pay period

### III. Argument

#### EXCEPTIONS #1 THROUGH 17

##### **Point 1: Judge Green Correctly Concluded that Southern Ocean and Jersey Shore Violated Section 8(a)(5) By Engaging in Unlawful Direct Dealing.**

For the Southern Ocean and Jersey Shore bargaining units, HMH ignored the Union’s requests for bargaining dates, purposefully excluded the Union’s lead negotiator and local union presidents from the Harborage harmonization presentation, did not give Horn a copy of the presentation that she was excluded from, only provided Horn and the local officials with the website address after the website was already live, and gave them about an hour to digest a multi-faceted website prior to communicating directly with unit

employees about the “extreme makeover” in benefits. The totality of these actions supports Judge Green’s finding that Southern Ocean and Jersey Shore’s actions violated Section 8(a)(5) of the Act.

The Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees. An employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1). An employer engages in direct dealing in violation of Section 8(a)(5) of the Act where 1) the employer communicates directly with union-represented employees; 2) for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union’s role in bargaining; and 3) such communication was made to the exclusion of the union. *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116 (2019); *Southern California Gas Co.*, 316 NLRB 979 (1995). Direct dealing will be found where the employer has chosen “to deal with the union through the employees, rather than with the employees through the union.” *NLRB v. General Electric Co.*, 418 F.2d 736, 759 (2<sup>nd</sup> Cir. 1969).

**A. HMH Communicated Directly with Southern Ocean and Jersey Shore Bargaining Unit Employees Regarding the Harmonization of Benefits.**

On May 22, HMH released e-mails and YouTube videos, and launched a reformatted website designed to inform employees of “a series of policy and benefit changes,” “there are many things that are going to change,” “an extreme makeover” of benefits, “enhancements,” and “January 1, 2019 all of the benefit changes will be effective.” All 35,000 HMH employees received these communications at the same time, including the approximately 1,500 Southern Ocean and Jersey Shore registered nurses

represented by the Union. Clearly, the above evidence satisfies the first prong of the direct dealing test.

**B. HMH Communicated Directly with Southern Ocean and Jersey Shore Employees for the Purpose of Establishing or Changing Wages, Hours, and Other Terms and Conditions of Employment.**

HMH created and distributed the emails, flyers, videos, and website to communicate how and when terms and conditions of employment were going to change. Specifically, for Southern Ocean and Jersey Shore employees, HMH's announced changes would modify their payday, PTO accrual, sick leave accrual, and pension and retirement fund contributions. HMH's announced changes also introduced new surcharges, like the \$15/pay period tobacco surcharge. And the language used in the publicity materials made clear that these were "changes" that would take effect in about seven months. Based on the above, it is clear that the second prong of the direct dealing test has been satisfied.

**C. HMH Communicated Directly with Bargaining Unit Employees to the Exclusion of the Union.**

HMH refused to schedule bargaining sessions with the Union, excluded Horn and local union presidents from the Harborage harmonization presentation, and gave Horn about an hour to digest a maze of a website before HMH bombarded unit employees with changes to paid time off, retirement plans and contribution rates, sick leave accrual, health insurance options, as well as the implementation of completely new terms and conditions of employment like the tobacco surcharge and spousal insurance penalty. Said actions constitute unlawful direct dealing.

On March 29, the Union expressed interest in jointly bargaining health insurance and other subjects in the parties' upcoming contract negotiations. Then on April 4, Horn

dutifully solicited bargaining dates for Southern Ocean, Jersey Shore, as well as dates for common table bargaining. Horn reiterated this request on April 10, proposing a series of bargaining dates in April and May. Ragaglia ignored these requests. On May 10, Horn again proposed a series of bargaining dates (including May 18) for Jersey Shore and Southern Ocean, but HMH refused to agree to a May bargaining date for these negotiations.

Then on May 19, Ragaglia invited DeLuca to the May 21 bargaining session with Harborage. In his email, Ragaglia promised a harmonization presentation that day, but for some reason, Ragaglia snubbed Horn and her bargaining team. Horn was neither invited to the presentation nor was she provided with a copy of the presentation after the fact. That left Horn and her team guessing as to the scope of HMH's proposed changes, as reflected in Local 5058's May 22 Facebook post.

On May 22, at 9:41am, Riveracruz emailed Horn and local presidents McCann and Bosch to notify them that HMH "will be sharing updated information on the harmonization with all of its 35,000 team members starting sometime later today." Riveracruz wrote that the harmonization effort touched on terms and conditions of employment, but she did not specifically identify any of the impacted terms and conditions of employment or the proposed modifications. Riveracruz went on to cite a series of half-truths to justify HMH's actions. First, Riveracruz stated it was "logistically impossible...to segregate out your members from receiving this information, some of which concerns mandatory subjects of bargaining." Powderley specifically debunked this argument in her testimony. She said that email lists could be created to only cover certain facilities, while excluding others. To be clear, HMH could have excluded

Southern Ocean and Jersey Shore unit employees from the harmonization emails, but it simply chose not to. Riveracruz next wrote that “I understand that you were unable to attend the meeting with HPAE leadership yesterday” (referring to the Harborage bargaining session). Not being invited and being unable to attend are two different things. Here, Ragaglia and his team purposely excluded Horn and her team from the meeting. Finally, Riveracruz wrote that “we believe that it was important that HPAE has a chance to review the information before it is accessible by your members and be prepared for any questions your members may have.” If this was true, HMM would have scheduled bargaining dates for negotiations<sup>10</sup> and presented the harmonization changes as proposals at the bargaining table prior to the May 22 release of the website. At the very least, if HMM was acting in good faith, it would have provided Horn with a copy of the harmonization presentation prior to May 22 as well as access to the developmental site (which Ragaglia obtained on May 20). Neither of these things happened here because HMM intentionally excluded Horn and her local union presidents from any dialogue. Such actions amount to unlawful direct dealing.<sup>11</sup>

HMM argues in its Exceptions brief that providing DeLuca and Halfacre with notice of the harmonization presentation and assurances that it would provide a preview of the harmonization website prior to its public release somehow satisfied HMM’s obligation to the Union locals representing Southern Ocean and Jersey Shore. Such an argument is not supported by the record evidence. In this regard, Horn is the assigned

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<sup>10</sup> Horn’s response to RiveraCruz’s email makes clear that as of May 22, HMM still had not agreed to any bargaining dates with Southern Ocean and Jersey Shore.

<sup>11</sup> Southern Ocean and Jersey Shore first agreed to bargain with the Union on about June 14. Prior to this date, Southern Ocean and Jersey Shore held a series of “Growing Together Team Member Workshops” on May 30, 31, June 1, 4, 5, 7, and 8 to further explain the upcoming benefit changes. (GC-7, page 2).

lead negotiator for Southern Ocean and Jersey Shore. Respondent did not invite Horn to the harmonization presentations it gave for Harborage and Palisades, nor did Respondent furnish Horn or the local union presidents with copies of the two harmonization presentations. Respondent's slithery actions purposely kept Horn in the dark and her members equally unaware of the extent of Respondent's proposed changes prior to the website release.

The Southern Ocean and Jersey Shore bargaining units consist solely of registered nurses. They have separate local leadership, separate bargaining committees, and separate CBAs from their northern sister locals. Their terms and conditions of employment are also separate and distinct from the Harborage and Palisades bargaining units. In their most recent CBAs, Harborage unit employees received more paid holidays, more generous sick leave allotments, and more generous dental coverage. Jersey Shore and Southern Ocean unit employees, however, received more generous vacation time off and some employees still enjoyed a defined benefit pension. Furthermore, equating the needs of 1,200 registered nurses to the needs of 150 service and maintenance employees is just wrong. Consequently, notifying DeLuca and Halfacre cannot constitute proper notice of the proposed changes to Horn and HMH's assertions otherwise must be rejected.

Furthermore, although Respondent did eventually send Horn the link to the TeamHMH website on May 22, it gave Horn no time to digest the information contained on [www.TeamHMH.com](http://www.TeamHMH.com) prior to releasing the same information to bargaining unit employees. To this end, Riveracruz emailed Horn a link to the live website at 9:41am on May 22. Assuming that Horn actually reviewed this message at 9:41am, this gave Horn a

little more than an hour to stop what she had been doing, go to the website, peruse every drop down menu and new tabs that opened up, read all of the FAQs and policies outlined on the website, and try to discern whether any of the information on the website differed from the presentation Ragaglia supplied Halfacre the day before (which Horn had heard about, but had been excluded from). This is far different than reading a 5-page contract proposal because Horn did not develop the website, and she had no idea how many “rabbit holes” she would have to travel through to inspect the entire website. Thus, HMH failed to give the Union time to consider its announced changes to terms and conditions of employment and failed to allow the Union to bargain over these changes prior to the release of the TeamHMH.com emails, YouTube video, and website. See *Armored Transport, Inc.*, 339 NLRB 374 (2003) (an employer’s delivery of new bargaining proposals to unit employees at the same time it delivered the proposals for the first time to the union violated Section 8(a)(5) of the Act because the employer failed to first present these proposals to the Union for consideration and bargaining). Based on the above, Judge Green correctly found that HMH engaged in unlawful direct dealing by releasing its proposed changes to Southern Ocean and Jersey Shore unit employees’ terms and conditions of employment to the exclusion of the Union.

**D. Palisades Engages in Unlawful Direct Dealing By Releasing Its Harmonization Changes to Unit Employees Prior to Tendering Contract Proposals on these Subjects to the Union.**

Unlike with Southern Ocean and Jersey Shore, Palisades had begun contract negotiations with the three bargaining units that represent about 1,300 of its employees. But Palisades refused to tender contract proposals to the Union prior to revealing its

harmonization changes. Consequently, Judge Green correctly found that Palisades violated Section 8(a)(5) of the Act.

On May 10 and May 15, Palisades met for contract bargaining with Richard Halfacre and his three distinct negotiating teams. At these bargaining sessions, Ragaglia told Halfacre that Palisades was not prepared to tender economic proposals at that time. Consequently, the parties exchanged proposals regarding non-economic terms and conditions of employment and agreed to meet again on May 22.

But behind the scenes, Ragaglia and HMH were readying the release of its updated harmonization website, as well as the email and YouTube blasts. These announced changes to employees' PTO, sick leave, health insurance, and retirement contributions were released shortly after 11:00am on May 22. Surprisingly, Ragaglia's testimony failed to explain why Palisades refused to proffer these harmonization changes as bargaining proposals on either May 10 or May 15, or even why these changes could not be incorporated into bargaining proposals at the May 22 bargaining session (after the changes were already announced to bargaining unit employees). Instead, Ragaglia left the Union unable to bargain over the announced changes for over two months, with confused employees counseled to submit questions about the changes to Respondent directly through the website. This is a perfect example of the 2<sup>nd</sup> Circuit's teaching that direct dealing will be found where the employer has chosen "to deal with the Union through the employees, rather than with the employees through the union." *NLRB v. General Electric Co.*, 418 F.2d at 759.

Other facts specific to the Palisades negotiations bolster support for Judge Green's finding of unlawful direct dealing here. In this regard, Powderley, Ragaglia, and

Halfacre all confirmed that Palisades did not make its harmonization presentation to the Union's bargaining team until hours after the TeamHMH.com website and related materials had been released to unit employees. No employee representatives from the three Palisades bargaining units was invited (or attended) the May 21 Harborage harmonization presentation. And Halfacre could not be certain that the harmonization materials presented on May 21 would be the same as those released on the website because Ragaglia cautioned him that the information was subject to change, and Ragaglia refused to supply Halfacre with a hard copy of the presentation. That is why Halfacre admonished Ragaglia on May 22 that he was not going to bargain over a website and that he required actual proposals to be tendered regarding the subjects covered on the TeamHMH website.

Furthermore, the Palisades bargaining units were separate and distinct from the Harborage unit. The three Palisades bargaining units had separate CBAs to account for their employees' different roles within the hospital, as well as their differences with the Harborage unit. In this regard, all three Palisades bargaining units earned varying amounts of vacation time. But in areas where the three Palisades bargaining units enjoyed the same benefits (e.g. sick leave, retirement), these amounts differed from what Harborage employees enjoyed as well as what HMH was announcing in its harmonization rollout.

The clearest example of Palisades' direct dealing involves the subject of retirement benefits. Under the 2017-2018 CBAs, some longer-term Palisades employees were still entitled to defined benefit pensions. Other new hires were transitioned over to

401(k) plans, but with different levels of employer matching and contribution levels (based on years of service).

Yet on May 10, Palisades refused to make a bargaining proposal over this item and instead demurred that it wasn't prepared to do so at that time. Ragaglia repeated his unwillingness to bargain over this subject on May 15. And at the Harborage harmonization presentation on May 21, Ragaglia presented screenshots, including page 26 of GC-8. This page announced the terms of the new defined contribution plan<sup>12</sup>, including a 1.5% core contribution by HMH, 100% matching contributions for the first 2% employees contribute, and a 50% match for the next 3% that employees contribute. This same screenshot also referenced the need to click on a different link to learn more about the fate of the existing defined contribution plan for Palisades employees. HMH has not established that Ragaglia explained during this presentation what would happen to the Palisades pension plan.

The next day, Palisades (and the rest of HMH) bombarded employees with emails, videos, and flyers directing them to visit the new and improved website. By going to the retirement section of the website, Palisades employees could click the link and discover that their defined benefit plan was being preserved in the short term. The FAQ section of the website also explains that team members at Palisades currently enrolled in the defined benefit plan will see these plans continue unchanged over the next few years, subject to IRS review. Team members at Palisades formerly enrolled in the

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<sup>12</sup> The FAQ section explains that the “new plan is going to be a 401(k) vehicle, managed by TIAA. The reason is that New Jersey does not allow tax deferral on employee contributions to 403(b) plans but does not collect tax on employee contributions to a 401(k) plan. This is important because most participants are currently contributing to or receiving employer contributions in a 403(b) plan. These existing plans will be frozen on January 1, 2019. We are unable to merge 403(b) accounts into the new 401(k) account.” (R 7, page 11).

defined benefit plan and currently enrolled in the defined contribution plan would be eligible for the new defined contribution plan. (GC 28, page 6, R 7, page 12). Halfacre, and consequently the Palisades bargaining team, did not have access to this information on May 21 because the screenshots Ragaglia showed Halfacre did not contain answers to the frequently asked questions listed on the website. When Ragaglia summarized the TeamHMH website for the Palisades bargaining team on May 22, he used the live website, unlike the Harborage presentation. But by the afternoon of May 22 (when Ragaglia reviewed these materials at the Palisades bargaining session), the cat was already out of the bag and the Union, bargaining unit employees, and the Union's lead negotiators were left scurrying to access, consume, and comprehend the sheer volume of information on the TeamHMH website. Palisades failed to present these subjects to the Union for consideration in a timely manner and clearly, Palisades refused to allow the Union to bargain over these announced changes until the end of July or beginning of August. The fact there was a disclaimer (or what the disclaimer said) on the website and some of the printed materials is immaterial to the disposition of this case because HMH failed to make proposals at bargaining prior to the release of this information, and/or failed to give the Union sufficient time to consider the proposed changes prior to revealing the changes to bargaining unit employees. Therefore, Judge Green correctly concluded that Palisades engaged in unlawful direct dealing in violation of the Act.

Two cases in which the Board found no violation of the Act, when bargaining proposals were forwarded to the union on the same day they were released to unit employees, are distinguishable from the facts here. In *United Technologies*, 274 NLRB 609 (1985), an employer handed out leaflets to employees explaining final contract offers the employer had tendered to the union earlier that same day. The Board found no

violation in part because the communications were done in a noncoercive manner and fully respected the Union's right as exclusive collective-bargaining representative. In our case, however, HMH never tendered bargaining proposals at the table, despite the fact that the parties met for bargaining on May 21 and May 22. On each day, Halfacre clarified that he was not going to bargain over a website, he wanted proposals on these mandatory subjects, and Ragaglia refused to offer any proposals. And in our case, HMH did not provide the Union with early access to the developmental website, did not furnish Halfacre with a requested copy of the harmonization proposal, and did not use the actual website in the May 21 Harborage presentation. Therefore, it cannot be said that HMH furnished to the Union the same harmonization materials it supplied its employees. As such, *United Technologies* is distinguishable. See also *Globe Business Furniture, Inc.*, 290 NLRB 841, fn. 2 (1988) (An employer may properly meet outside the presence of the union in order to explain its contract proposals directly to its employees, but the employer may not deny the Union the very information it needed to evaluate those same proposals during negotiations. In such circumstances, the Respondent's dialogue with employees is not a privileged communication under Sec. 8(c) of the Act, but rather is an effort at circumventing its obligation to deal with the exclusive representative of those employees in violation of the Act).

Additionally, the facts in *American Pine Lodge Nursing*, 325 NLRB 98 (1997); 164 F.3d 867 (4<sup>th</sup> Cir. 1999), are distinguishable from the facts in our case. In *American Pine Lodge Nursing*, the appeals court held that letters posted to employees containing proposals for large wage increases did not constitute unlawful direct dealing because the letters were transmitted to the union in exactly the same form prior to releasing the letters

to the unit employees. Furthermore, the letters were addressed to the union and requested only a response from the union. In our case, however, HMH did not furnish the Union with formal contract proposals on any of the harmonization subjects, the information supplied to the Union (e.g. screenshot presentation) was markedly different than the information directed to unit employees (e.g. YouTube video and website link). Consequently, our case is distinguishable from *American Pine Lodge Nursing*.

It is also clear from our case that even though HMH placed a disclaimer on the bottom of the TeamHMH.com website acknowledging its obligation to “deal” with the unions, the website contained a solicitation for employees with questions that haven’t been answered to submit those questions to HMH through the TeamHMH.com website. This is an invitation for direct bargaining, and coupled with the fact that no formal contract proposals were made to the Union here, our case is distinguishable from *American Pine Lodge Nursing*.

Additionally, Judge Green correctly relied on *Detroit Edison Co.*, 310 NLRB 564 (1993) to support his conclusion that HMH engaged in unlawful direct dealing. In this regard, the Board in *Detroit Edison Co.* required employers to provide unions with a meaningful opportunity to digest bargaining proposals (in this case a “sweetened” proposal) before releasing the same proposals directly to bargaining unit employees. In *Detroit Edison Co.*, the Board found that the “sweetened” proposal had not been communicated to the Union at the bargaining table, an infirmity in HMH’s behavior here. Likewise, HMH did not give Horn, Halfacre, or their bargaining teams sufficient time to comb through the TeamHMH.com website to compare it to existing terms and conditions of employment, prior to releasing the website and related communications directly to

bargaining unit employees. Consequently, Judge Green correctly relied on *Detroit Edison* in finding that HMH engaged in unlawful direct dealing in violation of Section 8(a)(5) of the Act.

### **EXCEPTION #18**

#### **Point 2: Judge Green Correctly Excluded R-9 From Evidence.**

##### **E. HMH Misled the Union with its Vaguely Worded, Tiny Disclaimer and Misled Counsel for the General Counsel by Offering Respondent Exhibit 9 into Evidence Without First Disclosing it to the General Counsel Pursuant to Subpoena B-1-17HQA37.**

HMH demonstrated bad faith by misleading the Union regarding the actual text of the disclaimer. In this regard, Ragaglia’s May 19 email to DeLuca explicitly stated that the disclaimer would say that “HMH is legally required to bargain with the Union regarding mandatory subjects and it will continue to do so.” Ragaglia testified that this was the standard disclaimer he had used for many years. But this was not the disclaimer shown to the Union’s Harborage bargaining team on May 21 or subsequently released to HMH employees on May 22. That disclaimer omitted the words “bargain” and “mandatory subjects” and replaced them with more ambiguous terms like “deal with the unions” without explicitly referencing what terms and conditions of employment HMH would be dealing with the Union. Furthermore, when this unnecessarily vague disclaimer was included in written correspondence to unit employees on May 22, it was buried in 5-point font on the sixth page of a six-page email announcing the harmonization initiative.<sup>13</sup> And this disclaimer was completely omitted from the YouTube video promising an “extreme makeover” of terms and conditions of employment. This watering down of the

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<sup>13</sup> Djar Horn’s May 25 email to Ragaglia said, in part, that “the 5pt font at the bottom of the notices is insufficient, especially given there were team leaders walking around on Thursday and Friday telling bargaining unit members that this is a done deal...” (GC 9).

disclaimer was purposeful and designed to confuse bargaining unit employees. This tactic succeeded as noted on page 6 of Nancy Gannon's affidavit (R-2) and Milena Buckley's testimony. These facts gravely undermine Ragaglia's testimony about transparency and more importantly, Ragaglia failed to explain why the more robust disclaimer he had used for 20 years was substituted for the vague one attached to all of HMM's May 22 communications with employees. Based on the above, HMM's intentional obfuscation regarding its disclaimer was an act of bad faith and cannot defeat its obligation to refrain from unlawful direct dealing.

In this same vain, Judge Green correctly decided to exclude R-9 from evidence. To this end, HMM's introduction at trial of a more expansive disclaimer in R-9 was done in bad faith as HMM failed to produce this document to the General Counsel pursuant to its trial duces tecum subpoena. Paragraph 8 of subpoena B-1-17HQA37 requested "documents showing all information maintained on the TeamHMM.com website on May 22, 2018, including but not limited to..." Paragraph 10 of subpoena B-1-17HQA37 requested "documents maintained by Respondent HMM referencing or including any content published on TeamHMM.com in April or May 2018..."

HMM now asserts that this document was used to refresh Ragaglia's recollection, but at trial, HMM counsel and Ragaglia represented that the expansive disclaimer in R-9 supposedly reflected what was on the TeamHMM.com website at its launch on May 22. Such a document was clearly covered under both subpoena paragraphs 8 and 10, but HMM's counsel failed to produce this document to the General Counsel. HMM's failure to produce this document at the outset of the trial is inexcusable. Consequently, HMM should be precluded from relying on this document as evidence that the disclaimer in R-9

was on the TeamHMH.com website as of May 22, 2018 and Judge Green correctly excluded this document from evidence. See *Equipment Trucking Co.*, 336 NLRB 277 (2001); *Lenscraft Optical Corp.*, 128 NLRB 807, 817 (1960).<sup>14</sup> Additionally, Ragaglia's representation that the R-9 disclaimer reflected what was on the TeamHMH.com website is directly contradicted by the ambiguous disclaimer on page 4 of GC-8, and the same ambiguous disclaimers contained on GC-7 and GC-10. Based on the above, HMH separately misled the Union and the General Counsel about the disclaimer language contained on its TeamHMH communications. Thus, HMH's reliance on its disclaimer to defeat the direct dealing allegations here cannot be countenanced.

**F. Harborage Engaged in Unlawful Direct Dealing By Refusing to Tender Bargaining Proposals Regarding Economic Terms While At the Same Time Releasing Changes to These Same Items Directly to the Bargaining Unit.**

Unlike with Southern Ocean, Jersey Shore, and Palisades, Harborage did preview its harmonization changes for the Union prior to the release of its full harmonization plan. But previewing some of the changes is no substitute for actually tendering bargaining proposals covering these same subjects. HMH purposely refused to do this here and Judge Green correctly determined that said conduct violates Section 8(a)(5) of the Act.

Harborage met and bargained with the Union on May 9 and 17. On each date, Ragaglia represented that Harborage was not prepared to tender contract proposals

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<sup>14</sup> Similarly, Judge Green correctly admitted GC-28 as a reflection of the FAQ answers on the TeamHMH.com website in May 2018. See *Bannon Mills*, 146 NLRB 611, 614, 633-634 (1964) (GC-28 is secondary evidence presented by a disadvantaged party when HMH failed to produce the FAQ answers that should have been attached to its own document, R-7). Paragraph 8 of Subpoena B-1-17HQA37 requested "Documents showing all information maintained on the TeamHMH.com website on May 22, 2018, including but not limited to information included in the "today" and "tomorrow" tabs, the FAQ section..." HMH, however, failed to produce the FAQ answers pursuant to this subpoena. As to the substance of the document, a comparison of the FAQ answers supplied after the trial as part of R-7 and the FAQ answers scraped from the TeamHMH.com website in GC-28 shows that the first ten pages of answers are nearly identical.

regarding economic subjects (e.g. PTO, retirement, health insurance). At the parties' third bargaining session, Ragaglia previewed the TeamHMH harmonization effort and Halfacre, in response, told Ragaglia that the Union was not going to bargain over a website, and it required actual contract proposals tendered at the bargaining table. Despite the fact that the harmonization presentation addressed changes to retirement plans, retirement contributions, sick leave and PTO accrual, among other things, Harborage did not tender a single economic proposal to the Union on this date. In sum, the parties were at the table and Harborage consciously decided not to tender bargaining proposals. Instead, HMH released the harmonization details directly to bargaining unit members accompanied by a vague disclaimer that it would "deal" with the unions.

If HMH's conduct here is found not to violate the Act, it would render bargaining meaningless. In this regard, HMH could seemingly announce a never-ending series of benefit changes, give a heads up to the Union, but not make any formal bargaining proposals, then release the details directly to bargaining unit employees to sow confusion, distrust of the Union, and most importantly, convey a sense of inevitability regarding the implementation of these changes.<sup>15</sup> Inexplicably here, HMH waited about two months after the release of the TeamHMH website to first tender economic contract proposals to the Union. Neither Powderley nor Ragaglia explained the cause of the delay, especially since the 401(k), sick leave, and PTO accrual changes had already gone public. But this would be the norm if HMH's conduct is found not to violate the Act. Employers could

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<sup>15</sup> Buckley's testimony alluded to co-workers' confusion, concerns, and lack of answers immediately after receiving GC-10 and the release of the harmonization website. (Tr. 85). Gannon's affidavit specifically refers to the sense of inevitability enveloping bargaining unit nurses. (R 2, page 6). And Horn's May 25 email to Ragaglia noted that managers were telling bargaining unit employees that this is "a done deal," all before HMH had tendered contract proposals regarding these subjects. (GC 9).

string unions along indefinitely by not making formal contract proposals and instead releasing proposed changes directly to bargaining unit employees. This is a prime example of the 2<sup>nd</sup> Circuit's admonition against dealing with the union through the employees. That is exactly what Harborage did here and it cannot be countenanced. Based on the above, Judge Green correctly determined that Harborage has engaged in unlawful direct dealing in violation of Section 8(a)(5) of the Act.

Furthermore, HMM's Exceptions brief repeatedly attempts to justify these illegal direct communications with union-represented employees by noting that HMM had a legal right to communicate directly with its non-union employees. It is certainly true that HMM had the legal right to communicate these changes to its non-union employees. But HMM next asserts that because 90% of its workforce is non-union, somehow it is insulated from liability for illegally communicating with the 10% of its workforce that is union-represented. To this end, HMM is saying that the legal rights of 3,000 union-represented employees cease to exist because 30,000 other colleagues chose not to be represented by a union. There is no legal basis for such a position and the Board must reject this argument. Additionally, HMM's own vice-president testified that it could have e-mailed the Corcoran-Davidoff letter, YouTube video, and links to the TeamHMM.com website only to employees at non-union hospitals. It could have also segmented out non-union employees at Southern Ocean, Jersey Shore, the Harborage, and Palisades, and only sent these communications to employees not represented by the Union. HMM had this ability, but it chose not to exercise this option. Be it laziness or a conscious desire to undermine the Union by sowing confusion and doubt amongst its members, this is the path HMM chose. But none of these actions relieved HMM of its obligation to present

these proposals to the Union, and giving the Union adequate time to review and digest these proposed changes prior to releasing them directly to its 3,000 union-represented employees.<sup>16</sup> For these reasons, Judge Green correctly determined that HMH violated Section 8(a)(5) of the Act.

**G. The Release of Certain Information on the TeamHMH.com Website Directly to Unit Employees Constituted Bargaining Proposals.**

HMH argued in its Exceptions brief that the information released directly to employees on the TeamHMH.com website did not constitute a proposal or proposals, and instead would just ultimately inform future bargaining proposals that HMH would make. To the extent that HMH is referring to items on the website that were incomplete or vague, I agree.

But the Merriam-Webster dictionary defines “proposal” as “an act of putting forward or stating something for consideration.” There are so many items on the TeamHMH.com website release that were specific, detailed, and more importantly, announced as changes (as of January 1, 2019), that these are essentially economic “proposals” transmitted directly to unit employees. These items include the co-pays for prescription drugs, co-pays and deductibles for health insurance coverage, 401(k) contribution levels, tobacco surcharges, maximum carryover of 80 hours of PTO per year, earning 5 sick days per year and capping sick leave banks at 400 hours, and capping holidays at 6 per year. HMH could have complied with the Act by simply tendering

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<sup>16</sup> HMH asserts that there was an exigence to its actions which precluded the Union from being given adequate time to review the website materials prior to its release to employees. HMH, however, only cites an alleged need to commence a timely open enrollment period to support its position. This manufactured urgency is belied by the fact that HMH delayed the open enrollment period for Union-represented employees at the Union’s request, and there is nothing in the record that shows why HMH could not have debriefed the Union on May 21 and 22 regarding its proposed changes and then released this information to all 35,000 employees on May 24 or 25.

contract proposals to the Union, prior to releasing the website to the public, covering the same economic items contained in the website. HMH purposely chose not to do this and consequently, Judge Green correctly concluded that HMH's actions constitute unlawful direct dealing.

#### **IV. CONCLUSION**

The entire record, a preponderance of the credible evidence, and the applicable case law support Judge Green's conclusion that HMH violated Section 8(a)(5) of the Act.

Dated at Newark, New Jersey this 17th day of August, 2020

Respectfully submitted,

/s/ Michael P. Silverstein

Michael P. Silverstein  
Counsel for the General Counsel

## CERTIFICATION

This is to certify that copies of the General Counsel's Answering Brief in Response to Respondent's Exceptions to the Decision of Administrative Law Judge Benjamin W. Green have been duly served via electronic filing on the Board's Executive Secretary on August 17, 2020 and on Respondent's counsel and Charging Party counsel via email on the same date as follows:

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Dated at Newark, New Jersey this 17th day of August, 2020.

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