

**No. 06-5013**

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**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**and**

**SEIU 1199 NEW JERSEY HEALTH CARE UNION**

**Intervenor**

**v.**

**REGENCY GRANDE NURSING & REHABILITATION CENTER**

**Respondent**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce the Board’s Order issued against Regency Grande Nursing & Rehabilitation Center (“Regency”) for its unlawful

recognition of Local 300S, Production Service & Sales District Council, a/w United Food and Commercial Workers International Union (“Local 300S”). The Decision and Order of the Board issued on August 30, 2006, and is reported at 347 NLRB No. 106. (A 2-16.)<sup>1</sup>

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is a final order with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)), as the unfair labor practices occurred in New Jersey.

The Board filed its application for enforcement on December 7, 2006. The application for enforcement is timely, as the Act imposes no time limit on such filings. SEIU 1199 New Jersey Health Care Union (“SEIU 1199”), which was the charging party before the Board, has intervened on the Board’s behalf.

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<sup>1</sup> “A” references are to the Appendix filed by Regency. “SA” references are to the supplemental appendix filed by the Board. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

## **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board's finding that Regency violated Section 8(a)(3), (2), and (1) of the Act by recognizing Local 300S, and thereafter executing a contract with Local 300S that contained union-security and dues-checkoff provisions, when that union did not represent a majority of the unit employees.

## **STATEMENT OF THE CASE**

As is relevant to the issues under review, SEIU 1199 filed its original charge on February 19, 2004. The charge alleged that, since January 9, 2004, Regency had recognized Local 300S even though Local 300S had never obtained authorization cards from a majority of the unit employees. (A 2, 4; 1306.) On September 30, 2004, SEIU 1199 filed its first amended charge. The amended charge alleged that, also on January 9, 2004, Regency had entered into a collective-bargaining agreement with Local 300S that contained a union-security clause at a time when Local 300S did not represent a majority of the unit employees. (A 2, 4; 1309.) The complaint by the Board's General Counsel contained both of these allegations. (A 2; 1310-13.) Regency filed an answer denying that it committed any unfair labor practices. (A 5; 1316-17.)

After the hearing, the administrative law judge found that Regency had committed the alleged unfair labor practices in violation of Section 8(a)(3), (2),

and (1) of the Act. (A 4-16.) On August 30, 2006, after Regency had filed timely exceptions, the Board issued its decision affirming, as modified, the judge's findings. (A 2-4; SA 15.) The Board rejected Regency's defense that the allegations regarding its unlawfully recognizing Local 300S, and its entering into a contract containing unlawfully discriminatory provisions, were untimely.

Regency filed a motion for reconsideration alleging that the violations found by the Board were time-barred because employees knew or should have known about Regency's recognition of Local 300S more than 6 months prior to the filing of the charge. Regency also asserted that the Board's remedy constituted a penalty because it directed Regency, but not Local 300S, to reimburse union dues.

(A 1486-89.) On October 31, the Board, finding no extraordinary circumstances, issued an Order denying Regency's motion for reconsideration. The Board found that Regency's arguments regarding the timeliness of the complaint were previously raised and considered by the Board. The Board also found that Regency had waived any argument pertaining to the remedy because it was not previously raised by Regency in its exceptions to the Board. (A 1498-1501.)

Regency then filed a letter asking the Board to reconsider its October 31 Order, in which it again argued that the complaint was time-barred and that the remedy was unfair to Regency. (A 1502-04.) On November 29, the Board issued a Supplemental Order denying Regency's request for reconsideration of its

October 31 Order. (A 1505.) The Board found that Regency’s request “fail[ed] to raise any matter that was not previously considered [, and that] [i]n addition, the request [was] lacking in merit.” (A 1505.)

## **STATEMENT OF FACTS**

### **I. THE BOARD’S FINDINGS OF FACT**

#### **A. Background; Unbeknownst to Employees, Regency Recognizes Local 300S**

Regency is a long-term care facility, consisting of 135 long-term and 20 residential health care beds. David Gross serves as Regency’s president. (A 5; 158, 999-1000, 1297.)

In an April 22, 2003 letter, James Robinson, the president of Local 300S, informed Gross that Local 300S was trying to organize Regency’s employees. (A 5; 1340.) On May 21, Regency agreed to recognize Local 300S if an arbitrator determined that Local 300S had obtained authorization cards from a majority of employees. (A 7; 1006, 1268.) The agreement provided that the arbitrator would determine whether Local 300S “represents the employees in the service and maintenance unit.” (A 7; 1268.) Prior to the card check, Robinson did not get a list of employees, or have knowledge as to how many employees were on the payroll. (A 7, 12; 358-59, 494-95, 511, 1057.)

On May 22, the arbitrator issued the following Award, which stated, in relevant part:

[Local 300S] furnished me with the signed authorization cards it had obtained from bargaining unit employees authorizing it to represent them for the purposes of collective bargaining. And [Regency] furnished me with a complete set of W-4 forms containing the signatures of all eligible employees.

In accordance with the parties' agreement and with the authority vested in me, I then compared the signatures on the cards provided by [Local 300S] with the signatures on the W-4 forms. Based upon that comparison, I hereby certify that [Local 300S] has been selected by a majority of eligible employees as their collective bargaining representative.

I hereby further direct [Regency] to recognize [Local 300S] as the collective bargaining representative for the agreed upon bargaining unit.

(A 8; 1251-52.)

Between May 22 and the end of the year, neither Local 300S President Robinson (A 8-9; 322, 328) nor Regency President Gross (A 8, 10; 1057) held a meeting with employees or gave them anything in writing to inform them that Local 300S had been recognized as their representative. Robinson did not retain copies of the union's authorization cards, or a list of the card signers. (A 8; 308-09, 359-60.)

### **B. Unbeknownst to Employees, Local 300S Submits a Contract Proposal**

At no time after the arbitration award did Local 300S President Robinson ask Regency for payroll records, current wages, benefit plans, personnel policies, or copies of the contracts that Gross had at the two other nursing homes that he

managed, where the employees were represented by SEIU 1199. (A 5, 9; 366-67, 370, 466, 517, 1256-61.) Nor did Robinson seek input from employees or inform them about contract negotiations. (A 8-9; 326-28.)

On December 17, Robinson sent Gross a contract offer that consisted of a copy of a contract entered into between Local 300S and another employer. The contract proposal did not even mention wage rates. (A 9, 10; 454, 521-22, 1065-68, 1298.)

### **C. SEIU 1199 Begins Organizing Company Employees; Regency Signs a Bargaining Agreement with Local 300S**

SEIU 1199 representatives visited the homes of three Regency employees on January 6, 2004; three on January 7; and one on January 8, at approximately 2:00 p.m. (A 10; 1222-30.) At 5:34 p.m. on January 8, Aaron Stefansky, Regency's controller, sent an e-mail to Local 300S President Robinson attaching the "final contract." (A 10; 1072-74.) President Gross took the "[v]ery unusual" step of "run[ning]" out of his house to meet with Robinson that night at approximately 10:45 p.m. (A 10; 1074-75.) Their meeting at a nearby diner lasted for approximately 30 or 40 minutes, during which both men signed the contract. (A 10; 323-24, 470-71, 1016-17.)

The 4-year contract was retroactive to January 1, 2004 and expired on December 31, 2007. (A 10; 1420.) The contract contained both union-security and dues-checkoff clauses that required all covered employees to join Local 300S

and pay union dues. (A 10; 1411-12.) The contract defined the bargaining unit as “all full time and regular part time Service employees, Maintenance employees and LPN employees employed by [Regency] at its [Dover] facility.” (A 10; 1411.)

**D. Employees Learn for the First Time that Local 300S Represents Them; the Parties Revise the Bargaining Agreement to Accommodate the Superior Benefits Provided by Regency Prior to the Contract**

On January 9, Local 300S President Robinson, at President Gross’ invitation, met with the unit employees to advise them of the contract. At the meeting, Gross announced for the first time that a card count had taken place, and that he had signed a contract with Local 300S. (A 10; 328-32, 1017-19.)

Robinson introduced himself to the employees and told them that dues would be deducted from their pay beginning in April. The employees then signed dual purpose dues-checkoff and authorization forms for Local 300S. Robinson explained the benefits and other provisions set forth in the contract, but he did not distribute copies of the contract. (A 10; 333-35, 400, 481-82, 1321, 1323, 1332, 1335, 1336.) Some workers told him that the benefits he described were inferior to those they already received without a union. (A 10-11; 483-85.)

On January 11, Gross received an e-mail from Regency’s administrator announcing: “Update-new info filtering in.” (A 10; 1262.) The e-mail stated that Regency management had received “reports that [SEIU] 1199 is aggressively going door to door telling staff not to sign local 300 union cards because [SEIU]

1199 has a better deal . . . . We will have to be as much if not more vigilant than they are at getting the right message out.” (A 10; 1262.)

On Monday, January 12, Gross and Robinson met with additional employees, at which time Robinson obtained more signed cards for Local 300S. (A 11; 1324-27, 1329.)

On January 19, the parties revised the contract to account for benefits the employees had received prior to the contract’s execution. In addition to increasing holiday and vacation leave, the contract revision added sick days, dental benefits, night-shift differentials, and life insurance benefits. (A 11; 1421.) Employees received copies of the contract in late January and early February. (A 11; 496, 512-13.)

#### **E. A Majority of Unit Employees Deny Signing Authorization Cards for Local 300S**

At the hearing before the administrative law judge, the evidence established that, when Regency recognized Local 300S, the bargaining unit of full-time and regular part-time service employees, maintenance employees, and LPNs contained approximately 117 employees. (A 7-8; 959-64, 1041-42, 1455-59.) At the hearing, testimony was received from 81 persons employed in the bargaining unit at the time Regency recognized Local 300S. (A 6, 11.) Seventy-four witnesses

testified that they had never signed a card for Local 300S prior to the union's recognition, or at any time prior to January 2004.<sup>2</sup> Two witnesses could not recall

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<sup>2</sup> The 74 credited employees (A 6 and n.1) include Clara Raab Contreras (A 26-27), Shila Smith (A 87-89), Mauricio Gonzalez (A 34-36), Paola Mella (A 46-47), Leatha Gatling (A 64-67, SA 1), Vanessa Cuartes (A 76-78), Shaun Dindial (A 131-34), Joshua Waer (A 106-08), Michele Meikle (A 112-14, 119-20), Sheena Joy (A 131-34), Dana Spangler (A 135-37), Steven Shann (A 139-42, 146), Nattie Thomas (A 148-50, 153), Ana Camacho (A 155-60), Manuela Figueroa (A 184-85, 187), Jose Omar Fauste (A 188-91, 202), Andrea Kimbrough (A 203-05), Eliana Muneton (A 207-08, SA 3), Elvira Tavera (A 217-18), Sebastian Gimenez (A 224-27), Rosana Coppola (A 236-37), Francisco Castro (A 241-43, 254), Lucrecia Artigas (A 255-57), Carlos Balbuena (A 267-69, 271), Maria Carmona (A 274-75), Harry Smith (A 280-82), Michele Harris (A 379-91), Shenette Williams (A 385-86), Belinda Walling (A 393-95), Frieda Palomba (A 401-03, 407, 413), Patricia Secola (A 424-27), Carole Gardner (A 433-35, SA 6), Robin McCord (A 441-43, 446-47), Mary Walker (A 533-36), Elizabeth Barbounis (A 540-41), Helen Phelan (A 544-45), Patricia Bendsen (A 555-57), Eleanor Augustine (A 558-60), Angela Zaretskie (A 564-65), Florie Archer (A 570-72), Victoria Montenegro (A 577-79, 586-87), Amarjeed Kaur (A 587-89), Krystal Lloyd (A 602-05), Alnora Sturdivant Finlayson (A 608-10), Jaclyn Sgro (A 627-28), Francisco Valentin (A 633-35, 637, 640), Juana Greta Heath Morillo (A 654-56), Jose Sanchez (A 663-65, 671, SA 7), Rosita Romero (A 676-78), Maria Cocio (A 687-89), Maria Oulds (A 692-95), Michael Gibbons (A 718-19), Anna Ferreira (A 734-35, 737-38, SA 8), Cristal Estudillo (A 743-44, 746, 751), Rita Noel (A 761-63, 767), Carmen Montanez (A 773-76), Alba Franco (A 791-94), Nilsa Ayala (A 800-03), Norma Harvey (A 808-11, 816), Johanna Rudas (A 823-25), Marion Cullen (A 828-35), Kelly Armstrong (A 842-46, SA 9), Juanito Pasion (A 853-56, 861-62), Azra Ali (A 876-78), Vivienne Waysome (A 880-82, 885, 892), Selina Akther (A 893-94, 896, 901-02), Kathy Rohde (A 903-06), Marion Roberts (A 914-17, 921, 929), Heather McQuown (A 933-36), Ella McKlin (A 953-56), Donna Nunn (A 967-69), Nora Aguado (A 982-84, 986), Claudia Montoya Agrensoni (A 1102-03), and Nancy Groman (A 1117-18).

signing a card for Local 300S.<sup>3</sup> Several other witnesses were not directly asked whether they had signed a card for Local 300S prior to Regency's recognition. (A 6 and n.4.)<sup>4</sup>

## II. THE BOARD'S CONCLUSIONS AND ORDER

On August 30, 2006, the Board (Chairman Battista and Members Liebman and Walsh) issued its decision, finding, in agreement with the administrative law judge, that Regency violated Section 8(a)(3), (2), and (1) of the Act (29 U.S.C. § 158(a)(3), (2), and (1)) by recognizing Local 300S and entering into and enforcing a collective-bargaining agreement that contained union-security and dues-checkoff provisions with Local 300S, at a time when Local 300S did not represent a majority of unit employees. (A 15.)

The Board's Order requires Regency to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 15.) Affirmatively, the Board's Order requires Regency to withdraw and withhold

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<sup>3</sup> Swalahah Mohamed (A 6 and n.2; 618-20) and Mary Terry (A 6 and n.2; 529-30).

<sup>4</sup> Carole Carr (A 374-76), Minnie Conklin (A 93-106), Claudia Cortes (A 941-48), and Kerry Hickenbottom (A 751-60).

recognition from Local 300S as the exclusive collective-bargaining representative of its employees in the recognized unit; to cease maintaining any collective-bargaining agreement between them, unless Local 300S is certified by the Board; to reimburse, with interest, all of its former and present unit employees for fees and moneys deducted from their pay pursuant to the union-security and dues-checkoff clauses of the contract with Local 300S dated January 8, 2004, except for those who voluntarily joined and became members of Local 300S prior to January 8, 2004; and to post copies of a remedial notice. (A 3, 15.)

### **STATEMENT OF RELATED CASES**

This case has not previously been before this Court and Board counsel is not aware of any related case pending before this or any other court.

### **STATEMENT OF THE STANDARD AND SCOPE OF REVIEW**

When reviewing the Board's determination in a particular case, this Court "must 'accept the Board's factual determinations and reasonable inferences derived from [those] determinations if they are supported by substantial evidence.'"

*Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 175 (3d Cir. 2002) (quoting *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 151 (3d Cir. 1994)). See Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 304 U.S. 474, 487-88 (1951). This Court therefore cannot "substitute [its] view of the record even if [it]

would have reached different conclusions on *de novo* review.” *Stardyne*, 41 F.3d at 151 (citing *Universal Camera*, 304 U.S. at 488).

“The Board’s credibility determinations in particular merit great deference.” *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1177 (3d Cir. 1989). The deference is due to the administrative law judge’s having “see[n] the witnesses and hear[d] them testify,” as compared to the Court’s looking “only at cold records.” *ABC Trans-National Transport, Inc. v. NLRB*, 642 F.2d 675, 684 (3d Cir. 1981) (citations omitted). Accordingly, the Board’s “findings should be given great deference, particularly when they are based on demeanor testimony.” *Id.* at 686.

### **SUMMARY OF ARGUMENT**

The Board found that Regency acted unlawfully by recognizing Local 300S, and entering into a contract that contained union-security and dues-checkoff provisions, when that union did not represent a majority of the employees in the unit. That finding is based primarily on the credited testimony of a majority of unit employees that they did not sign cards for Local 300S prior to Regency’s recognition. That finding is further supported by the suspicious actions of Regency President Gross and Local 300S President Robinson surrounding the recognition and signing of the contract.

Regency has shown no extraordinary circumstances that would warrant this Court’s reversal of the Board’s credibility determinations. Nor did the Board err

by concluding that the arbitrator's card-check decision did not overcome the credited employee testimony and surrounding circumstances that showed an unlawful recognition. The arbitrator's decision was vague, failing to state, among other things, the number of cards he received, or the number of employees in the unit. Moreover, the unit description posed by the parties to the arbitrator differed from the unit description contained in the subsequent contract, making it uncertain that the arbitrator even approved recognition in the unit described in the contract. Finally, the Board has no policy of deferring to arbitration awards that would control the rights of third parties, such as SEIU 1199, who did not agree to be bound.

The Board also reasonably found that the complaint was not time-barred by Section 10(b) of the Act, which requires that the unfair labor practice charge be filed within 6 months of the alleged unfair labor practice. The February 2004 charge was filed more than 6 months after Regency's May 2003 recognition of Local 300S. However, an exception exists to the 6-month limitation under Section 10(b) when the charged party engages in fraudulent concealment of the conduct that constitutes the unfair labor practice. Here, the evidence amply demonstrated that Regency's recognition of Local 300S was deliberately concealed until January 9, 2004, when Regency and Local 300S announced their contract to unit employees. Thirty-eight employees credibly testified that, prior to that event, they

were unaware that recognition had been extended to Local 300S. Further, Robinson and Gross conceded that they had agreed to keep the May 22, 2003 recognition “quiet,” and Robinson also conceded that employees were kept “uninformed” about any contract negotiations.

Regency’s challenge to the Board’s remedy directing it to reimburse employees for any Local 300S dues it deducted from employees’ pay is not before this Court because Regency filed no exception to the administrative law judge’s decision on that ground.

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT REGENCY VIOLATED SECTION 8(a)(3), (2), AND (1) OF THE ACT BY RECOGNIZING LOCAL 300S, AND THEREAFTER EXECUTING A CONTRACT WITH LOCAL 300S THAT CONTAINED UNION-SECURITY AND DUES-CHECKOFF PROVISIONS, WHEN THAT UNION DID NOT REPRESENT A MAJORITY OF THE UNIT EMPLOYEES**

Two issues are before this Court. First, whether the Board properly found that, when Regency granted recognition to Local 300S on May 22, 2003, Local 300S did not represent a majority of bargaining-unit employees. If so, under well-settled principles, Regency acted unlawfully by recognizing Local 300S and entering into a contract that contained union-security and dues-checkoff clauses. Second, whether the Board properly found that the parties concealed Regency’s recognition of Local 300S from the bargaining-unit employees and SEIU 1199

until January 9, 2004, the day after they signed the contract. If so, then SEIU 1199's initial charge was not untimely, even though it was filed more than 6 months after the unlawful recognition. As we show below, the evidence amply supports the Board's findings that Regency unlawfully recognized Local 300S and that, due to the concealment of the recognition, the unfair labor practice charge to that effect was not time-barred.

## **A. Regency Unlawfully Recognized Local 300S**

### **1. Applicable Principles**

Section 7 of the Act gives employees the fundamental right to “bargain collectively through representatives of their own choosing” or “to refrain from such activity.” (29 U.S.C. § 157). To protect this right, Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) makes it an unfair labor practice for an employer “to dominate or interfere with a labor organization or contribute . . . other support to it,” an embodiment of “a clear legislative policy to free the collective bargaining process from all taint of an employer’s compulsion, domination, or influence” (*Int’l Ass. Of Machinists, Lodge 35 v. NLRB*, 311 U.S. 72, 80 (1940)). Employees’ Section 7 rights to free choice in deciding who, if anyone, is to be their representative, are clearly abridged when an employer recognizes a union that a majority of them have not chosen for their collective-bargaining representative. Accordingly, an employer renders unlawful support in violation of Section 8(a)(2)

and (1) of the Act by recognizing a minority union.<sup>5</sup> *See Int'l Ladies Garment Workers' Union v. NLRB*, 366 U.S. 731, 738-39 (1961); *Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476, 482 (3d Cir. 1980).

To further protect employees' Section 7 rights, Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Such discrimination in violation of Section 8(a)(3) occurs where an employer enters into a collective-bargaining agreement with an unlawfully recognized union that contains a union-security provision requiring employees either to become or remain union members and pay union dues. *See Haddon House Food Products, Inc. v. NLRB*, 764 F.2d 182, 187 (3d Cir. 1985).<sup>6</sup>

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<sup>5</sup> A violation of Section 8(a)(2) produces a derivative violation of Section 8(a)(1). *See NLRB v. Peninsula General Hosp. Med. Ctr.*, 36 F.3d 1262, 1264 n.1 (4th Cir. 1994); *Fun Striders, Inc. v. NLRB*, 686 F.2d 659, 661 (9th Cir. 1981).

<sup>6</sup> A Section 8(a)(3) violation, like a Section 8(a)(2) violation, produces a derivative violation of Section 8(a)(1) of the Act. *See Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426, 430-31 (6th Cir. 1997).

## **2. The Board Reasonably Determined that the General Counsel Established a Prima Facie Case that Regency Unlawfully Recognized Local 300S**

Testimony from employees, as well as inferences from the circumstances surrounding the recognition and the signing of the contract, amply support the Board's finding that the General Counsel established a prima facie case that Regency recognized Local 300S at a time when it lacked majority support.

### **a. A Majority of Employees Deny Signing Cards for Local 300S**

At the hearing, the General Counsel presented testimony from 81 of the approximately 117 employees alleged to be in the unit when Regency recognized Local 300S on May 22, 2003. As the judge found (A 6), "not one employee unequivocally testified that he or she signed a card for Local 300S before that union was recognized." To the contrary, 74 employees, a majority of unit employees, denied having signed an authorization card for Local 300S prior to Regency's recognition, or at any time prior to January 9, 2004. The judge (A 5, 6) credited the testimony of the 74 witnesses based on his "observation of the demeanor of the witnesses." The Board (A 2 n.3) "carefully examined the record and f[ound] no basis for reversing the findings."

Under settled principles, the credited testimony from a majority of unit employees that they had not authorized a union when it was recognized by the

employer is a sufficient basis to find that the employer unlawfully recognized a minority union. *See Sprain Brook Manor*, 219 NLRB 809, 810 (1975) (union found not to lawfully represent employees where no authorization cards had been retained but a majority of unit employees testified or were prepared to testify that they had not signed cards at the time the union was recognized), *enforced sub nom. NLRB v. Book*, 532 F.2d 877 (2d Cir. 1976); *American Service Corp.*, 227 NLRB 13, 13 n.1 (1976) (union found not to lawfully represent employees where majority of unit members testified that they had not authorized the union to represent them).

**b. The Circumstances Surrounding Regency's Recognition of Local 300S Were Suspect**

The Board reasonably found that the actions of both Regency and Local 300S supported a finding that Regency recognized Local 300S at a time when it did not have support from a majority of the unit employees.

First, the Board reasonably found that Gross' decision to immediately proceed with a card count was inconsistent with his desire to delay any pressure to increase wages that he knew unionized employees would immediately demand. (A 9, 12; 498-99, 1009-11, 1047-48, 1059-61.) As the Board explained (A 12), Gross could have sought a Board election, which would have delayed any union demands for a wage increase. Discrediting Gross' claim that he was not aware of Regency's right to an election (A 7; 1052-53), the Board reasonably inferred (A 12) that Regency preferred the card-check route in order to ensure that Local 300S

became the employees' representative, something it could not have ensured had both Local 300S and SEIU 1199 competed in a Board-conducted election.

Second, the Board reasonably found (A 5, 11; 297-98) several of Robinson's actions "unusual," particularly given his 30 years of experience in union affairs. For instance, the Board found (A 11, 12 n.11) it odd that Robinson, who never claimed to have a policy of discarding cards after 6 months, would have discarded the cards before a contract was reached, and, for that matter, before employees were even notified of the recognition. Moreover, the Board reasonably found (A 11) that, even apart from discarding the cards, it was suspicious that Robinson "would have kept no record of who signed the cards." The absence of any record of who signed cards left Robinson, during the time frame before the contract was signed, unable to directly communicate with any employee who had already pledged support for Local 300S, and unable to strengthen Local 300S' bargaining position by seeking support from those who had not yet signed cards for Local 300S.

The Board also found (A 8) it suspicious that Robinson could recall so little about the details of the union organizing campaign. He was unable even to offer testimony or contemporaneous notes "showing which employees were contacted who supported the union, or [] who may have been helpful organizing and representing the workers." One would have expected, as the Board explained (A

8), that once Robinson became aware that Local 300S' majority status was at issue, he would have taken the most basic steps to gather supporting evidence from unit employees and from the three organizers (see A 305) who allegedly assisted him. Yet, Robinson admittedly made no attempt to talk to the other organizers about their recollections (A 7; 316-17) or to any unit employee to verify that, prior to May 22, 2003, he or she had signed a card (A 8; 316-17). Nor, for that matter, was Regency able to present any employee who had signed a card for Local 300S prior to May 22, 2003.

The Board further found (A 6, 8-9) it suspicious that Robinson was unable to provide any of the questionnaires that allegedly had accompanied the authorization cards. Thus, apart from discarding the cards themselves, Robinson also claimed to have discarded an unspecified number of the completed employee questionnaires that had accompanied the cards. (A 6, 8-9; 484, 1474-75.) The Board reasonably found "doubtful" Robinson's claim that he received and then discarded the responses (A 6), and instead inferred that "Robinson did not retain the responses because there were none" (A 9). Indeed, Robinson later contradicted his earlier testimony and claimed that no one returned the questionnaires and that he received only verbal responses. (A 517-18.)

Third, the Board also reasonably found that the parties' actions after the recognition raised serious doubts that the recognition was aboveboard. As the

Board found (A 13), “there is no credible evidence that in the 7½ months between the recognition and the execution of the contract, employees were made aware of the recognition.” Consistent with that finding, 38 employees credibly testified that they were unaware of Local 300S’ presence prior to January 2004. (A 6.)

Significantly, Regency does not dispute the Board’s credibility-based finding (A 13) that no evidence exists of “meaningful negotiations occur[ing].” Consistent with that finding, there is no evidence that Robinson even took the time to learn of the employees’ current terms of employment (A 13), or that he even asked employees what terms they desired (A 9). To the contrary, Robinson admittedly (A 9, 13; 366-67, 370) failed to ask for or receive the most basic background information from Regency such as payroll records, current wage rates, employee seniority dates, descriptions of Regency’s health and dental plans, and employment and personnel manuals.

Yet, within days of acquiring knowledge that SEIU 1199 was organizing the employees, the parties suddenly signed a contract. The signing was so sudden that Gross admittedly took the “[v]ery unusual” step of having to “run out” of his house late at night to sign the contract. (A 10, 13; 1074-75.) Moreover, their hasty action led, as the Board found (A 13) and as Regency does not dispute, to a contract that contained many terms that were inferior to those that employees previously received. The discrepancy prompted the parties to make major

modifications to the contract just one week after it was signed. As the Board explained (A 13), if the parties had actually engaged in any serious negotiations prior to the advent of SEIU 1199, then “Robinson, an experienced union president, would have obtained basic, rudimentary information as to the benefits the employees were receiving so that the January 19 modifications to the contract would not have been necessary.”

In sum, the Board (A 13), based “particularly” on the “facts that not one of the 81 employees who testified stated that he or she signed a card for Local 300S, and that 74 employees out of the 117 members of the unit affirmatively stated that they did not sign a card authorizing that union to represent them,” as well as on the circumstantial evidence set forth above, was fully warranted in finding “that the General Counsel ha[d] made a prima facie showing that Local 300S did not represent a majority of the unit employees when it was recognized by [Regency].”

### **3. The Board Reasonably Found that Regency Had Not Rebutted the Prima Facie Case**

#### **a. The Board Reasonably Concluded that Arbitrator Nadelbach’s Card-Check Decision Did Not Overcome the General Counsel’s Prima Facie Case**

Contrary to Regency’s contention (Br 39-52), the Board reasonably declined to give the arbitrator’s card-check decision controlling weight. As the Board explained (A 12), the arbitrator’s award failed to “identify . . . the number of cards he received, the number of employees in the unit, or which categories of

employees were encompassed in the unit.” The arbitrator simply noted that Local 300S had submitted signed authorization cards and that the signatures had been compared to signatures on W-4 forms submitted by Regency. Therefore, the arbitrator left unclear, as the Board noted (A 12), whether he had even received a list of employees in the unit, much less whether he had compared the names on the W-4 forms and the names on the cards to a list of unit employees.

The uncertainty as to what, if any, list the arbitrator worked from is particularly critical here given discrepancies in the language used by the parties to describe the bargaining unit. The parties’ agreement to refer the cards to the arbitrator referenced Local 300S’ claim to represent employees in the “service and maintenance unit.” (A 7; 1268). The subsequent contract, however, described the unit as containing “[s]ervice employees, [m]aintenance employees and LPN employees.” (A 10; 1411.) Therefore, it is unclear whether the arbitrator approved a unit that included the LPN’s.

Moreover, even if the arbitrator reviewed a list, and that list included LPNs, it is impossible to know the accuracy of the list. That is particularly true here, given that the list Regency attempted to recreate for the hearing admittedly contained several errors (A 8, 12; 959-64, 1040-41, 1455-59, SA 10-14), and that prior to the card count Robinson never confirmed with Gross the size of the bargaining unit (A 7, 12; 358-59, 494-95, 511, 1057).

In sum, given the ambiguities of the arbitrator's award, the Board was fully warranted in crediting the testimony of employees who denied signing cards over the arbitrator's award. *See Windsor Castle Health Care Facilities*, 310 NLRB 579, 590 (1993) (declining to allow arbitration award to control the result where neither the cards nor the list of bargaining-unit employees was submitted at the hearing and where the unit description in the contract differed from the one described in the arbitrator's award).

The Board's determination not to allow the arbitration award to control the result, does not, as Regency claims (Br 39-41), even implicate the kind of deference the Board gives to an arbitration award that resolves, for the parties who had agreed to be bound by the arbitration decision, a factual question common to both a grievance and a Board proceeding. *See Int'l Harvester Co.*, 138 NLRB 923, 927 (1962), *enforced* 327 F.2d 784 (7th Cir. 1964). *See generally, Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964). As the Board stated (A 12), since "the policy of deferring to an arbitrator's award originates from theories of contract and estoppel," third parties, such as SEIU 1199, who had not agreed to be bound by the card-check decision, were not bound by it. *See Sprain Brook Manor*, 219 NLRB at 810. *Cf. NLRB v. Plasterer's Local Union 79*, 404 U.S. 116, 131-37 (1971) (in jurisdictional dispute under Section 10(k) of the Act (29 U.S.C. § 10(k))

the Board correctly declined to defer to an arbitration procedure that was not agreed to by all interested parties.)

Regency argues (Br 40-41) that, having agreed to a card check, it was exposed to a charge of violating Section 8(a)(5) of the Act if it refused to recognize Local 300S in the face of the arbitrator's decision. But the overarching principle is that an employer simply is not allowed to recognize a minority union, and even an employer's good-faith belief that it is recognizing a majority union is not a defense to a Section 8(a)(2) allegation when it is shown that the employer had in fact recognized a minority union. *See Int'l Ladies Garment Workers'*, 366 U.S. at 739. *Accord NLRB v. Atlas Lumber Co.*, 611 F.2d 26, 28 (3d Cir. 1979). Moreover, the Board's position is not unfair to an employer, like Regency, that is willing to expedite the process of collective bargaining by having a card check. An employer can negotiate a contract clause, such as Regency did here (A 1412), that requires that, in the event its recognition of the union is found unlawful, the union indemnify it for any dues and fees it forwarded to the union.

**b. Regency Has Not Shown Extraordinary Circumstances  
Requiring Reversal of the Board's Credibility Findings**

Apart from arguing that the Board erred by failing to find the card-check decision controlling, Regency challenges the Board's decision to credit the 74 witnesses who testified that they had not signed authorization cards for Local 300S prior to May 22, 2003. None of the three bases for this challenge has merit.

First, Regency (Br 41-42, 44) refers to evidence that some witnesses at the hearing were confused about whether the Board agent, or SEIU 1199, had asked them to sign something stating they had not supported Local 300S prior to the contract signing. But this confusion is hardly an extraordinary basis to discredit their separate and independent testimony at the hearing that they did not sign cards for Local 300S prior to Regency's May 22, 2003 recognition.<sup>7</sup>

Second, Regency suggests that their testimony was tainted because, prior to the hearing, SEIU 1199 had pressured them into signing the petition stating they had not signed a card for Local 300S prior to January 2004 (Br 46, 52), and because the Board agent had suggested certain responses to them during the investigation of the case (Br 44, 45, 46, 51). Regarding the SEIU 1199 solicitors, the evidence established at most, as the Board explained (A 7), that SEIU 1199 solicitors had told some employees that they would receive better benefits if their union represented them. The evidence did not establish that employees signed a petition that did not accurately reflect their views, or that their testimony at the

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<sup>7</sup> A Board agent had given them an affidavit that asked, among other questions, “[d]id you sign a card for Local 300S sometime in the spring of 2003 (on or before May 21, 2003) authorizing it to represent you for the purpose of collective bargaining” (see, for example, A 1198-99), and SEIU 1199 had distributed a petition that stated, “[b]efore January 1, 2004, I had not signed a [u]nion authorization card or any other document selecting Local 300S . . . as my union representative” (see, for example, A 1444).

hearing was not accurate.<sup>8</sup> Regarding the Board agent, the evidence established at most, as the Board found (A 7), that the agent informed a few employees of the reason for the investigation.<sup>9</sup> There was no “evidence that the Board agents conducted themselves in any way other than the highest standard expected of government attorneys.” (A 7.)

Third, Regency claims (Br 43-44) that, of the 74 employees the Board found not to have signed cards for Local 300S prior to May 22, 2003, the Board erroneously included approximately 20, leaving a minority of unit employees having credibly testified that they did not sign cards prior to the recognition. Specifically, Regency claims (Br 43-44) that Aida Basualto signed a card prior to

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<sup>8</sup> For example, employee Manuela Figueroa (Br 19, A 185-87, 1324, SA 2) acknowledged that SEIU 1199 informed her that it was a better union, but she made clear that the petition accurately reflected the fact that she had not signed a card for Local 300S prior to January 1, 2004, and that the only card she signed for Local 300S was on January 12, 2004. Similarly, Cristal Estudillo (Br 19, A 748-49, 1442) testified that she was asked to sign the petition and proceeded to sign because she agreed with it.

<sup>9</sup> For example, as Regency’s own brief demonstrates (Br 19-20, SA 4-5), when Shenette Williams did not understand why the agent was contacting her as a former Regency employee, the agent simply explained the basis for why he was trying to question her. There is no evidence, as the Board found (A 7), that the Board agent influenced the information provided by any employee. For example, taken in context, Francisco Castro’s testimony (Br 20, A 243-48, 252-55) demonstrates that he was not pressured to sign the Board’s affidavit. Rather, his testimony establishes that the pressure he did feel was to join Local 300S. That feeling was understandable given the contractual requirement that he join Local 300S.

May 22, 2003, and it also claims that 19 other employees were so unsure of their actions that the judge could not have credited their denial of having signed cards for Local 300S prior to May 22, 2003. These claims are without merit.

As for Basualto, although she initially asserted that she had signed two cards for Local 300S one day apart in late winter 2002 or early spring 2003, and that she had mailed one of them to Local 300S (A 7; 1085-86, 1089-90, 1097), the only card introduced into evidence was a card signed by her on December 8, 2003 (A 7; 1467). Therefore, since she was most clear in remembering that she signed the two cards only a day apart (A 1089-90, 1097), it is doubtful, as the Board explained (A 7), “that she signed a card for Local 300S before that union was recognized in May 2003.”

Regency’s challenge to the testimony of the other 19 employees is based either on testimony taken out of context or alleged testimonial discrepancies that have little bearing on their denial of having signed an authorization card for Local 300S prior to May 22, 2003. For example, employee Paola Mella testified (A 47-48) that she did not sign a card for Local 300S prior to May 22, 2003, and that the only card she did sign was in January 2004. Although Regency insinuates (Br 8) that Mella was confused as to what she signed, she simply confirmed (A 47-49, 1321, 1323) the specific authorization card that she did sign in January 2004. Likewise, Maria Oulds testified (A 695) that she did not sign an authorization card

for Local 300S prior to January 2004. Her testimony is not undermined by her inability to remember on cross-examination (Br 8, A 701) whether the separate authorization and dues forms that she did sign for Local 300S in 2004 required one or two signatures. Similarly, Norma Harvey testified that she first learned of Local 300S when she was required to sign the authorization card in 2004. (A 808-09, 1449.) Her response on cross-examination (Br 11, A 813)--that it was "possible" she signed something else that mentioned Local 300S in 2004 besides the authorization card--does not cast doubt on her denial of having signed something in 2003. Indeed, her response was hardly surprising, given that the same day in 2004 that she signed the authorization form (A 1449), she signed a dues deduction form (A 1449), and then later in 2004 she signed the SEIU 1199 petition that referenced Local 300S (A 1204).

In sum, the Board was fully warranted in finding (A 13, 15) that Regency, having failed to rebut the General Counsel's prima facie case, unlawfully recognized Local 300S when it did not have majority support.<sup>10</sup> Further, because Regency unlawfully recognized Local 300S, its entering into a contract with Local 300S that contained union-security and dues-checkoff provisions violated Section 8(a)(3) and (1) of the Act, as the Board found (A 13, 15) and as Regency does not separately contest.

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<sup>10</sup> This case is not the first time that Local 300S was found to have been unlawfully recognized by an employer. *See Elmhurst Care Ctr.*, 345 NLRB No. 98 (2005), 2005 WL 2477121 (directing employer to withdraw voluntary recognition of Local 300S and to cease accepting recognition from Local 300S unless certified by the Board), No. 07-1062 (D.C. Cir. petition for review filed March 7, 2007); *New York Rehabilitation Care Mgmt.*, 344 NLRB No. 148 (2005), 2005 WL 1827769 (revoking Board's certification of Local 300S and directing second election) (see A 1354-1401 (underlying representation proceeding)), Nos. 06-1162, 06-1216 (D.C. Cir. briefing completed April 13, 2007). In addition, on March 12, 2004, the Board approved a settlement stipulation involving Local 300S. (A 1402-10.) Local 300S agreed that, for an 11-month period, it would not accept recognition or enter into a collective-bargaining agreement with any employer unless it was certified by the Board after a Board-conducted representation election. The stipulation covered the five boroughs of New York City and six surrounding New York State counties. (A 1408.)

**B. The Complaint Was Not Time-Barred By Section 10(b) of the Act**

Section 10(b) of the Act (29 U.S.C. § 160(b)) provides that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board.” Under that provision, actions occurring more than 6 months prior to the filing and service of a charge may not be alleged as unfair labor practices. *See Machinists Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 416, 424-25 (1960). “Because the six-month limitations period functions as an affirmative defense to an unfair labor practice charge the party . . . relying on the defense has the burden of proof to establish the untimeliness of the charge.” *NLRB v. Public Service Electric and Gas Co.*, 157 F.3d 222, 228 (3d Cir. 1998).

Regency argues (Br 24-38) that the unfair labor practice proceeding against it was jurisdictionally barred by Section 10(b) because the charge was filed in February 2004, more than 6 months after Regency’s May 22, 2003 recognition of Local 300S. On its face, the charge was untimely. However, the 6-month limitations period begins to run only when an “aggrieved party has a clear and unequivocal notice” that the Act was violated. *Public Service*, 157 F.3d at 228. Accordingly, Regency concedes (Br 33), as it must, that an exception exists to the 6-month limitation under Section 10(b) when the charged party engages in fraudulent concealment of the conduct that constitutes the unfair labor practice.

The three criteria required to find fraudulent concealment are “(1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part.” *Browne & Sharpe Mfg.*, 321 NLRB 924 (1996), *affirmed sub nom. IAM v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997). Here, all three criteria are present.

First, the evidence demonstrates that Regency’s recognition of Local 300S was deliberately concealed until January 9, 2004, when Regency and Local 300S met with the unit employees. At the hearing, both Robinson (A 8, 9, 14; 498-99) and Gross (A 8, 9, 14; 1009-11, 1059-61) conceded that Gross asked Robinson to keep the May 22, 2003 recognition “quiet” from the employees and that Robinson agreed. Robinson further conceded (A 8, 9, 14; 326, 328) that employees were kept “uninformed” about any contract negotiations. Consistent with the admissions of Robinson and Gross, Regency does not dispute the Board’s finding (A 6, 13-14) that, as 38 employees testified, they were unaware of the presence of Local 300S prior to the signing of the contract in January 2004.

Second, there is no serious dispute that Regency’s recognition of Local 300S was a material fact necessary to put a party on notice of the fact that Regency had unlawfully recognized Local 300S.

Third, as the Board found (A 14), SEIU 1199 was not ignorant of this fact through “any fault or want of due diligence on its part.” Until Regency’s employees learned on January 9, 2004 that Regency had recognized Local 300S, there was no reasonable way SEIU 1199 could have learned about the recognition.<sup>11</sup>

Accordingly, the Board was fully warranted in finding (A 13) that the 6-month statute of limitations did not begin to run until January 9, 2004, and that the charge was timely under Section 10(b) because it was filed only a month later. As the Board explained in *Avne Systems, Inc.*, 331 NLRB 1352, 1361 (2001), a case even Regency relies on (Br 29-30), “[t]o take the most obvious example, if an employer and a [u]nion entered into a contract which they thereupon put into a drawer and only notified the affected employees of its existence 6 months and 1 day after its execution, the 10(b) period would start to run from the date of its disclosure.” This case is yet another “obvious example.” As the Board found (A

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<sup>11</sup> The Board, contrary to Regency’s contention (Br 34-36), did not have to pass on the issue of whether the employees or SEIU 1199 are the “adversely affected” party for purposes of Section 10(b) notice. The parties’ intentional concealment of Regency’s recognition of Local 300S meant, as the Board explained (A 3), that neither the employees nor SEIU 1199 learned of the recognition prior to January 8, 2004. Nor does the Board’s decision, as Regency suggests (Br 34-38), require that an employer or union must specifically inform other unions of recognition. The Board simply recognized that in a case such as this, when the recognition is hidden from the employees, it was reasonable for the Board to also find that SEIU 1199 did not know about the recognition.

12-13), “this appears to have been a ‘desk-drawer’ recognition kept secret from the employees and arranged for the purpose of providing [Regency] with a readily-available method of supporting a hastily agreed-on contract.”

Regency’s attacks on the Board’s finding that employees did not know about Regency’s recognition of Local 300S are without merit. Regency relies on (Br 4, 33 (A 6, 10; 1059)) Gross’ claim that he informally told between 6 and 12 employees about the recognition when they came to talk to him about other matters. That claim, however, was not credited because it was directly contradicted by Gross’ admitted desire to keep things quiet, and was further undermined by Gross’ inability to name any of the 6 to 12 employees (A 1059) and by the fact that no employee corroborated Gross’ claim. In addition, given Gross’ acknowledgement (A 10; 1003-04) that there was a “very, very active” “grapevine” in the facility and the town of Dover, and that “when anything happened in the building, within, really before the end of the day, there were no [sic] secrets,” the Board reasonably inferred (A 14) that had any information about Regency’s recognition of Local 300S been provided to employees prior to January 2004, it would have “spread quickly” throughout the facility.<sup>12</sup>

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<sup>12</sup> Similarly, given Robinson’s concessions that he agreed to keep things quiet and did not inform employees about negotiations, the Board reasonably rejected Robinson’s assertion (Br 22, (A 8; 322, 496)) that he “discretely” told employees of Local 300S’ recognition after the card check.

Regency (Br 36-38) fares no better by relying on the testimony of five employees to claim that employees knew of Regency's recognition of Local 300S prior to January 2004. Testimony from three of the employees actually detracts from Regency's claim. Juanito Passion (Br 23, A 868-69) only noted that an unidentified union indicated that if it received enough signatures it could represent the employees; Mary Neubauer (Br 23, A 1123-24), the secretary who sits at the front desk, only recalled that several people met with a "judge" in 2003, an apparent reference to the card-check arbitrator; and Mary Groman (Br 23, (A 6; 1113)) only recalled being told that she could not get a raise while union activity was going on. There is no evidence that any of these employees knew of the card-check arbitration decision or Regency's recognition of Local 300S prior to January 2004. To the contrary, Passion noted (A 870-71) that, after the initial union activity, there was no talk about a union through the entire summer and that he did not learn that Local 300S was going to represent them until January 2004.

The final two employees that Regency relies on establish that at most they might have heard something about Regency and an unidentified union. Maureen Van Ben Thuesan, who worked in accounts receivable, simply recalled being told by administrator Joe Olzewski that Gross had directed him to stop a wage survey of other employers due to negotiations with a union. (A 1129.) Similarly, Local

300S' steward Kathy Rhode (A 903, 908) claimed that in September 2003 she heard from Olzewski and Nursing Director Alvarez that the "union [was] in."<sup>13</sup> Such passing comments hardly constitute "clear and unequivocal" notice to employees (*Public Service*, 157 F.3d at 228) that Local 300S had been recognized, particularly where, as the Board explained (A 13-14), "there was no identification of the union involved," and 38 other employees credibly testified that they were unaware of the presence of Local 300S prior to the contract's being signed in January 2004. *See, for example, East Bay Automotive Council v. NLRB*, 2007 WL 1112705, \*4 (9th Cir. Apr. 17, 2007).<sup>14</sup>

Finally, Regency proves little (Br 36-38) by emphasizing evidence that employees had knowledge that Local 300S had engaged in organizing activity in

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<sup>13</sup> Rhode acknowledged, however, that she did not learn about Local 300S' recognition until January 2004 (A 905), that she had no knowledge of anyone signing a card for Local 300S in 2003 (A 910), and that she had no knowledge (A 910) of the arbitration award.

<sup>14</sup> Moreover, even if these passing comments constituted sufficient notice of Local 300S' recognition, Regency has not carried its burden of proving that they were made prior to August 19, 2003, or more than 6 months prior to the filing of the February 19, 2004 charge. Rhode's conversation occurred in September or early October 2003 (A 908), within 6 months of the charge. Van Ben Thuesan did not testify with certainty that the conversation occurred more than 6 months before the charge, asserting only that the conversation took place "maybe, the end of July, some time in August, maybe." (A 1130.)

early 2003. Whatever evidence of organizing existed, there is simply no evidence that the employees knew of Local 300S' recognition or the arbitration award.

Moreover, although, as the Board explained (A 6, 13), there is evidence that some employees knew of some organizing in the spring of 2003, "in many cases there was no clear identification of the union which was organizing." For example, employee Michele Meikle acknowledged (A 130) being approached to sign a card for a union in 2003. She did not, however, as Regency asserts (Br 15), state "that she was approached several times by [Local] 300[S]." To the contrary, she specifically testified (A 124) that she did not know which union was soliciting.

### **C. Regency's Objection to the Board's Remedy Is Not Before the Court**

Regency asserts (Br 52-53) that the Board's remedy, requiring Regency to reimburse employees for dues collected, is punitive. Section 10(e) of the Act (29 U.S.C. §160(e)), however, precludes the Court from considering this objection because it was not first timely raised before the Board, as required by the Board's rules.

As the Board found (A 1500-01) and as Regency does not dispute, this remedy was recommended by the administrative law judge in his decision (A 15-16) yet Regency did not raise any objection to this remedy in its exceptions to the judge's decision. The Board's Rules provide: "No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any

further proceeding.” 29 C.F.R. § 102.46(g). The Board’s Rules further provide that exceptions “shall set forth specifically the question of procedure, fact, law, or policy to which exceptions are taken” and that “[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.” 29 C.F.R. § 102.46(b). Having failed to exhaust its administrative remedies under the Board’s Rules, Regency is properly precluded from raising the objection in any subsequent motion for reconsideration. *See Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 116 (D.C. Cir. 2000), *affirming in relevant part, Detroit Newspaper Agency*, 327 NLRB 799, 799 (1999); *Giant Food Stores*, 298 NLRB 410, 410-11 (1990).

Section 10(e) of the Act (29 U.S.C. § 160(e)) does provide that if a party is able to show “extraordinary circumstances” for not doing so, it is relieved of the jurisdictional requirement that it have timely raised its objection before the Board. Here, Regency has not offered any extraordinary circumstances, let alone any circumstances, to this Court that would excuse its failure to raise its objection to the remedy before the Board in its exceptions to the decision of the administrative law judge.

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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Dated at Washington, D.C.  
this 20th day of April, 2007

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*
	*
Petitioner	*
	*
and	*
	*
SEIU 1199 NEW JERSEY HEALTH CARE UNION	* No. 06-5013
	*
	* Board No.
	* 22-CA-26231
	*
Intervenor	*
	*
	*
v.	*
	*
REGENCY GRANDE NURSING & REHABILITATION CENTER	*
	*
	*
Respondent	*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies each of the Board's final brief have this day been served by first class mail upon the following counsel at the address listed below:

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Dated at Washington, D.C.  
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