UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

A & C HEALTHCARE SERVICES, INC.

and

Cases 20-CA-33588
20-CA-33780

SEIU, UNITED HEALTHCARE WORKERS - WEST

COUNSEL FOR THE ACTING GENERAL COUNSEL'S MOTION TO ISSUE DECISION AND ORDER ON PREVIOUSLY FILED EXCEPTIONS AND BRIEFS

Now comes Micah Berul, Counsel for the Acting General Counsel, pursuant to Section 102.24 of the National Labor Relations Board's Rules and Regulations, with this Motion to Issue Decision and Order on Previously Filed Exceptions and Briefs.

In support of this Motion, Counsel for the Acting General Counsel submits the following:

1. (a) The charge in Case 20-CA-33588 was filed by the Union on September 18, 2007, and a copy was served by first-class mail on Respondent on September 19, 2007. A copy of the charge in Case 20-CA-33588 is attached as Exhibit 1(a); and a copy of the affidavit of service is attached as Exhibit 1(b).

(b) The first-amended charge in Case 20-CA-33588 was filed by the Union on November 2, 2007, and a copy was served by first-class mail on Respondent on

November 5, 2007. A copy of the first-amended charge in Case 20-CA-33588 is attached as Exhibit 2(a); and a copy of the affidavit of service is attached as Exhibit 2(b).

(c) The charge in Case 20-CA-33780 was filed by the Union on January 23, 2008, and a copy was served by first-class mail on Respondent on January 24, 2008. A copy of the charge in Case 20-CA-33780 is attached as Exhibit 3(a); and a copy of the affidavit of service is attached as Exhibit 3(b).

(d) The first-amended charge in Case 20-CA-33780 was filed by the Union on February 7, 2008, and a copy was served by first-class mail on Respondent on February 7, 2008. A copy of the first-amended charge in Case 20-CA-33780 is attached as Exhibit 4(a); and a copy of the affidavit of service is attached as Exhibit 4(b).

(e) The second-amended charge in Case 20-CA-33780 was filed by the Union on February 13, 2008, and a copy was served by first-class mail on Respondent on February 14, 2008. A copy of the second-amended charge in Case 20-CA-33780 is attached as Exhibit 5(a); and a copy of the affidavit of service is attached as Exhibit 5(b).

(f) The third-amended charge in Case 20-CA-33780 was filed by the Union on March 20, 2008, and a copy was served by first-class mail on Respondent on March 21, 2008. A copy of the third-amended charge in Case 20-CA-33780 is attached as Exhibit 6(a); and a copy of the affidavit of service is attached as Exhibit 6(b).

2. On March 26, 2009, following completion of the investigation of the matters raised by the charges and amended charges listed above, the Regional Director for Region 20 issued a Consolidated Complaint in Cases 20-CA-33588 and Case 20-CA-33780, alleging that Respondent was violating Section 8(a)(1) and (5) of the Act by

failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees; and by making unilateral changes to their terms and conditions of employment. A copy of Consolidated Complaint is attached as Exhibit 7(a); and a copy of the affidavit of service is attached as Exhibit 7(b).

3. On April 21, 2008, a hearing was held before Administrative Law Judge Gerald A. Wacknov, who issued a decision and recommended order (the ALJD) on July 18, 2008, finding Respondent violated Section 8(a)(1) and (5) of the Act, by refusing to recognize and bargain with the Union and making changes to employees' terms and conditions of employment without bargaining with the Union. A copy of the ALJD is attached as Exhibit 8.

4. Respondent filed exceptions to the ALJD and a brief in support of exceptions. A copy of Respondent's exceptions dated August 14, 2008, and supporting brief dated the same date, is attached as Exhibit 9. Counsel for the General Counsel filed an answering brief to Respondent's exceptions. A copy of the answering brief dated August 29, 2008, is attached as Exhibit 10. Counsel for the General Counsel also filed limited exceptions to the ALJD and a supporting brief. A copy of Counsel for the General Counsel's limited exceptions and brief in support thereof, each dated August 15, 2008, are attached as Exhibits 11(a) and 11(b). Counsel for the General Counsel also filed a brief in support of the ALJD dated August 15, 2008. A copy of Counsel for the General Counsel's brief in support of the ALJD is attached as Exhibit 12. Respondent filed a reply brief to General Counsel's brief dated August 27, 2008. A copy of Respondent's reply brief is attached as Exhibit 13.

5. On June 8, 2009, Chairman Liebman and Member Schaumber decided to adopt the ALJD with a modified order (354 NLRB No. 33).

6. On June 17, 2010, the United States Supreme Court issued a decision in *New Process Steel, L.P., v. NLRB,* holding that all decisions issued by the two-member panel of Chairman Liebman and Member Schaumber from January 2008 to March 2010 were invalid, as the Board did not have the required three-member quorum. 560 U.S. ___ (2010). Among these decisions was the June 8, 2009, decision described above in paragraph 5.

7. On June 21, 2010, the Union filed a new charge in Case 20-CA-35111, alleging that Respondent, during the six months prior to the filing of Case 20-CA-35111, failed and refused to bargain in good faith with the Union and made unilateral changes to terms and conditions of employment. A copy of the charge in Case 20-CA-35111 is attached as Exhibit 14(a); and a copy of the affidavit of service is attached as Exhibit 14(b). The bad-faith allegation in the new charge is premised on a bargaining obligation, and there is no definitive Board Order establishing such a bargaining obligation. In order for the Region to determine the merits of the bad-faith bargaining allegation in case 20-CA-35111, it is necessary as a predicate that the Board to determine whether Respondent has a duty to bargain with the Union, as alleged by the complaint and found in the ALJD, in Cases 20-CA-33588 and 20-CA-33780. Further, in order for Region 20 to determine the merits of the new bad faith bargaining allegation, the Region must consider the totality of circumstances surrounding the current negotiations between the parties,

including Respondent's prior conduct as described in the ALJD in Cases 20-CA-33588 and 20-CA-33780.

8. In light of the Supreme Court's decision in *New Process Steel,* Counsel for the Acting General Counsel respectfully requests that the Board consider the above-referenced exhibits for purposes of issuing a Decision and Order in Cases 20-CA-33588 and 20-CA-33780 by a duly constituted Board.

WHEREFORE, Counsel for the Acting General Counsel respectfully requests that the Board grant this Motion to Issue Decision and Order on Previously Filed Exceptions and Briefs.

Dated at San Francisco, California this 29th day of September, 2010.

Respectfully submitted,

Micah Berul
Counsel for the Acting General Counsel
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103

FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A&C Healthcare Center and SEIU United Healthcare Workers-West	Cases20-CA-33588 20-CA-33780

DATE OF MAILING: September 29, 2010

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S MOTION TO ISSUE DECISION AND ORDER ON PREVIOUSLY FILED EXCEPTIONS AND BRIEFS

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

Mr. Robert M. Cassel
A &C Healthcare Center
60 Mirabel Ave.
Mill Valley, CA 94941
casselaw@aol.com

Bruce A. Harland, Esq.
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091
bharland@unioncounsel.net

Subscribed and sworn to before me **this 29th day of September, 2010**	DESIGNATED AGENT Susie Lowe **NATIONAL LABOR RELATIONS BOARD**

FORM NLRB-501 (11-88)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

NOT WRITE IN THIS SPACE	
Case	Date Filed
20-CA-33588	9/18/2007

INSTRUCTIONS
File an original together with four copies and a copy for each additional charged party in item 1 with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
A & C Healthcare Center

b. Number of workers employed

c. Address (street, city, state, ZIP code)
33 Mateo Avenue, Millbrae, CA 94030

d. Employer Representative
Robert M. Cassel
60 Mirabel Ave.
Mill Valley, CA 94941

e. Telephone No.
Contact: 415-383-0200
Fax No.
Contact: 415-383-7007

f. Type of Establishment (factory, mine, wholesaler, etc.)
Healthcare Center

g. Identify principal product or service
Health Care

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Within the last six months immediately preceding the filing of this charge, the above-named employer, by and through its agents, violated Sections 8(a)(1) and 8(a)(5) of the Act when it, as a successor employer, refused to recognized the Union and refused and failed, and continues to refuse and fail, to bargain in good faith with the Union.

RECEIVED
NLRB, REGION 20
2007 SEP 18 P 3:00
SAN FRANCISCO, CA

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
SEIU, United Health Care Workers - West

4a. Address (street and number, city, state and ZIP code)
560 Thomas L. Berkeley Way, Oakland, CA 94612

b. Telephone No.
510-251-1250
Fax No.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization.
Service Employees International Union

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Bruce A. Harland Title Attorney
Signature of representative or person making charge Bruce A. Harland

Address
1001 Marina Village Pkwy, #200
Alameda, CA 94501

Telephone No.
(510) 337-1001
(Fax)

Date
September 18, 2007

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001).

1/469732

Exh 1(a)

FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A & C Healthcare Center and SEIU United Health Care Workers - West	CASE 20-CA-33588 Board Agent: David B. Reeves **DATE OF MAILING: September 19, 2007**

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

Served by regular mail:

A & C Healthcare Center
33 Mateo Avenue
Millbrae CA 94030

A & C Healthcare Center
Attn: Mr. Robert M. Cassel
60 Mirabel Avenue
Mill Valley CA 94941

Subscribed and sworn to before me this **19th day of September, 2007**	DESIGNATED AGENT Caroline Anderson **NATIONAL LABOR RELATIONS BOARD**

Exh. 1(b)

FORM EXEMPT UNDER 44 U.S.C 3512

FORM NLRB-501 (9-07)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

FIRST AMENDED CHARGE AGAINST EMPLOYER

FILE COPY

DO NOT WRITE IN THIS SPACE

Case	Date Filed
20-CA-33588	11/2/2007

INSTRUCTIONS:
File an original together with four copies and a copy for each additional charged party named in item 1 with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
A & C Health Care Services, Inc.

b. Number of workers employed
about 88

c. Address (Street, city, state, and ZIP code)
33 Mateo Avenue
Millbrae CA 94030-

d. Employer Representative
Robert M. Cassel

e. Telephone No.
(415)383-0200
Fax No.
(415)383-7007

f. Type of Establishment (factory, mine, wholesaler, etc.)
Nursing Home

g. Identify principal product or service
Health Care Services for the Aged

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (3) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Within the last six months immediately preceding the filing of this charge, the above-named Employer, by and through its agents, violated Sections 8(a)(1) and 8(a)(5) of the Act when it, as a successor employer, and/or a joint employer with Pleasant Care Corporation (Pleasant Care), of the employees refused to recognize the below-named Union and refused and failed, and continues to refuse and fail, to bargain in good faith with the Union, or to apply the terms and conditions of the collective-bargaining agreement between the Union and Pleasant Care (the CBA), as a perfectly clear successor employer.

On about August 27, 2007, the Employer violated Sections 8(a)(1) and 8(a)(3) of the Act by terminating Union Steward Linda Wright because of her status as a Union Steward and her activity, membership in, and support for the Union.

The Union hereby requests injunctive relief under Section 10(j) that would order the Employer immediately to recognize and bargain with the Union, reinstate Wright, and apply the terms and conditions of the CBA.

RECEIVED
NLRB, REGION 20
2007 NOV -2 A 11:
SAN FRANCISCO, CA

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
SEIU, United Health Care Workers - West

4a. Address (Street and number, city, state, and ZIP code)
560 Thomas L. Berkley Way
Oakland CA 94612-

4b. Telephone No.
(510)251-1250
Fax No.
(510)763-2680

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) Service Employees International Union, Change to Win

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

X By Bruce A. Harland Bruce A. Harland Esq. Attorney
(signature of representative or person making charge) (Print/type name and title or office, if any)

Address 1001 Marina Village Parkway, #200
Alameda CA 94501-

(fax) (510)337-1023
(510)337-1001
(Telephone No.)

Nov. 2, 2007
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT 20-2007-2078

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is

Exh. 2(a)

FORM NLRB-877
(4-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A & C Healthcare Services, Inc. and SEIU, United Health Care Workers - West	Case(s) 20-CA-33588 Board Agent: Micah Berul

Date of Mailing: **November 5, 2007**

AFFIDAVIT OF SERVICE OF FIRST-AMENDED CHARGE AGAINST EMPLOYER, I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document*(s)* by post-paid first class mail upon the following persons, addressed to them at the following addresses:

A & C Health Care Services, Inc.
Attn: Mr. Robert M. Cassel
33 Mateo Avenue
Millbrae CA 94030

A & C Healthcare Center
Attn: Mr. Robert M. Cassel
60 Mirabel Avenue
Mill Valley CA 94941

Subscribed and sworn to before me **this 5th day of November, 2006**	DESIGNATED AGENT Caroline Anderson **NATIONAL LABOR RELATIONS BOARD**

©U.S.GPO:1
988-0-202-
185/72858

Exh. 2(b)

FORM NLRB-501 (11-88)

UNITED STATES AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
20-CA-33780	1/23/2008

INSTRUCTIONS
File an original together with four copies and a copy for each additional charged party in item 1 with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
A & C Healthcare Center

b. Number of workers employed

c. Address (street, city, state, ZIP code)
33 Mateo Avenue, Millbrae, CA 94030

d. Employer Representative
Robert M. Cassel
60 Mirabel Ave.
Mill Valley, CA 94941

e. Telephone No.
Contact: 415-383-0200
Fax No.
Contact: 415-383-7007

f. Type of Establishment (factory, mine, wholesaler, etc.)
Healthcare Center

g. Identify principal product or service
Health Care

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1), (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Within the last six months immediately preceding the filing of this charge, the above-named employer, by and through its agents, violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act when it intimidated, threatened and coerced workers who were engaged in protected, concerted Union activity, and by unilaterally changing terms and conditions of employment.

RECEIVED
NLRB, REGION 20
2008 JAN 23 P 3:31
SAN FRANCISCO, CA

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
SEIU, United Health Care Workers - West

4a. Address (street and number, city, state and ZIP code)
560 Thomas L. Berkeley Way, Oakland, CA 94612

b. Telephone No.
510-251-1250
Fax No.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization.
Service Employees International Union

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Bruce A. Harland Title Attorney

Signature of representative or person making charge Bruce A. Harland

Address
1001 Marina Village Pkwy, #200
Alameda, CA 94501

Telephone No.
(510) 337-1001
(Fax)
(510) 337-1023

Date
January 23, 2008

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

1/481690

Exh. 3(a)

FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A & C Healthcare Center and SEIU, United Health Care Workers - West	CASE 20-CA-33780 **DATE OF MAILING:** January 24, 2008

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

Served by regular mail:

A & C Health Care Services, Inc.
33 Mateo Avenue
Millbrae, CA 94030

Subscribed and sworn to before me this **24th day of January, 2008**	DESIGNATED AGENT Susan A Markmon **NATIONAL LABOR RELATIONS BOARD**

Exh. 3(b)

FORM EXEMPT UNDER 44 U.S.C 3512

FORM NLRB-501 (9-07)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

FIRST AMENDED CHARGE AGAINST EMPLOYER

FILE COPY

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
20-CA-33780	2/7/2008

INSTRUCTIONS:
File an original together with four copies and a copy for each additional charged party named in item 1 with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
A & C Healthcare Center

b. Number of workers employed
approx 87

c. Address *(Street, city, state, and ZIP code)*
33 Mateo Avenue
Millbrae CA 94030-

d. Employer Representative
Robert M. Cassel

e. Telephone No.
(415)383-0200
Fax No.
(415)383-7007

f. Type of Establishment *(factory, mine, wholesaler, etc.)*
Nursing Home

g. Identify principal product or service
Health services

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (3) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Within the last six months immediately preceding the filing of this charge, the above named Employer, by and through its agents, violated Sections 8(a)(1), (3) and (5) of the Act when it unilaterally changed the scheduling procedure; discrimatorily suspended an employee; refused to allow the Union's Shop Steward to remain in a meeting with an employee who reasonably believed that discipline could be issued (and ultimately did result in discipline); by disciplining the Union's Shop Steward for engaging in representational activities during this meeting; and by withdrawing recognition from the Union during a meeting with the Union.

RECEIVED
NLRB REGION 20
2008 FEB -7 P 1:01
SAN FRANCISCO, CA

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
SEIU, United Healthcare Workers - West

4a. Address *(Street and number, city, state, and ZIP code)*
560 Thomas L. Berkley Way
Oakland CA 94612-

4b. Telephone No.
(510)251-1250
Fax No.
( ) -

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)* Service Employees International Union

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Mario Santos Mario Santos Union Representative/Organizer
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 560 Thomas L. Berkley Way
Oakland CA 94612-

(fax) ( ) -
(510)251-1250
(Telephone No.)

2/7/08
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT 20-2008-0224

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exh. 4(a)

FORM NLRB-877
(4-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A & C Healthcare Center and SEIU United Health Care Workers - West	Case(s) 20-CA-33780 Board Agent: Micah Berul

Date of Mailing: **February 7, 2008**

AFFIDAVIT OF SERVICE OF FIRST-AMENDED CHARGE AGAINST EMPLOYER, I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid first class mail upon the following persons, addressed to them at the following addresses:

A & C Health Care Services, Inc.
Attn: Robert M. Cassel, Esq.
33 Mateo Avenue
Millbrae CA 94030

Subscribed and sworn to before me **This 7th day of February, 2008.**	DESIGNATED AGENT Caroline Barker Caroline Barker **NATIONAL LABOR RELATIONS BOARD**

©U.S.GPO:1
988-0-202-
185/72858

Exh. 4(b)

FORM EXEMPT UNDER 44 U.S.C. 3512

FORM NLRB-501 (9-07)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
SECOND AMENDED CHARGE AGAINST EMPLOYER

FILE COPY

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
20-CA-33780	2/13/2008

INSTRUCTIONS:
File an original together with four copies and a copy for each additional charged party named in item 1 with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer A & C Healthcare Center		b. Number of workers employed about 87
c. Address *(Street, city, state, and ZIP code)* 33 Mateo Avenue Millbrae CA 94030-	d. Employer Representative Robert M. Cassel	e. Telephone No. (415)383-0200 Fax No. (415)383-7007
f. Type of Establishment *(factory, mine, wholesaler, etc.)* Nursing Home	g. Identify principal product or service Health services	

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (3) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Within the last six months immediately preceding the filing of this charge, the above named Employer, by and through its agents, violated Sections 8(a)(1), (3) and (5) of the Act when it unilaterally changed the scheduling procedure and discriminatorily suspended an employee; refused to allow the Union's Shop Steward to remain in a meeting with an employee who reasonably believed that discipline could be issued (and ultimately did result in discipline); by disciplining the Union's Shop Steward for engaging in representational activities during this meeting; and by withdrawing recognition from the Union during a meeting with the Union.

The Employer also on about January 15, 2008, informed the Union at a bargaining session that it was setting new initial terms and conditions of employment even though it had already hired employees as of August 8, 2007, on a probationary basis, and on November 8, 2007, on a permanent basis without telling them it would set new initial terms and conditions of their employment; and the Employer has within the last six months preceding the filing of this charge unilaterally implemented new terms and conditions concerning, including but not limited to: union security; wages; union access to the facility; union representation in disciplinary meetings; dues checkoff; hiring; seniority; scheduling; hours; paid vacations; paid holidays; grievance and arbitration procedure; health plan; pension plan; sick leave; and the modified duty clause of predecessor contract.

3. Full name of party filing charge *(If labor organization, give full name, including local name and number)*
SEIU, United Healthcare Workers - West

4a. Address *(Street and number, city, state, and ZIP code)* 560 Thomas L Berkley Way Oakland CA 94612-	4b. Telephone No. (510)251-1250 Fax No. (510)763-2680

RECEIVED NLRB REGION 2008 FEB 13 P 12:00 SAN FR

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)* Service Employees International Union

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

X By Mario Santos Mario Santos — Union Representative/Organizer
(signature of representative or person making charge) — *(Print/type name and title or office, if any)*

Address 560 Thomas L. Berkley Way, Oakland CA 94612- — (fax) ( ) - (510)251-1250 *(Telephone No.)* — 2/13/08 *(date)* X

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT 20-2008-0224 Exh. 5(a)

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is

FORM NLRB-877
(4-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A & C Healthcare Center and SEIU United Health Care Workers - West	Case(s) 20-CA-33780 Board Agent: Micah Berul

Date of Mailing: **February 14, 2008**

AFFIDAVIT OF SERVICE OF SECOND-AMENDED CHARGE AGAINST EMPLOYER, I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid first class mail upon the following persons, addressed to them at the following addresses:

A & C Health Care Services, Inc.
Attn: Robert M. Cassel, Esq.
33 Mateo Avenue
Millbrae CA 94030

Cassel Law Office
Attn: Robert M. Cassel, Esq.
60 Mirabel Avenue
Mill Valley CA 94941

Subscribed and sworn to before me **This 14th day of February, 2008.**	DESIGNATED AGENT Caroline Barker Caroline Barker **NATIONAL LABOR RELATIONS BOARD**

U.S.GPO:1
988-0-202-
185/72858

Exh. 5(b)

FORM NLRB-501 (9-07)

UNITED STA OF AMERICA
NATIONAL LABOR RELATIONS BOARD

THIRD AMENDED CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 20-CA-33780	Date Filed 3/20/2008

INSTRUCTIONS:
File an original together with four copies and a copy for each additional charged party named in item 1 with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
A & C Healthcare Services, Inc.

b. Number of workers employed
about 87

c. Address (Street, city, state, and ZIP code)
33 Mateo Avenue
Millbrae CA 94030-

d. Employer Representative
Robert M. Cassel

e. Telephone No.
(415)383-0200
Fax No.
(415)383-7007

f. Type of Establishment (factory, mine, wholesaler, etc.)
Nursing Home

g. Identify principal product or service
Health services

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (3) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Within the last six months immediately preceding the filing of this charge, the above named Employer, by and through its agents, violated Sections 8(a)(1), (3) and (5) of the Act when it unilaterally changed the scheduling procedure and discriminatorily suspended an employee; refused to allow the Union's Shop Steward to remain in a meeting with an employee who reasonably believed that discipline could be issued (and ultimately did result in discipline); by disciplining the Union's Shop Steward for engaging in representational activities during this meeting; and by withdrawing recognition from the Union during a meeting with the Union.

The Employer also on about January 15, 2008, implemented its Employee Handbook and informed the Union at a bargaining session that it was setting new initial terms and conditions of employment even though it had already hired employees as of August 8, 2007, on a probationary basis, and on November 8, 2007, on a permanent basis without telling them it would set new initial terms and conditions of their employment; and the Employer has within the last six months preceding the filing of this charge unilaterally implemented new terms and conditions concerning, including but not limited to: union security; wages; union access to the facility; union representation in disciplinary meetings; dues checkoff; hiring; seniority; scheduling; hours; paid vacations; paid holidays; grievance and arbitration procedure; health plan; pension plan; sick leave; modified duties; at-will status; employer right to revise terms and conditions; disability accommodation; anti-harassment policy; discipline; resident dignity; overtime; rest and meal periods; physical examinations and health requirements; leaves of absence; employee evaluations; attendance; bonuses; and dress code.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
SEIU, United Healthcare Workers - West

4a. Address (Street and number, city, state, and ZIP code)
560 Thomas L. Berkley Way
Oakland CA 94612-

4b. Telephone No.
(510)251-1250
Fax No.
(510)763-2680

RECEIVED NLRB REGION 20 2008 MAR 20 A 10:06 AN FRANCISCO, CA

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) Service Employees International Union

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

X By Mario Santos Mario Santos
(signature of representative or person making charge)

Union Representative/Organizer
(Print/type name and title or office, if any)

Address 560 Thomas L. Berkley Way
Oakland CA 94612-

(fax) ( ) -
(510)251-1250
(Telephone No.)

3-19-08 X
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT 20-2008-0224

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is

TOTAL P.02

Exh. 6(a)

FORM NLRB-877
(4-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A & C Healthcare Services Inc. and SEIU United Health Care Workers - West	Case(s) 20-CA-33780 Board Agent: Micah Berul

Date of Mailing: **March 21, 2008**

AFFIDAVIT OF SERVICE OF THIRD-AMENDED CHARGE AGAINST EMPLOYER, I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid first class mail upon the following persons, addressed to them at the following addresses:

Robert M. Cassel, Esq.
A & C Health Care Services Inc.
33 Mateo Avenue
Millbrae CA 94030

Subscribed and sworn to before me **This 21st day of March, 2008.**	DESIGNATED AGENT Caroline Barker Caroline Barker **NATIONAL LABOR RELATIONS BOARD**

©U.S.GPO:1
988-0-202-
185/72858

Exh. 6(b)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

A & C HEALTHCARE
SERVICES, INC.

and

Cases 20-CA-33588
20-CA-33780

SEIU, UNITED HEALTHCARE
WORKERS – WEST

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

SEIU, United Healthcare Workers - West, herein called the Union, has charged in Cases 20-CA-33588 and 20-CA-33780 that A & C Healthcare Services, Inc., herein called Respondent, has been engaging in unfair labor practices affecting commerce as set forth in the National Labor Relations Act, 29 U.S.C., Sec. 151, et seq., herein called the Act. Based thereon, and in order to avoid unnecessary costs or delay, the General Counsel, by the undersigned, pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, ORDERS that these cases are consolidated.

These cases having been consolidated, the General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, issues this Order Consolidating Cases, Consolidated Complaint and Notice of Hearing and alleges as follows:

1. (a) The charge in Case 20-CA-33588 was filed by the Union on September 18, 2007, and a copy was served by first-class mail on Respondent on September 19, 2007.

Exh. 7(a)

(b) The first-amended charge in Case 20-CA-33588 was filed by the Union on November 2, 2007, and a copy was served by first-class mail on Respondent on November 5, 2007.

(c) The charge in Case 20-CA-33780 was filed by the Union on January 23, 2008, and a copy was served by first-class mail on Respondent on January 24, 2008.

(d) The first-amended charge in Case 20-CA-33780 was filed by the Union on February 7, 2008, and a copy was served by first-class mail on Respondent on February 7, 2008.

(e) The second-amended charge in Case 20-CA-33780 was filed by the Union on February 13, 2008, and a copy was served by first-class mail on Respondent on February 14, 2008.

(f) The third-amended charge in Case 20-CA-33780 was filed by the Union on March 20, 2008, and a copy was served by first-class mail on Respondent on March 21, 2008.

2. (a) At all material times, Respondent, a California corporation with various nursing home facilities throughout the State of California, including a facility located at 33 Mateo Avenue in Millbrae, California, has been engaged in the business of providing residential nursing care to patients.

(b) During the 12-month period ending November 29, 2007, Respondent, in conducting its business operations described above in subparagraph 2(a), derived gross revenues in excess of $100,000.

(c) During the period of time described above in subparagraph 2(b), Respondent, in conducting its business operations described above in subparagraph 2(a), purchased and received at its California facilities, goods and materials valued in excess of $5,000, which originated from points located outside the State of California.

3. (a) In about July 2007, Respondent purchased a nursing home located at 33 Mateo Avenue in Millbrae, California, herein called the Pleasant Care facility, from Pleasant Care Corporation, herein called Pleasant Care, pursuant to an Order of the Bankruptcy Court, Central District of California (Los Angeles Division), in which Respondent's bid for the nursing home was deemed the winning bid by the Bankruptcy Court.

(b) About August 8, 2007, Respondent assumed operation of the Pleasant Care facility, in circumstances in which it was perfectly clear that Respondent planned to retain all of the employees in the Unit, and since then Respondent has continued to operate the business of Pleasant Care in basically unchanged form and has employed as a majority of its employees individuals who were previously employed by Pleasant Care.

(c) Based on the operations described above in subparagraph 3(b), Respondent has continued the employing entity and since about August 8, 2007, has been a successor to Pleasant Care.

4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), (7) and has been a health care institution within the meaning of Section 2(14) of the Act.

5. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

6. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Amparo Ragudo	-	Corporate Officer
Carlos Ragudo, Jr.	-	Corporate Officer

Carmen Preston-Foo - Administrator

7. (a) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees performing work covered by the collective-bargaining agreement between Pleasant Care and the Union effective for the period October 1, 2006, through June 15, 2008.

(b) From about October 1, 2006, until about August 8, 2007, the Union was the exclusive collective-bargaining representative of the Unit employed by Pleasant Care, and during that period of time, the Union was recognized as the representative by Pleasant Care. This recognition was embodied in a collective-bargaining agreement effective by its terms for the period October 1, 2006 through June 15, 2008.

(c) Since about August 8, 2007, based on the facts described above in paragraph 3 and subparagraphs 7(a) and 7(b), the Union has been the designated exclusive collective-bargaining representative of the Unit.

(d) From about October 1, 2006, and at all material times, until about August 8, 2007, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the Unit employed by Pleasant Care.

(e) At all material times since about August 8, 2007, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

8. (a) About September 14, 2007, the Union requested that Respondent recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(b) From about August 8, 2007, until about December 2007, Respondent failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

9. (a) About December 2007, Respondent recognized the Union as the exclusive collective-bargaining representative of the Unit.

(b) About January 30, 2008, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the Unit.

(c) From about January 30, 2008 to February 1, 2008, Respondent failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

10. (a) Since about August 8, 2007, and continuing to date, Respondent has:

(i) failed to provide scheduled wage increases to Unit employees; and

(ii) ceased to recognize the seniority of Unit employees with respect to the assignment of schedules, overtime, and vacations.

(b) On an unknown date in about early-September 2007, Respondent terminated the medical and dental insurance of Unit employees and ceased making contributions to Unit employees' pension funds.

(c) About September 3, 2007, Respondent reduced from nine to seven the number of paid holidays for Unit employees.

(d) Since about September 14, 2007, and continuing to date, Respondent has:

(i) refused to process disputes concerning Unit employees' wages, hours and other terms and conditions of employment through the grievance procedure; and

(ii) refused to allow union representatives access to Respondent's Pleasant Care facility for representational purposes.

(e) About November 8, 2007, Respondent:

(i) reduced from twelve to six the number of paid sick days for Unit employees; and

(ii) eliminated accrued vacation days for Unit employees.

(f) Commencing on an unknown date in about late-December 2007, and continuing to date, Respondent:

(i) ceased providing two weeks notice to Unit employees of changes in their work schedules; and

(ii) ceased giving modified duties to Unit employees who temporarily are unable to perform full duties.

(g) Commencing in about early January 2008, Respondent:

(i) reduced the starting wages of certified nursing assistants to $11 per hour; and

(ii) has hired new employees without prior notice to the Union for the purpose of referring applicants who may be members of the Union.

(h) About January 7, 2008, Respondent suspended its employee Sandra Mejia Batlle because of the changes it made to her schedule without two weeks of notice of the change to her schedule, as described in subparagraph 10(f)(i).

(i) About January 15, 2008, Respondent implemented an Employee Handbook that applies to Unit employees, which, *inter alia*:

(i) establishes new wage rates and bonuses;

(ii) classifies Unit employees as at-will employees;

(iii) provides Respondent has right to unilaterally revise wages, hours and other terms and conditions of employment;

(iv) establishes new disciplinary procedures;

(v) establishes new requirements for physical examinations and other health requirements;

(vi) creates new meal and rest periods;

(vii) establishes new hours of work and overtime policies;

(viii) establishes new accommodations for disabled employees;

(ix) establishes a new anti-harassment policy;

(x) establishes a new employee dress code;

(xi) establishes new attendance rules;

(xii) establishes new procedures for evaluating the performance of Unit employees; and

(xii) establishes a new leave of absence and vacation policies.

11. The subjects set forth in paragraph 10 relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

12. Respondent engaged in the conduct described above in paragraphs 10 and 11, without prior notice to the Union, and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

13. By the conduct described above in subparagraph 8(b), 9(b) and 9(c) and paragraphs 10 and 11, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

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

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in subparagraphs 10(f)(i), 10(g)(i), and 10(h), the General Counsel seeks a remedial order requiring that Respondent pay quarterly compound interest on any monetary award.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on the 21st day of April, 2008, **at 9:00 a.m.,** and on consecutive days thereafter until concluded, a hearing will be conducted in the **E.V.S. Robbins Courtroom 306 (third floor), 901 Market Street, San Francisco, California,** before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this consolidated complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be **received by this office on or before April 9, 2008, or postmarked on or before April 8, 2008.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties. An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at http://www.nlrb.gov, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. A failure timely to file the answer will not be excused on the basis that the transmission could not be accomplished because the

Agency's website was off-line or unavailable for some other reason. When an answer is filed electronically, an original and four paper copies must be sent to this office so that it is received no later than three business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

DATED AT San Francisco, California, this 26th day of March 2008.

Joseph P. Norelli, Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

Complaints\drafts\CPT.20-CA-33588 et al.RevisedComplaint.doc

FORM NLRB-877
(4-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A&C HEALTHCARE SERVICES, INC.

and

SEIU, UNITED HEALTHCARE WORKERS - WEST

Case Nos. 20-CA-33588
20-CA-33780

DATE OF MAILING March 26, 2008

AFFIDAVIT OF SERVICE OF ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document*(s)* by post-paid certified and regular mail upon the following persons, addressed to them at the following addresses:

VIA CERTIFIED MAIL

Robert M. Cassel, Esq.
A&C Healthcare Services, Inc.
33 Mateo Avenue
Millbrae, CA 94030
Phone: 415-383-0200
Fax: 415-383-7007
(Cert No. 7005 2570 0001 6710 6890)

VIA REGULAR MAIL

Robert M. Cassel, Esq.
Cassell Law Office
60 Mirabel Avenue
Mill Valley, CA 94941
Phone: 415-383-0200
Fax: 415-383-7007

Mr. Mario Santos
SEIU UHW-West
560 Thomas L. Berkley Way
Oakland, CA 94612
Phone: 415-503-5724

Bruce A. Harland, Esq.
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091
Phone: 510-337-1001
Fax: 510-3371023

Subscribed and sworn to before me on	DESIGNATED AGENT
March 26, 2008	Susie Lowe **NATIONAL LABOR RELATIONS BOARD**

Exh. 7(b)

JD(SF)–27-08
Millbrae, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

A & C HEALTHCARE SERVICES, INC.

and

Case 20-CA-33588
20-CA-33780

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST

Micah Berul, Esq., San Francisco, CA, for the General Counsel
Robert M. Cassel, Esq., Mill Valley, CA, for the Respondent
Bruce Harland, Esq., of Weinberg, Roger & Rosenfeld, Alameda, CA, for the Union

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in San Francisco, California on April 21, 2008. The charges were filed by Service Employees International Union, United Healthcare Workers-West (Union) on September 18, 2007 and January 23, 2008, respectively. Thereafter, on March 26, 2008, the Regional Director for Region 20 of the National Labor Relations Board (Board) issued a consolidated complaint and notice of hearing alleging violations by A & C Healthcare Services, Inc. (Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel) and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted,[1] I make the following:

---

[1] General Counsel's post-hearing motion to strike portions of Respondent's brief is denied, however matters discussed in the brief that are not part of the record have been disregarded. Respondent's post-hearing motion to strike references to certain cited cases in General Counsel's brief is denied.

Exh. 8

Findings of Fact

I. Jurisdiction

The Respondent, a California corporation with two nursing home facilities in the State of California, including the facility herein located in Millbrae, California, is engaged in the business of providing residential nursing care to patients. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of $100,000, and annually purchases and receives at its California facilities goods and services valued in excess of $5,000 which originated outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. The Labor Organization Involved

It is admitted, and I find, that the Union is and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act,

III. Alleged Unfair Labor Practices

A. Issues

The principal issue in this proceeding is whether the Respondent, as a successor employer, unilaterally changed employees' pre-existing terms and conditions of employment without bargaining with the Union, in violation of Section 8(a) (5) and (1) of the Act.

B. Facts

The facts in this proceeding, which were largely stipulated, are not in material dispute. In July, 2007,[2] The Respondent, a licensed nursing home owner/operator, purchased the predecessor's nursing home facility as the low bidder in a bankruptcy auction. The Order of the Bankruptcy Court, Central District of California (Los Angeles Division), is the underlying document setting forth the parameters of the transaction and the respective obligations of the buyer (Respondent) and seller (Predecessor). The Bankruptcy Court retained jurisdiction of the entire purchase/transfer process until such time as the Respondent acquired the proper State license and thereby replaced the predecessor as the legal owner/operator of the facility. The sequence by which the Respondent would first become the interim operator of the facility under the predecessor's California State operating license, and subsequently would become the legal owner/operator of the facility upon obtaining its own operating license, is set forth, *inter alia*, in a separate document between the Respondent and predecessor entitled Operations Transfer Agreement (OTA), also subject to the approval of the Bankruptcy Court.

The Respondent assumed interim operation of the facility on August 8, on which date the Respondent's principals personally informed all the individuals employed by the predecessor, including managers and supervisors, that they were immediately being hired by the Respondent on a 90-day probationary basis. Further, the Respondent told the non-

[2] All dates or time periods hereinafter are within 2007 unless otherwise noted.

supervisory employees that they would continue to receive their regular pay but would not receive health or other benefits. This announcement effectively modified the employees' then-current wages, hours and benefits, which were established and set forth in a collective bargaining agreement between the Union and predecessor, extending from October 1, 2006 until June 15, 2008. It was stipulated that the Respondent did not state to the employees it was setting "initial terms and conditions of employment."

Upon assuming operations of the facility, the Respondent continued to provide residential nursing care to patients at the facility in essentially unchanged form from the predecessors' operations, and with the same employee complement.

On November 8, coinciding with the end of the 90-day probationary period, the Respondent informed all but six of the 85 non-supervisory/managerial employees who had been previously employed at the facility by the predecessor, that they had passed their probationary period and were eligible to become, and did become, permanent employees.

Also on November 8, the Respondent announced and unilaterally established terms and conditions of employment covering wages, holidays, health insurance, overtime, sick leave and no-call/no-show policy, to all assembled workers who had passed probation and wished to be employed in permanent regular positions.

The Complaint alleges and the Respondent admits that on about September 14, during the probationary period and prior to the aforementioned November 8 announcement of terms and conditions of employment, the Union requested that Respondent recognize and bargain collectively with the Union as the collective-bargaining representative of the unit employees. The Respondent apparently did not reply to this request for several months during which period its license application was pending. Then, on Monday, December 3, it advised the Union by letter that it would agree to recognize the Union conditionally, provided that:

> 1) Respondent had been licensed by the Department of Health and thereby able (sic) to close its purchase of the Facility; 2) employ persons directly as a healthcare employer; 3) and a majority of employees currently employed were previously bargaining unit employees of the former employer.

Further, the Respondent offered, subject to the above conditions, to meet and bargain with the Union on January 3, 2008.

Prior to January 3, 2008, the Respondent had been granted the appropriate license by the Department of Health, and its purchase of the facility had been consummated. On January 3, 2008, the Respondent recognized the Union as the exclusive collective- bargaining representative of the Unit employees employed by the Respondent. On about January 15, 2008, the Respondent issued an Employee Handbook which unilaterally establishes wages, hours and working conditions that are apparently different from and/or in addition to those previously announced to the employees on November 8, *supra*. The parties held bargaining sessions on January 15, January 30, March 7, and April 4, 2008.

C. Analysis and Conclusions

The Complaint alleges and the General Counsel and Union argue that the Union became a *Burns*[3] "perfectly clear" successor on August 8, when it hired all the unit employees employed by the predecessor on a probationary basis without simultaneously setting their initial, i.e. non-probationary, terms and conditions of employment upon becoming permanent employees; therefore, although *Burns* makes it clear that the Respondent, as a successor employer, assumes no contractual relationship with the Union, it is nevertheless obligated to negotiate with the Union regarding initial terms and conditions of employment that differ from those previously enjoyed by the employees, as set forth in the collective bargaining agreement.

The Respondent maintains that this case is unique and that all prior cases under *Burns* are readily distinguishable because they do not arise in a bankruptcy setting. First, it is argued that the Bankruptcy Court's Order specifically addresses the issue of successorship, and precludes the finding that the Respondent is a successor under the Act. Thus, the Bankruptcy Court's Order states, at paragraph 8:

> Except for unexpired leases and executory contracts to be assumed by the Debtors and assigned to the buyer [Respondent], the buyers shall not be assuming any of the Debtors' [predecessor's] liabilities. The buyers are not successors of the Debtors, and the buyers shall have no successor liability as a result of purchasing any of the Debtors' facilities.[4]

The Respondent's brief is silent regarding the meaning and intent of this language, or its significance and implications vis-à-vis a successor employer's obligations under the National Labor Relations Act. The quoted language simply appears to immunize the Respondent from the debtor's contract liability unless the Respondent specifically becomes a party to the contract, and further, appears to immunize the Respondent from the debtor's tort liability attendant to lawsuits that may have been brought or could be brought against the debtor. This language appears to have no bearing whatsoever regarding the Respondent's relationship to the Union, which, as noted in *Burns*, is not a contractual relationship. Accordingly, as the Respondent has not demonstrated that the language is pertinent to the issues herein, I find no merit to the Respondent's argument.

Next, the Respondent maintains that its successorship status did not begin when it took over the operation of the facility on August 8, because it was merely the interim operator until such time as it obtained its own operating license. In *Golden Cross Health Care of Fresno*, 314 NLRB 1201, 1205-6 (1994), the Board found, under similar circumstances, that successorship status commenced when the employer began operating the facility; thus, although legal ownership of the facility had not yet been transferred and the employer's operating license had not yet been granted, the record evidence supported the finding of a "respectable certainty" that these eventualities would, in fact, occur. The Respondent has not demonstrated that obtaining

---

[3] *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

[4] The Court's Order deals with multiple debtor entities and multiple buyer entities; hence the plural designations.

the new operating license or completing the transfer of ownership of the property was in jeopardy or problematical or less than a "respectable certainty" at the time it became the interim operator of the facility.[5] Therefore, I find this argument of the Respondent to be without merit.

Assuming *arguendo* that it became a successor on August 8, the Respondent contends that is not a *Burns* successor but rather a *Spruce Up*[6] successor because on that date it did in fact establish initial terms and conditions of employment by hiring the predecessor's employees at their current wage rate, but as probationary employees with no benefits. Thus, the Respondent states in its brief:

> There is no evidence herein R [Respondent] had failed to clearly offer its initial terms and conditions on August 8th. The only employment being offered on that date to all R employees (including supervisors and management staff) pursuant to the OTA was probationary employment for a 90 day period which if successful would provide eligibility for permanent employment on wages and benefits to be announced on or before the expiration of the 90 day period.

In *Windsor Health Care* the Administrative Law Judge essentially subscribed to a similar argument, finding the successor employer, upon hiring the predecessor's employees as "temporary employees," and later unilaterally setting initial terms and conditions of employment, was not a *Burns* successor because:

> As the Board noted in *Spruce Up*:
>
> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by [*Burns*].
>
> When the possibility that the predecessor's employees may not enter into an employment relationship with the new employer is a real one, the Board does not consider it "perfectly clear" that the new employer "plans to retain all of the employees in the unit." Ibid.[7] Here, Respondent informed the Candlewood applicants that they would be employed only in a temporary or probationary status for 90 days. That should have signaled to the applicants that terms and conditions of employment with Respondent were not going to be identical with those of its predecessor, and they could have declined employment upon

---

[5] The fact that the Respondent had been previously licensed to operate and was operating another nursing home in the State of California, and, in addition, Sections 16 and 17 of the Court's Order that provide for forfeiture of the Respondent's deposit and purchase price if the Respondent fails to obtain the appropriate license or to consummate the transaction in the manner required, are strong indicators of the Respondent's certitude that the license would be granted and the transaction consummated.

[6] *Spruce Up Corp.*, 209 NLRB 194 (1974).

[7] *Spruce Up,* supra.

> learning they would have to complete a probationary period. Thus,... Respondent did not violate the Act by setting initial terms of employment. Contrast *Elf Atochem North America, Inc.*, 339 NLRB 796 (2003) (Employer a "perfectly clear" successor when it informed employees it would provide them employment, recognize their seniority, and grant equivalent salaries and benefits.)

However the Board disagreed with this rationale and came to the opposite conclusion, as follows:

> Turning to the instant case, the judge, applying *Spruce Up*, found that the *Burns* "perfectly clear" exception does not apply because the Respondent informed Candlewood applicants that they would be employed only in a temporary or probationary status. This, the judge reasoned, "should have signaled" to them that their terms and conditions of employment would change, thus raising the possibility that some might decline employment and rendering the "perfectly clear" exception inapplicable.
>
> We disagree. Although the Respondent did subject former Candlewood employees to what amounted to a probationary period, we nonetheless find, applying *Spruce Up*, that the *Burns* "perfectly clear" exception does apply because the Respondent "failed to clearly announce its intent to establish a new set of conditions prior to inviting former [Candlewood] employees to accept employment."[footnote omitted.] 209 NLRB at 195.

Thus the Board in *Windsor* determined that simply hiring employees on a probationary basis, without clearly advising them of an intent to establish a new set of conditions of employment, is insufficient to create the inference that employees might decline employment; therefore, for purposes of determining union majority, their probationary status is immaterial.

It seems unclear whether the Board in *Windsor* has directly addressed the precise issue presented here by the Respondent, namely, whether an offer of 90-day probationary employment, *during which the employees will be receiving no health insurance or continuation of other contractual benefits previously enjoyed,* constitutes an announcement and establishment of new terms and conditions of employment within the meaning and rationale of *Spruce Up*.[8] In other words, is there a real possibility that the Respondent's changes to the employees' current conditions of employment are sufficient to cause them to reject the offer of *probationary* employment and seek employment elsewhere? If so, then, under *Spruce Up*, the Union's majority status remains uncertain until sometime after August 8.[9]

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[8] Thus in *Windsor,* it appears the employees were initially told only that they would be hired as "temporary employees" and were later advised that they would no longer have their previous benefits during their probationary period.

[9] In this regard, the Respondent would apparently argue that in a bankruptcy setting the employees could have reasonably anticipated benefits inferior to what they had received under the predecessor's tenure, and such lowered expectations would cause them to decline the probationary offer of employment and/or seek other employment in the interim. However it seems equally probable that, as experienced long-time employees who were familiar with the patients and their needs, the Respondent would make every effort to retain their services by offering them substantially the same benefits they previously enjoyed at the expiration of the probationary period. Accordingly, the one postulate is not more probable that the other.

The Respondent assumes that it's bargaining obligation attached only after the 90-day probationary period had expired on November 8, at which time it retained a majority of the former unit employees; thus, during the probationary period the employees' status as permanent employees was merely tentative. However, as noted, the Board in *Windsor* has found, in effect, that the status of former permanent employees, who are initially hired by a successor employer as temporary or probationary employees, is not changed for purposes of determining union majority.

The Respondent maintains that because it purchased the predecessor through a bankruptcy auction, it's principles had only limited opportunity to learn about the facility prior to the purchase, and had been unable to perform a thorough "due diligence" investigation customarily attendant to the purchase of an ongoing business enterprise. Further, the Respondent maintains it had no access to the facility or information about the employees until the Respondent's principals walked through the door on August 8, and hired the employees sight unseen, not knowing the condition of the facility, the competence and qualifications of the employees or of the administrative/ supervisory staff, or the physical needs of the patients. Accordingly, the Respondent suggests that under these circumstances, particularly because it had been unable to pre-evaluate the qualifications and competence of the employees and staff, it was not a "perfectly clear" *Burns* successor on August 8; thus, to presume on August 8, that a majority of the employees would survive the probationary screening process or ultimately become permanent employees is simply an unrealistic presumption under the circumstances.

There is no record evidence indicating the extent of the Respondent's information concerning the facility, its supervisors, administrators and employees, prior to August 8, and therefore the Respondent's arguments in its brief on this point are unsupported by record evidence. What is clear however, is that the Respondent's negotiations with the predecessor culminated in the execution of the aforementioned Operations Transfer Agreement on July 26, a detailed document consisting of some 21 pages, including provisions pertaining to the hiring "on a probationary basis, each Facility Employee who elects to accept employment with New Operator..."[10]

The record is devoid of any evidence showing that the facility was other than a functioning health care institution, operating with the proper license in accordance with and under the scrutiny of applicable governmental agencies, and subject to strict requirements and safeguards for the care and safety of its patients. The fact that the facility was purchased through a bankruptcy auction may be relevant to its profitability,[11] but it is not relevant to the qualifications or competency of the predecessor's employees or staff. Accordingly, there seems to be no compelling reason to conclude that the employee complement inherited by the Respondent was generally less qualified and more likely to be replaced than any other complement of employees; or to conclude that a special exception, under *Burns* and its progeny, should be carved out for successors who elect to acquire businesses through bankruptcy auctions.

---

[10] The Respondent suggests that the hiring of the employees on a probationary basis was in effect mandated by the Bankruptcy Court. It seems clear, however, that this hiring arrangement was voluntarily negotiated between the Respondent and predecessor, and was not imposed by the Bankruptcy Court.

[11] However, many facilities of the predecessor were simultaneously sold as a part of the same bankruptcy proceeding, and it does not necessarily follow that the facility in question was contributing to the overall financial indebtedness of the predecessor.

However, under the circumstances herein, it seems to make no difference whether the Respondent is a *Burns* "perfectly clear successor." Assuming *arguendo* the Respondent was not a *Burns* "perfectly clear" successor on August 8, it is necessary to determine the date the Respondent's bargaining obligation begins. I find that clearly this date was prior to the expiration of the 90-day probationary period. Insofar as the record shows, not one employee voluntarily left the Respondent's employ during his or her probationary period; nor, insofar as the record shows, did the Respondent hire any new employees during this period. Further, there is no evidence that the Respondent intended to discharge a majority or even a substantial number of the former employees and replace them at the end of the probationary period. Thus, the employee complement was not in a state of flux during this period, and the Respondent's argument that its employee complement was indeterminate until November 8, is not supported by the record evidence, as it clearly knew prior to November 8 the number of employees it intended to discharge and, if necessary, replace. Accordingly, the Respondent's permanent employee complement and the Union's majority status having been established prior to November 8, I find that its bargaining obligation attached at some point between September 14, the date the Union requested that Respondent recognize and bargain collectively with the Union,[12] and prior to November 8, the date when the Respondent unilaterally established terms and conditions of employment for its then permanent employee complement.

On the basis of the foregoing, I conclude that the Respondent's refusal to recognize and bargain with the Union from sometime prior to November 8 until January 8, 2008, is violative of Section 8(a)(5) and (1) of the Act, as alleged. I further conclude that the changes to the employees' terms and conditions of employment made on and after November 8, constituted unilateral changes in violation of Section 8(a)(5) and (1) of the Act, as alleged.

The complaint also alleges that the Respondent unlawfully withdrew recognition from the Union. The parties stipulated that during the January 30, 2008 bargaining session the Respondent withdrew recognition from the Union, but rescinded this withdrawal of recognition the following day. The record contains no further evidence regarding this matter. As represented by Respondent's attorney during his opening statement at the hearing, something occurred during the January 30 bargaining session that caused him to lose his temper and to abruptly withdraw recognition. Under the circumstances, the Respondent's conduct is tantamount to one party simply walking out in the middle of a bargaining session, certainly not an uncommon occurrence during the sometimes contentious course of bargaining. The fact that the Respondent immediately rescinded such conduct and thereafter resumed bargaining is, in effect, an admission of error. Nor is there any evidence that this conduct impacted subsequent bargaining. Under the circumstances, I shall dismiss this allegation of the complaint.[13]

Conclusions of Law and Recommendations

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

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

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[12] As the Union did not request recognition until September 14, it appears the Respondent had no bargaining obligation until that date.

[13] *Passavant Memorial Hospital*, 237 NLRB 138 (1978), cited by the General Counsel, is inapposite.

3. The Respondent has violated Section 8(a)(5) and (1) of the Act as found herein.

The Remedy

Having found that the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act, I recommend that, on request of the Union, the Respondent be required to rescind any departures from terms and conditions of employment that, absent the Respondent's unilateral conduct, would have existed for permanent employees on November 8, 2007. I further recommend that the Respondent retroactively restore such terms and conditions of employment until such time as the parties reach a collective bargaining agreement or a bargaining impasse. [14] See, generally, *Planned Building Services*, 347 NLRB 670 (2006); *Windsor Convalescent Center of North Long Beach*, 351 NLRB No. 44 (2007).

I shall also recommend that the Respondent be required to cease and desist from making unilateral changes, and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Finally, I shall recommend the posting of an appropriate notice, attached hereto as "Appendix."

ORDER[15]

The Respondent, A & C Healthcare Services, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally changing wages, hours, and other terms and conditions of employment of employees without first giving notice to and bargaining with the Union in the following appropriate unit:

> All employees performing work covered by the collective – bargaining agreement between Pleasant Care and the Union effective October 1, 2006 through June 15, 2008.

---

[14] The matter of the Respondent's health care obligations is yet an open issue. Thus, in the Operations Transfer Agreement, Section 2.5 (f), the Respondent is required to establish and maintain a group healthcare plan for the general benefit of it its employees and their dependents. Accordingly, contrary to the position of the General Counsel, the Respondent may not have any continuing obligation under the prior group healthcare plan, as this matter is governed by the OTA; and, in addition, whether the new healthcare plan may be deemed an initial term and condition of employment not subject to the Respondent's bargaining obligation is another matter for consideration in a compliance proceeding.

[15] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act:

(a) On request of the Union, rescind any departures from terms and conditions of employment that existed prior to commencing operations at the facility on August 8, 2007, retroactively restoring preexisting terms of employment, as set forth in the remedy section of this decision.

(b) On request of the Union, bargain collectively with the Union as the exclusive representative of the employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if agreement is reached, embody such agreement in a signed document.

(c) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Regional Office, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. July 18, 2008

Gerald A. Wacknov
Administrative Law Judge

[16] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

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

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of employees without first giving notice to and bargaining with the Union in the following appropriate unit:

All employees performing work covered by the collective – bargaining agreement between Pleasant Care and the Union effective October 1, 2006 through June 15, 2008.

WE WILL , on request of the Union, rescind any departures from terms and conditions of employment that existed prior to commencing operations at the facility on August 8, 2007, retroactively restoring preexisting terms of employment, as set forth in the remedy section of this decision

WE WILL, on request of the Union, bargain collectively with the Union as the exclusive representative of the employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if agreement is reached, embody such agreement in a signed document.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

A & C Healthcare Services, Inc.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be referred to the Board's office, 901 Market Street, Suite 400, San Francisco, CA. 94103-1735, Phone 415/356-5130.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

A & C HEALTHCARE SERVICES, INC., Case Nos. 20-CA-33588
20-CA-33780

and

SERVICE EMPLOYERS INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST,

RECEIVED
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2000 AUG 15 P 4:32
SAN FRANCISCO, CA

BRIEF IN SUPPORT OF EXCEPTIONS

Robert M. Cassel
60 Mirabel
Mill Valley, CA 94941
(415) 383-0200
Attorney for
A & C HEALTHCARE SERVICES

Exh. 9

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SCHEDULE OF EXCEPTIONS

1. "Respondent's post-hearing motion to strike references to certain cited cases in General Counsel's brief is denied." (ALJ Decision, page 1, footnote 1)

2. "This language appears to have no bearing whatsoever regarding the Respondent's relationship to the Union, which, is noted in *Burns*, is not a contractual relationship. Accordingly, as the Respondent has not demonstrated that the language is pertinent to the issues herein, I find no merit to the Respondent's argument." (ALJ Decision, page 4, lines 29-34)

3. "The Respondent has not demonstrated that obtaining the new operating license or completing the transfer of ownership of the property was in jeopardy or problematical or less than a "respectable certainty" at the time it became the interim operator of the facility. Therefore, I find this argument of the Respondent to be without merit." (ALJ Decision, page 4, line 43 through page 5, lines 1-3)

4. "The fact that the Respondent had been previously licensed to operate and was operating another nursing home in the State of California, and, in addition, Sections 16 and 17 of the Court's Order that provide for forfeiture of the Respondent's deposit and purchase price if the Respondent fails to obtain the appropriate license or to consummate the transaction in the manner required, are strong indicators of the Respondent's certitude that the license would be granted and the transaction consummated." (ALJ Decision, page 5, lines 45- 50)

5. "In this regard, the R would apparently argue that in a bankruptcy setting the employees could have reasonably anticipated benefits inferior to what they had received under the predecessor's tenure, and such lowered expectations would cause them to decline the probationary offer of employment and/or seek other employment in the interim. However it seems equally probable that, as experienced long-time employees who were familiar with the patients and their needs, the Respondent would make every effort to retain their services by offering them substantially the same benefits they previously enjoyed at the expiration of the probationary period. Accordingly, the one postulate is not more probable that **[sic]** the other." (ALJ Decision, page 6, footnote 9)

6. "However, as noted, the Board in *Windsor* has found, in effect, that the status of former permanent employees, who are initially hired by a successor employer as temporary or probationary employees, is not changed for purposes of determining union majority." (ALJ Decision, page 7, lines 4-7)

7. "Accordingly, there seem to be no compelling reason to conclude that the employee complement inherited by the Respondent was generally less qualified and more likely to be replaced than any other complement of employees or to conclude that a special exception, under *Burns* and its progeny, should be carved out for successors who elect to acquire businesses through bankruptcy auctions." (ALJ Decision, page 7, lines 35-43)

8. "Assuming *arguendo* the Respondent was not a Burns "perfectly clear" successor on August 8, it is necessary to determine the date the Respondent's

bargaining obligation begins. I find that clearly this date was prior to the expiration of the 90 day probationary period." (ALJ Decision, page 8, lines 2 to 5)

9. "Accordingly, the Respondent's permanent employee complement and the Union's majority status having been established prior to November 8, I find that its bargaining obligation attached at some point between September 14, the date the Union requested that Respondent recognize and bargain collectively with the Union, and prior to November 8, the date when the Respondent unilaterally established terms and conditions of employment for its then permanent employee complement. (ALJ Decision, page 8, lines 13-15)

10. "I conclude that the Respondent's refusal to recognize and bargain with the Union from sometime prior to November 8 until January 8, 2008, is violative of Section 8(a)(5) and (1) of the Act, as alleged." (ALJ Decision, page 8, lines 20-24)

11. "The Respondent has violated Section 8(a)(5) and (1) of the Act as found herein." (ALJ Decision, page 9, line 1)

12. "I recommend that, on request of the Union, the Respondent be required to rescind any departures from terms and conditions of employment that, absent the Respondent's unilateral conduct, would have existed for permanent employees on November 8, 2007. I further recommend that the Respondent retroactively restore such terms and conditions of employment until such time

as the parties reach a collective bargaining agreement or a bargaining impasse." (ALJ Decision, page 9, lines 6-12)

13. **"ORDER"** in its entirety. (ALJ Decision, page 9, through page 10, lines 1- 30)

BACKGROUND OF THE CASE

On March 22, 2007 the Pleasant Care Corporation filed petitions for relief under Chapter 11 of Title 11, U.S. Bankruptcy Code with respect to several facilities one of which was a residential care facility known as Emmanuel Residential of Millbrae, California.

Under the auspicious and Order of U.S. Bankruptcy Court on July 5, 2007, Case No. LA 07-12312-EC, Respondent (hereinafter "R") was selected as he successful bidder for the rights to operate, and if successful as a purchaser, acquire this facility.

On July 26, 2007 R entered into an Operations Transfer Agreement (hereinafter "OTA") for the interim management of the subject residential care facility pending issuance of New Operator Licenses by various state and federal licensing authorities.

The purpose of the OTA was to protect the creditor assets including, primarily, the above facility as a functioning entity pending R's acquisition of required state and federal licenses required to operate a health care facility, employ health care workers, and approvals to receive and disperse large sums of federal and state funds in the care and treatment of the residents of the facility. Pending acquisitions of the required approvals and licenses R's operation of the facility was regulated and supervised by very specific terms of the OTA under the continuing and exclusive jurisdiction of the Bankruptcy Court.

The effective date of the OTA was July 31, 2007 after which, upon five business day's prior notice and during normal business hours, R would be granted reasonable access to the facility and its books and records.

The OTA required R to acquire appropriate licenses and approvals to as a necessary condition to completing the purchase prior to December 31, 2007 and failing to do so R would forfeit its deposit, purchase price, and surrender the operation and management of the facility to Bankruptcy Court. During the interim preceding the issuance of required licenses R would operate under the licenses of the debtor but debtor would continued to receive and all funds received from Medicare, Medi-Cal, Veterans Administration, managed care and heath maintenance organizations and disperse operating funds to R according to various formulae.

R operated the facility under the terms of the OTA until early in December 2007 when it was finally granted a license to operate the facility under in its own name by the California Department of Health and at which time it closed its purchase and lease transactions under the terms prescribed by the Bankruptcy Court.

All events material to the issues presented herein occurred during the period R operated and managed the facility under the terms of the OTA and prior to December 2007 when the transaction closed and it became the owner of the facility and the actual employer of all employees hereinafter referred referenced.

Prior to closing in December 2007 the OTA stated in precise detail the procedures which R was required to undertake for the term of its management and operation of the facility pending the closing. These included specific staffing requirements including the hiring of probationary workers at specified wages and benefits as set forth in the OTA and other personnel related requirements under the overall supervision of the Bankruptcy Court pursuant to its retained continuing jurisdiction.

The business enterprise acquired by R was, and has remained, a convalescent and residential Hospital, located in Millbrae, California which provides cares and medical treatment

for approximately 125 to 150 disabled and predominantly aged persons, most of which require round-the-clock assistance. A high percentage of the patients receive state and/or federal financial assistance for their care and support. The facility operates under various state and federal authorities, principally the California Department of Health which very closely monitors the quality of the care being provided by way of unscheduled visits and daily reports the care, treatment, complaints, and significant changes in the residents' conditions.

At the time of the auction and thereafter until August 8, 2007 the facility continued to be operated by the debtor in bankruptcy. On August 8, 2007 R was granted permission for an initial visit to the facility at which time its Chief Executive Officer (hereinafter CEO) was introduced to employees in a group meeting assembled at approximately 11 am.

In the course of an approximately one-hour meeting with the facility employees and representatives of the Charging Party (hereinafter CP), R through its CEO announced it would be the new operator of the facility beginning immediately. She informed the group each of them were being offered employment on a 90 day probationary basis at the end of which those who were successful would be eligible to apply for employment as permanent employees. Their compensation for the duration of the 90 day period would be at the rate of their current base wage but not including any fringe benefits in addition thereto.

R further announced to those assembled that as of the end of the 90 day probationary period, November 8, 2007 probationary employees who successfully completed probationary employment would be offered the opportunity to become employed as permanent workers under terms and conditions of employment which would be announced on or before that date.

The meeting adjourned in approximately one hour and thereafter those who wished to accept R's offer of probationary employment advised the facility Administrator and commenced employment as probationary workers for R shortly thereafter.

During the course of the probationary employment a thorough review of each probationary employee's prior employment records were reviewed, the facility records were carefully screened for current employees who had been named in complaints made to, or investigations made by the California Health Department, and current on-the-job observation and evaluations were conducted by supervisors. This review as resulted in which the disqualification for permanent employment of six of the probationary employees.

On the 90th day, November 8, 2007, all employees who successfully passed their probationary periods were invited to a group meeting with R at which time R conveyed congratulations and offered employment at new terms and conditions which were set forth on handouts to each attendee. All eligible employees accepted permanent employment on the terms offered as clarified by various questions asked and answered during the meeting.

All events pertinent to the Unfair Labor Practice Charges herein occurred during the Respondent's interim management period prior to the closing of the transaction in December 2007 upon California Department of Health license issuance.

NATURE OF ISSUES PRESENTED

The dispute herein alleges Respondent became a "perfectly clear" successor as that term was defined by the Burns and further amplified by Spruce Up on August 8, 2007 following the initial above described meeting with the facility's employees.

The underlying charge was based on the Region's assertion that while R did offer initial terms and conditions of probationary employment, as it stipulated herein, it did not explicitly characterize them as "initial terms and conditions of employment" when they were presented to the assembled employees of the debtor.

However, the decision of the ALJ herein appears to disregard R's probationary hiring of debtor's employees all together on the basis of its conclusion "Accordingly, there seem to be no compelling reason to conclude that the employee complement inherited by the Respondent was generally less qualified an more likely to be replaced than any other complement of employees..." (Decision lines 38 -42) and "the status of former permanent employees, who are initially hired by a successor employer as temporary or probationary employees, is not changed for purposes of determining union majority." (Decision lines 5 – 7). Hence, the decision appears to conclude R simply hired the predecessor's employees as its own permanent employees at their former terms and conditions rather than those offered by R.

Respondent contends: (a) it had, and properly exercised the right to select from probationary employees those who met its own standards and to set their initial terms and conditions of employment; (b) the number of such employees was, by definition, indeterminate until the conclusion of the 90 day probationary period, and; (c) the probationary and permanent wage and benefit rates were properly and clearly offered to prospective employees at the time of the initial meeting with employees on August 8th, and was no evidence presented that any prospective employee had any doubt as to nature of probationary employment or the wages and offered by R in connection therewith.

There were no Unfair Labor Practices of any description found by Region 20 of the Board in connection with any aspect of this case at any time.

ARGUMENT

RESPONDENT'S EXCEPTION NO. 1

> "Respondent's post-hearing motion to strike references to certain cited cases in General Counsel's brief is denied." (ALJ Decision, page 1, footnote 1)

This case apparently reflects the first known application of the "perfectly clear" exception of NLRB v. Burns to a U.S. Bankruptcy Court directed business transfer in which R is held to have become a "perfectly clear" successor and obligated to retroactively apply terms and conditions established by the predecessor employer rather than the initial terms and conditions offered by R.

No authority is cited by Counsel for the General Counsel, (hereinafter "CGC") or Administrative Law Judge Wacknov (hereinafter "ALJ"), and Respondent (hereinafter "R") has found none which applies the Burns exception, as further clarified in Spruce Up to an employer who is bound by the terms of a business transfer under the auspices of the Bankruptcy Court as articulated in an Operation Transfer Agreement ("OTA") which the ALJ concedes controlled some matters (see footnote 14) at issue.

In view of the absence of controlling case precedent as a guide to relevant evidentiary and substantive issues and the assurance of CGC the pivotal issue to be litigated was whether R had used the appropriate form and language in advising probationary employees of its initial terms and conditions of employment when they were initially assembled on August 8, 2007 the parties herein agreed to dispense with an evidentiary hearing.

CGC conceded, and so stipulated, R had said in the August 8, 2007 meeting that it was offering probationary employment to the bankrupt's employees and, if accepted, they would be

paid their former rate of pay but no benefits. Although thus conceding the preceding had occurred CGC took the position it was a defective offer for Burns exception purposes because R had failed to explicitly characterize to its offer as "initial terms and conditions of employment being set" by R. CGC and R thereafter stipulated to these facts in Joint Exhibit 1.

In a pre-trial conference with CGC, R advised the ALJ it was unable to locate any case authority requiring the characterization of the initial terms and conditions being offered as "initial terms and conditions being set" by R in addition to their plain and clear statement and sought any case authority on which CGC intended to rely. ALJ directed CGC to provide such a list to R and there after R received from CGC such a list of the ten (10) cases upon which CGC stated it would rely. The cases so listed were the ten cases analyzed by R in its brief to the ALJ.

It was on the basis of the above assurances from CGC that R agreed to waive an evidentiary hearing (other than a preliminary witness who testified as to the fact of union recognition by the former employer of which R had no knowledge) and proceed on the basis of a stipulation between CGC and R as the evidence in the case. This agreement was expressly predicated by R on the belief CGC and R had narrowed the issue to the language and form of the words used by R in presenting its offer of probationary employment to debtor employees assembled on August 8, 2007.

Upon receipt of CGC's brief to the ALJ it was quickly apparent CGC was relying on many cases other than the ten listed in his response to the ALJ's direction he turn over to R. R thereafter moved that all other cases cited by CGC be stricken in accordance with the above ruling of the ALJ and the failure of CGC to honor its statements to R and the ALJ. R hereby takes exception to the ALJ's denial of R's motion as stated in footnote No. 1.

RESPONDENT'S EXCEPTION NO. 2

> "This language appears to have no bearing whatsoever regarding the Respondent's relationship to the Union, which, is noted in *Burns*, is not a contractual relationship. Accordingly, as the Respondent has not demonstrated that the language is pertinent to the issues herein, I find no merit to the Respondent's argument." (ALJ Decision, page 4, lines 29-34)

The ALJ faults R for being silent as to the "meaning and intent" of the language of paragraph 8 of the Bankruptcy Court's Order stating:

> "...The buyers [herein R] are not successors of the Debtors, [herein former and transferring employer] and the buyers shall have no successor liability as a result of purchasing any of the Debtor's facilities." (Order of Bankruptcy Court Paragraph 8)

In the absence of relevant precedent of appellate courts or the Board relating to similar facts and legal issues, none of which, as noted above, were cited by CGC or ALJ, R urges the "meaning and intent" of the language of Paragraph 8 of the U.S. Bankruptcy Court's order should be taken at face value to mean and intend precisely what the words say for reasons amply illustrated by this case, and specifically to the potential liability under the National Labor Relations Act (hereinafter "NLRA" or "Act").

Nothing but speculation is advanced by the ALJ to support his narrow reading of the language and scope of the language:

> "The quoted language simply appears to immunize the Respondent from the debtor's contract liability unless the Respondent specifically becomes a party to the contract, and further, appears to

immunize the Respondent from the debtor's tort liability attendant to lawsuits that may have been brought or could be brought against the debtor."

"This language appears to have no bearing whatsoever regarding the Respondent's relationship to the Union, which, as noted in Burns, is not a contract relationship." (page 4, lines 26 through 29).

The above narrow reading of this language is inappropriate to the facts herein. The precise status of debtor's employees and the implications thereof for R under the Act by R's performance of the terms of the transfer as regulated by OTA suggest complex potential legal complications of which this case is but one example. The appropriate licensing of R necessary to close the purchase transaction with the debtor and former employer thus relieving it of further responsibilities under the OTA and general supervision of the Bankruptcy court did not occur until December, 2006 five months after the events at issue herein.

No valid reason is apparent to assume the court's language was meant to deny "immunities" for liabilities under the Act potentially imposed on succeeding employers in connection with their interim operation and management of the debtor's workforce under terms and conditions of an OTA imposed on succeeding employers generally for short periods of time.

WHEREAS, the parties wish to provide for: (a) the interim management of the Facility by New Operator pending the issuance of the New Operator License; ... (c) the orderly transition of the operations of the Facility from Transferor to New Operator upon the issuance of the New Operator License. (OTA, page 1)

Logically, it appears difficult and perhaps impossible as illustrated herein to reconcile the purchaser's (herein R's) responsibilities to the Bankruptcy Court as set forth in the OTA without surrendering its common law rights under Burns to set its own initial terms and conditions of employment. The OTA unilaterally establishes interim terms and conditions applicable to the workforce being managed for a indefinite period of time which, as illustrated herein, may be at a substantial variance with prior terms and conditions applicable to the workforce under a pre-existing collective bargaining agreement which is, presumably, suspended during this indefinite period of a pending sale and interim management under the OTA.

The reasoning of the ALJ herein set forth seems to directly conflict with the rights granted by the Act applicable to two private and independent parties who are assumed to be at liberty to structure purchase and sale agreements under traditionally principals developed under the Act without incurring third party liabilities in doing so. R is of the view that this is the 500 lb gorilla lurking behind the door in this case.

R as the successful bidder became subject to the OTA until such time as the purchase terms satisfied, herein 5 months later. However, under the OTA R became a temporary interim manager, operator and employer of the workforce subject to the terms of the OTA. The Burns exception requires prospective actions by the "employer" which clearly articulate the terms and conditions being offered in exchange for their continued employment.

The scheme of the business transfer under an OTA assumes a reverse sequence of events wherein the successful bidder operates and manages the workforce for an interim period (herein approximately 5 months) during which the sale is either perfected or abandoned. Only after the sale has been consummated does the successful bidder escape the commands of the OTA and become in a position to exercise its rights under Burns.

However, the rationale of this case precludes R from asserting those rights retroactively because it holds R's compliance with the OTA during its indefinite initial period of operation and management is evidence R failed to take appropriate actions to establish its own initial terms and conditions rather than those prescribed by the OTA. The remedy proposed by the ALJ herein is the retroactive imposition of the predecessor's terms and conditions under the predecessor's collective bargaining agreement (except for the health plan contributions which he concludes are controlled by the OTA) thus effectively disregarding the OTA completely.

A Hobson's Choice

The ironic net result of the conflict of the various interests involved herein creates a Hobson's choice for R, e.g. (a) R's interest is exercising it rights under Burns to set its own initial terms and conditions of employment upon acquiring the debtor's business by auction; (b) The Bankruptcy Court's interests are to manage a transfer and sale of debtor's assets by the terms of an OTA in such a way so as to preserve to the fullest extent the value of the debtor's assets in the event the sale does not close and reverts to court administration, and; (c) The interests of the Board under the Act are to carry over the terms and conditions of the prior employer when the incoming employer has failed to properly and timely advise former employees of terms and conditions being offered by the successor.

The ALJ herein sought to reconciled these conflicts by minimizing R's obligations under the OTA by rejecting completely the "probationary" period of employment required under the OTA, assuming all predecessor probationary employees were suitable to R, despite contrary facts, and thus imposing a bargaining obligation in advance of the hiring of any permanent employees by R.

R faithfully attempted to adhere to the terms of the OTA for the almost five months of its temporary management of the debtor's workforce while simultaneously balancing its obligations to clearly and prospectively set its initial terms and conditions for permanent employment to those successful probationary employees who elected to become permanent employees after November 8th.

However, the ALJ's disregard of the OTA and retroactive elimination of the status of probationary employment obviously eliminated any opportunity for R to exercise its right under Burns to prospectively set its own initial terms and conditions of employment for employees of its own choice who had completed to R's satisfaction their probationary.

There is no requirement or even suggestion in Burns or Spruce Up which precludes an employer from offering probationary employment (especially in highly critical occupations such as health care) for specifically designated periods at specifically articulated initial terms and conditions of employment at prospectively articulated initial terms and conditions followed by offers permanent employment to selected employees provided such offers are similarly made in a manner which are made prospectively and are clearly and complete.

The ALJ's decision gave R the effective choice of deliberately ignoring the terms of the OTA and hiring only permanent employees thus eliminating preliminary assessment periods of probationary employment or complying with the OTA and surrendering its right under Burns to set it own initial terms and conditions of employment when hiring employees on a probationary basis to assess their skills and value to the employer.

Unlike the cases cited by CGC and relied upon by the ALJ, not a single unfair labor practice was found by the Region to have occurred for any reason, at any time, or of any description related to the issues herein. These cited cases have tended to impose a forfeiture of

employer's Burns common law rights to set its own initial terms and conditions of employment presumably as a penalty for abusing them by failing fully or correctly to prospectively inform employees of those being offered by the employer.

It is significant that CGC did not offer a single sworn statement from any of the roughly 100 employees of debtor that any one of which was in any way induced by statements made by R, or disclaimers not made, to believe they (much less a majority of their co-employees) would pass their probationary periods and guaranteed an offer of employment by R at terms and conditions even roughly parallel to those paid by debtor.

RESPONDENT'S EXCEPTION NO. 3

> "The Respondent has not demonstrated that obtaining the new operating license or completing the transfer of ownership of the property was in jeopardy or problematical or less than a "respectable certainty" at the time it became the interim operator of the facility. Therefore, I find this argument of the Respondent to be without merit." (ALJ Decision, page 4, line 43 through page 5, lines 1-3)

The clearest evidence demonstrating the acquisition of a license to operating a healthcare facility is not a "certainty" respectable or otherwise neither is nor should be is the plain face because the lives of predominately elderly, sick and infirm are in the completely in the hands of each of the facility's employees. An improper call by a facility employ whether well meaning or otherwise can have life or death consequences. Health care is an occupation which must insist on zero tolerance of worker error. For this reason probationary employment and qualification assessment is required by the OTA to protect a health care debtor's assets during the period in which they are being operated and managed by successful bidders who competence is in the process of being accurately assessed by licensing authorities. Potential malpractice liability

could have a disastrous impact on the value of the assets upon which creditors are relying from the bankruptcy procedures.

One indicator of the truth of the difficulty and uncertainty of acquiring a healthcare facility license is the fact herein that nearly five months elapsed before R was successful. There would be no explanation for such a delay other than the extremely high level of scrutiny accorded such applications by the granting authorities concerned.

RESPONDENT'S EXCEPTION NO. 4

> "The fact that the Respondent had been previously licensed to operate and was operating another nursing home in the State of California, and, in addition, Sections 16 and 17 of the Court's Order that provide for forfeiture of the Respondent's deposit and purchase price if the Respondent fails to obtain the appropriate license or to consummate the transaction in the manner required, are strong indicators of the Respondent's certitude that the license would be granted and the transaction consummated." (ALJ Decision, page 5, footnote 5)

R takes exception to the ALJ's statement in Footnote No. 5:

There are no facts or showing in this case which even suggest R harbored any "certitude" strong or weak the Health Department License would be granted. There are many reasons such licenses are not granted including a failure of the parties to agree with respect to the size of deposit by a licensee to insure alternative accommodations and service to patients in the event of a break in service for any reason at the licensed facility potentially caused by a delay in Medicare and Medical payments, which was forecast to be problematic in 2008, a bleak budget year for California or a labor dispute in which labor is withdrawn by labor representatives.

Again, it must be again noted, the proof herein was in the pudding. The most powerful indicator a license may not have be issued was that over five months passed before a license was issued just weeks before the December 31st deadline provided in the OTA. R's potential of

forfeiture of deposit and purchase price in a matter of weeks hardly engendered confidence and certitude but, too the contrary, had the reverse effect of threatening financial ruin if that were to come to pass.

To be sure a more appropriate speculation by the ALJ, assuming such speculation was entitled to any weight whatever, would be an increased concern that in the face of two successful license applications for rural facilities far distant from San Francisco, what could explain the delay other than possible ultimate denial?

RESPONDENT'S EXCEPTION NO. 5

> "In this regard, the R would apparently argue that in a bankruptcy setting the employees could have reasonably anticipated benefits inferior to what they had received under the predecessor's tenure, and such lowered expectations would cause them to decline the probationary offer of employment and/or seek other employment in the interim. However it seems equally probable that, as experienced long-time employees who were familiar with the patients and their needs, the Respondent would make every effort to retain their services by offering them substantially the same benefits they previously enjoyed at the expiration of the probationary period. Accordingly, the one postulate is not more probable that **[sic]** the other." (ALJ Decision, page 6, footnote 9)

R takes exception to the ALJ's speculation in footnote 9 as to what arguments the ALJ speculates R would advance to support a hypothetical assertion that employees would decline an offer of employment followed by the ALJ's hypothetical response to his own hypothetical speculation. His response is premised on his speculation as to their presumed value to R because of their experience, long tenures, and familiarity with patients and their needs.

Plainly, R has not made any such argument and equally plainly the ALJ's counter argument as to the increased value of predecessor employees because they are presumed by the ALJ to be "experienced and long-term employees who were familiar with the patients and their needs" and

to whom R would make offers of substantially the same benefits as they received from the predecessor. These speculations are unsupported and quite obviously entitled to no weight whatsoever.

RESPONDENT'S EXCEPTION NO.6

> "However, as noted, the Board in *Windsor* has found, in effect, that the status of former permanent employees, who are initially hired by a successor employer as temporary or probationary employees, is not changed for purposes of determining union majority." (ALJ Decision, page 7, lines 4-7)

R takes exception to the ALJ's statements as to the holdings in *Windsor*.

R respectfully submits this statement is simply erroneous. The Board discounted the denominations of "temporary" and "probationary" not because it believed their status as either was unchanged for the purpose of determining union majority but because the employer failed to satisfy the preliminary requirement of Spruce Up of informing them of the terms and conditions of employment in either classification prior to, or at the time of their hire. Accordingly, without prior or contemporaneous knowledge of the terms and conditions of the employment being offered, the effect such would have on their status, their superficial designations as probationary or temporary is irrelevant and they would be reasonably be left to assume their prior terms and conditions of employment remained unchanged.

The Board also noted there was no evidence these employees had ever actually received the personnel policies and handbooks which the Employer said it had published 10 days after their date of hire. In fact, while being hired as "temporary" employees they were also told the employer would review their work during the 90 day period and offer regular employment to those who passed the review, which clearly blurred the traditional distinction between "temporary" employment, i.e. for a fixed period short of permanent, and "probationary"

employment i.e. for a period of training and testing a person in a new job or role (compact Oxford English Dictionary).

Therefore, not only did the employer conflate the two classifications, it failed to inform employees in either putative classification of their actual terms and conditions prior to or contemporaneously with their hire on June 30th. The terms of their employment were similarly not made known to them on the June 30 date of their hire but only as information allegedly incorporated by reference as "[o]ther terms and conditions of your employment ...set forth in Windsor's personnel policies and its employee handbook" which were not, however, distributed if at all, until July 9th.

It is noted findings were absent as to as whether, or when, these employees actually received the June 30 letter purportedly informing them of the Respondent's general intent to change terms and conditions of employment, a key consideration when re-hiring former employees. The Board noted even if they had been informed by the alleged general statement that new terms will subsequently be set, this information would not be sufficient to fulfill the employer's Spruce Up obligation.

The striking comparison of this fact pattern, not to mention the multiple findings of unlawful discriminatorily motivated terminations in which the Windsor facts were embedded as compared with the facts of the case at bar summarized below buttresses, beyond any doubt, the conclusion that the Windsor decision of the Board provides no support for the ALJ's conclusion herein for the following reasons:

Comparison of Facts Herein with Windsor, the Facts Herein:

1. Not a single unfair labor practice by R was found at any time having to do with any aspect of the initial hiring of probationary employees, the performance evaluation of probationary employees, the termination of six probationary employees who failed to pass their probationary period, or the offers of permanent employment to successful probationary employees.

2. All R employees were uniformly subject to probationary employment for a 90 day period. Six did not perform satisfactorily and were not offered permanent positions. None of these terminations were found to be unlawful for any reasons despite the longevity of some of the terminated employees.

3. The terms and conditions of employment offered by R were made on the day, (August 8th) R made the first visit to the facility and met for the first time with the employees of the former operator. The terms were clear, unequivocal and not requiring interpretation or explanation, i.e. current pay and no benefits.

4. The terms and conditions were not later modified or rescinded. They were the terms which prevailed during the entire 90 day period at the end of which new written terms and conditions were announced on the 90th day and placed in writing for those employees who successfully passed probation and wished to consider employment as permanent employees.

5. R offered the same initial terms and conditions of employment to every person (including exempt employees) employed by the former operator on August 8th and all were

placed on a probation status without exception. All employees were systematically evaluated prior to the 90th day, and six failed to pass probation.

6. R offered successful probationary employees the same specific initial terms and conditions on November 8th should they wish to apply for permanent employment.

RESPONDENT'S EXCEPTION NO. 7

> "Accordingly, there seem to be no compelling reason to conclude that the employee complement inherited by the Respondent was generally less qualified and more likely to be replaced than any other complement of employees or to conclude that a special exception, under *Burns* and its progeny, should be carved out for successors who elect to acquire businesses through bankruptcy auctions." (ALJ Decision, page 7, lines 35-43)

R takes exception to the statement on p. 7 lines 35 42 on several grounds:

R has not contended the "fact of Bankruptcy" compels a conclusion debtor's employee complement was less qualified and more likely to be replaced than any other compliment of employees. However, R does contend that the common law right of an employer to hire and initially set terms and conditions of employment carries with it the right to select employees of its own choosing.

In fact, as Burns and Spruce Up make clear, the employer only forfeits this right by stating or implying it plans to adopt, or is adopting the predecessor's terms and conditions of employment or otherwise by failing to clearly state his intentions to set his own terms and conditions thereby creating the reasonable impression the predecessor's terms and conditions will be adopted and continued.

But, neither does R agree a new employer will necessarily have the same objective performance standards as the predecessor, or the same subjective standards with respect to

personality characteristics and ability to get along with co-workers, potential leadership qualities, and pleasant demeanor as the predecessor. There is no tenet of the Act which suggests any limits to personality or performance standards which Employers should or should not select or deselect with the exception of the prohibitions of discrimination of the basis of characteristics related to union activity.

The clearest rejoinder to this unsupported speculation is the fact herein that six of predecessor's employees failed to pass muster and were rejected as candidates for permanent employment. The charging party herein filed unfair labor practice charges against R which conducted a thorough investigation of R's selection process and dismissed the charges.

As to the need for a "special exception" to be carved out for successors who elect to acquire business through bankruptcy actions, R has not so stated or implied. However, it could well be inferences drawn from standard, non-bankruptcy contexts will need to be altered if the Board's experiences with bankruptcy situations so indicate. For example, creditor's interests and the manner in which they alter standard business practices in buying and selling businesses may well have to be taken into account in connection with traditional practice based on two-party dynamics, i.e. buyer and seller.

Moreover, as this case illustrates the role of the Bankruptcy Court in monitoring and directing various aspects of the transaction may call for changes in "perfectly clear" case procedures and the duties and responsibilities of both employee and employer representatives inter se and the Bankruptcy Court representing creditors of the predecessor. R does not presume to claim sufficient experience to suggest the need for any "special exceptions" however; neither does it believe the typical "perfectly clear" procedures and assumptions forming the back-drop of traditional Burns exception cases should be indiscriminately applied to Bankruptcy cases.

RESPONDENT'S EXCEPTION NO. 8

> "Assuming *arguendo* the Respondent was not a Burns "perfectly clear" successor on August 8, it is necessary to determine the date the Respondent's bargaining obligation begins. I find that clearly this date was prior to the expiration of the 90 day probationary period." (page 8, lines 2 to 5)

R takes exception to the ALJ's recommended finding that although R was not a perfectly clear Burns successor on the day it commenced operations, August 8, 2007 it nevertheless became such prior to the expiration of the 90 day probationary period because:

> "Insofar, as the record shows, not one employee voluntarily left the R's employ during his or her probationary period; nor, insofar as the record shows, did the R hire any new employees during this period. Further, there is no evidence that the R intended to discharge a majority of even a substantial number of the former employees and replace them at the end of the probationary period. Thus, the employee complement was not in a state of flux during this period, and the Respondent's argument that its employee complement was indeterminate until November 8, is not supported by the record evidence, as it clearly knew prior to November 8 the number of employees it intended to discharge and, if necessary, replace" Page 8, lines 8 through 13

These conclusions are irrelevant to the question of whether R was within its rights to set initial terms and conditions for the 90 day probationary initial employment or for permanent employment 90 days thereafter.

The "right" of an incoming employer to set initial terms and conditions is a recognition that absent unlawful a forfeiture of this right by the use of improper or illegal standards by the employer in hiring, advancement or termination of employment all employers enjoy a common law right to select their own employees for their own reasons without the intrusion of government.

Nowhere in the Act does it impose on an employer the obligation to speculate as to which of its new employees are former employees of a predecessor and likely to satisfactorily complete a probationary comprise and in concert with other probationary employees constitute a majority of its workforce thus requiring the employer to immediately recognize the union which represented them when employed by the predecessor. None are cited by the ALJ.

The core purpose of a probationary period is to permit both the employer and the employee to abandon the arrangement at will, unfettered and without either incurring adverse consequences provided the actions are not in violation of the law. The fact that at some point in the beginning of the 90 days, middle or end thereof, either will decide to terminate the relationship cannot be determined in advance.

Speculation as to whether the employer "clearly knew" who would choose to leave, be terminated, and whether those remaining would or would not constitute a majority of a permanent employees remaining at the end of the probationary period can only be guess work. Moreover, if guesswork is to be allowed as a gauge for recognition, when, short of the 90 day period, would the employer be required to make such a guess? No answer is suggested by the ALJ.

In this case, the probationary period in which to make discretionary hiring and retention decisions was 90 days. In theory, the entire work force was intentionally "in flux" for the 90 day period in the interest of both employer and employee. Establishing as matter of evidence what an employer "clearly knew," might have known," "suspected but did not truly 'know'" or "thought he or she knew at the beginning of a given week but was unsure of at the end of the week" would present insurmountable evidentiary issues because, by definition, only the

"employer" (whoever that might be) would have knowledge as to what he or she actually "knew," "clearly" or otherwise and when.

The conjecture of the ALJ as to what Respondent "clearly knew" but had not stated imposes no statutory obligation on the employer to abandon its right to make unfettered hiring and compensation decisions at any time during this period nor on the employee to voluntarily leave at any time shorter than 90 days.

Notwithstanding compliance with the letter and spirit of Burns and Spruce Up the ALJ found R became a successor retroactively on August 8, 2007, the day on which R offered probationary terms and conditions of employment. The only authority upon which the ALJ relied was Golden Cross Health Care of Fresno, (hereinafter "Golden Cross"). However, the holding of this case is totally inapposite to the facts herein at issue for the following reasons:

Golden Cross Health Care of Fresno

This case is easily distinguished on the following considerations:

A. The successor issue in "Golden Cross" occurred in the context of a completely private and voluntary sale, no bankruptcy issues were involved. In fact, the Board noted in footnote 2, there was evidence respondent therein had been denied a license to operate a convalescent home in Bakersfield, California because, in part, of a bankruptcy proceeding, i.e. "For, at the time of her Bakersfield license application, that home had been subject to bankruptcy proceedings," and Respondent therein acknowledged, "We did not have the agreements to buy [the Bakersfield home] at that time."

B. In the case at bar herein the fact the successor issue arose in the context of an ongoing bankruptcy is a matter of record. Moreover, the OTA states in the forth Recital, the sale of the property herein at issue was also very plainly expressly contingent upon the issuance of a Health Department License which, as noted above, did not occur until nearly 5 months after the August 8th date of Respondents assumption of operation.

C. Quite plainly, unlike Golden Cross the issuance of the new Operator License by the California Department of Health, in the instant case, was the most important single fact of the transaction and easily distinguishes the cases. And, again unlike Golden Cross there were no patently illegal plans to terminate a majority of employees who were known union adherents and replace them with new employees who would be opposed to the union.

D. It is quite obvious the date selected date by respondent in Golden Cross had no basis in legitimate hiring considerations by the employer. Rather, it was put forward as part of an illegal hiring scheme to provide time to conduct mass illegal terminations of employees known, or thought to be sympathetic to the union while the hiring of "safe" employees who would be expected to vote against the union.

E. The unsuccessful purpose advanced by Respondent in Golden Cross was designed to delay the formal date of operations commencement by several months on any available excuse to provide time to reduce the count of employees who would be counted in determining the presence or absence of a continuing union majority. Such a delay was intended also to permit the employer to establish its own initial terms and conditions of employment well after it had commenced actual operations and failed to do so.

In summary, the contrast of Golden Cross with R herein is striking. R announced the initial terms and conditions of probationary employment prior to hiring employees on August 8, 2007 and thereafter announced the initial terms and conditions being offered for the hire of permanent employees who had successfully completed their 90 day probationary periods.

The holding of Golden Cross can better be seen as a forfeiture of rights and remediation compelled by the commission of multiple and mass unfair labor practices in contrast to R herein which has not been found to have committed a single unfair labor practice, of any kind, at any time period at issue herein.

RESPONDENT'S EXCEPTION NO. 9

> "Accordingly, the Respondent's permanent employee complement and the Union's majority status having been established prior to November 8, I find that its bargaining obligation attached at some point between September 14, the date the Union requested that Respondent recognize and bargain collectively with the Union, and prior to November 8, the date when the Respondent unilaterally established terms and conditions of employment for its then permanent employee complement. (ALJ Decision, page 8, lines 13-15)

R takes exception to this statement on the basis no R employees had been granted permanent status prior to November 8. Successful probationary employees were not offered the position of permanent employee until November 8, on which day R disseminated the terms and conditions which were being offered to successful probationary employees who wished to become employed as permanent employees. For the same reason a bargaining obligation of R could not have come into existence "...at some point between September 14...and prior to November 8..." but only after a full complement of permanent employees had been hired and a majority of which were employees who had been employed by the predecessor company.

RESPONDENT'S EXCEPTION NO. 10

> "I conclude that the Respondent's refusal to recognize and bargain with the Union from sometime prior to November 8 until January 8, 2008, is violative of Section 8(a)(5) and (1) of the Act, as alleged." (ALJ Decision, page 8, lines 20-24)

R takes exception to page 8, lines 4 through 13 and footnote 12

R takes exception to the ALJ's speculation that R "clearly knew prior to November 8 the number of employees it intended to discharge and, if necessary, replace" on the basis of the evidence presented. The parties stipulated, #4, R hired predecessor employees on a 90 day probationary basis. This fact was undisputed. The existence of a probationary period of 90 days meant just that. R would not, and did not, make final decisions as to which probationary employees failed to pass until the 90th day at which time all unsuccessful probationary employees had been informed. Moreover, if disqualifying acts by any probationary period employee had occurred on the 90 day they too would have been rejected for permanent employment. To suggest as the ALJ does herein, that R knew the full list of who R intended to discharge before the end of the 90 day probationary period is, at best, mere speculation and unsupported by any evidence whatever.

The record, therefore, does not support a date earlier than November 8th for determining the presence or absence of a majority of predecessor employees who became employed as permanent workers of R at, or after, the November 8th the date and time R had informed all employees of the initial terms and conditions of permanent employment with R.

RESPONDENT'S EXCEPTION NO. 11

> "The Respondent has violated Section 8(a)(5) and (1) of the Act as found herein." (ALJ Decision, page 9, line 1)

R takes exception to this Exception on the basis that R at no time violated Section 8(a)(3) for the reason stated herein.

RESPONDENT'S EXCEPTION NO. 12

> "I recommend that, on request of the Union, the Respondent be required to rescind any departures from terms and conditions of employment that, absent the Respondent's unilateral conduct, would have existed for permanent employees on November 8, 2007. I further recommend that the Respondent retroactively restore such terms and conditions of employment until such time as the parties reach a collective bargaining agreement or a bargaining impasse." (ALJ Decision, page 9, lines 6-12)

R takes exception to this Exception on the basis that R at no time engaged in unilateral conduct in violation of the Act and the remediation requested herein by the ALJ is unwarranted.

RESPONDENT'S EXCEPTION NO. 13

ORDER: in its entirety. (ALJ Decision, page 9, through page 10, lines 1- 30)

R takes exception to the ALJ's (a) Conclusions of Law and Recommendations; (b) The Remedy, and; (c) Order to the extent they incorporate terms and conditions to which R has taken exception in Exceptions No. 1 through and including No. 12 herein above.

CONCLUSION

The effect of the ALJ's decision herein is to misinterpret and misapply the Burns exception in such a way as to nullify the underlying Burns right of employers to set the initial terms and conditions of their employment of a prior employer's employees without being required to adopt the prior employer's terms. This right is predicated on the clear articulation of

the terms it is offering in a time and manner which permit offerees a fair opportunity to consider them in advance of making decisions to accept, reject, or start working.

The Region did not challenge the facts herein that R had informed the employees of the prior employer of its offer of 90 day probationary employment at their prior base rates and no other benefits. Moreover, it stipulated the offer had been made on August 8, 2007 when R had first visited the facility and held a group meeting at which R had been introduced. CGC advised R it had proceeded with the underlying charge because it believed the terms offered were not explicitly characterized as "initial terms and conditions."

However, The ALJ herein, paid little attention to the specific words or manner by which R informed the assembled employees of the initial terms and conditions it was offering to them for employment as 90 day probationary employees and the opportunity of permanent employment should they successfully pass their probationary status. Rather, the ALJ invalidated the position of "probationary employee" finding the employees simply remained "permanent" under Windsor, which R strenuously disputes, and thus the hiring of a majority as permanent employees on August 8th made R an immediate successor employer at wages rates unspecified by the ALJ.

No explanation is provided by the ALJ as to how and why such employees could have been employed in a permanent job not offered by R and at terms and conditions of employment not offered by R and not explained to by the ALJ is not explained.

Having rejected the employees' "probationary status" in its entirety and speculating that all were qualified and therefore would constitute a majority imposed, on an uncertain date, a bargaining obligation on R. Obviously mindful R had set initial terms and conditions for permanent employees on November 8, the ALJ conveniently concluded the obligation attached

sometime before this date because as he speculated there was "no compelling reason to conclude" they were "generally less qualified" than "any other complement of employees" without noting that six had already been rejected by R as unsuitable.

Thus, the ALJ concluded R had acted illegally in refusing to bargain with CP when asked to do so on September 14 and had acted unlawfully when if "unilaterally established terms and conditions of employment for its then "permanent employee complement" with the exception of the health plan which he notes was controlled by the OTA.

R submits this creative and completely imaginative alternative reality must be rejected as contrary to the law, facts, and common sense. R carefully complied with the terms of the OTA (which the ALJ admits controlled some portion of the transaction) and Spruce Up requirements of carefully and contemporaneously stating the terms and conditions of employment both for probationary and permanent workers, exercised its own independent judgment in the selection of employees which it found acceptable, and at no time committed any unfair labor practice act of any description.

On November 8, 2007 R set initial terms and conditions of employment for the position of permanent employee which it offered to successful probationary employees.

When the final complement of permanent employees who had accepted R's terms and conditions was established and constituted a majority of former employees R recognized CP and commenced collective bargaining following the closure of the transaction and the release of R's obligation to operate according to the OTA. Bargaining is ongoing following R's receipt of license approval by the California Health Department and acquisition of ownership.

R respectfully urges the serpentine and convoluted reasoning of the ALJ be rejected in its entirety in preference to a straight line application based on plain facts and applicable law.

R faithfully complied with the terms of the OTA and the Act. It committed no violations of the Act and proceeded at all times and in a fair and open manner. It is entitled to the right to establish its own initial terms and conditions of employment and does not contest it bargaining obligation to the CP which, as noted, is ongoing.

Dated: August 14, 2008

Respectfully Submitted,

By: Robert Cassel /ar
Robert M. Cassel

PROOF OF SERVICE BY U.S. MAIL

I declare I am at least eighteen years of age and not a party to this action. My business address is 60 Mirabel, Mill Valley, California 94941. I am readily familiar with the business's practice for collecting and processing correspondence for mailing. On August 14, 2008, I served a copy of the following documents:

BRIEF IN SUPPORT OF EXCEPTIONS

To the following person at the address listed below:
via First Class Mail (in sealed envelope with United States Postal Service with the postage fully prepaid)

On Behalf of the General Counsel:
Micah Berul, Esq.
NLRB Region 20
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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

A & C HEALTHCARE SERVICES, INC.

and	Cases	20-CA-33588 20-CA-33780

SEIU, UNITED HEALTHCARE WORKERS – WEST

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent's Exception No. 1

In its Exception No. 1, Respondent takes exception to the Administrative Law Judge's denial of Respondent's post-hearing motion to strike references to certain cases General Counsel cited in his post-hearing brief. (ALJD 1: Fn 1). In that motion, Respondent, asserted that in a pre-trial telephone conference among the parties held to facilitate the parties in reaching time-saving stipulations and to increase the possibility of settlement, General Counsel had identified ten cases he would be citing in his post-hearing brief, implying that General Counsel had agreed only to cite those cases in its post-hearing brief to the ALJ. In that conversation, and in connection with a discussion about successorship issues, the Judge requested that Counsel for the General Counsel furnish Respondent with case citations it was relying upon with respect to the issues

Exh. 10

raised by the successorship allegations in the complaint. The Judge and the parties noted that the General Counsel was not authorized or required to furnish Respondent with his work product. Nonetheless, in an effort to be helpful, General Counsel complied with the Judge's request and provided Respondent with a list of case citations it was relying on concerning the successorship issues. No agreement concerning what cases General Counsel would or would not cite in his brief was made or even discussed, and there is nothing in the record evidence to indicate that any such agreement was made. Had Counsel for the General Counsel entered into such an extraordinary agreement, it certainly would have been included in the parties' joint stipulation, or at the very least, mentioned in the record. To the contrary, there is nothing in the record whatsoever in this regard. Accordingly, it was proper for the Judge to deny Respondent's motion to strike portions of the General Counsel's Brief based on matters that were not in the record.

Moreover, nearly all of the 31 cases Respondent argues are in excess of the Judge's purported "instructions" do not concern the successorship issues discussed by the parties and the Judge during the pre-trial telephone conference. Rather, these case citations are primarily straightforward authority to establish that the various changes Respondent made to bargaining unit employees' terms and conditions of employment concerned mandatory subjects of bargaining, part of the General Counsel's burden of proof. For these reasons, Respondent's Exception No 1. should be rejected.

Respondent's Exception No. 2

In its Exception No. 2, Respondent takes issue with the Judge's characterization of the language in Paragraph 8 of the Bankruptcy Court's Order. (Joint Exh. 1, Exh. A, para. 8). That paragraph states as follows:

> Except for unexpired leases and executory contracts to be assumed by the Debtors and assigned to the buyer, the buyer shall not be assuming any of the Debtors' liabilities. The buyers are not successors of the Debtors, and the buyers shall have no successor liability as a result of purchasing any of the Debtors' facilities.

In his decision, however, the Judge correctly notes that Respondent did not argue or discuss in its post-hearing brief, the meaning, intent or significance of this paragraph as it might relate to Respondent's obligations as a *Burns* [1] successor under the National Labor Relations Act (ALJD 4:24-26). Therefore, the Judge properly concluded that Respondent had not demonstrated that the language of this paragraph had any relevance to its obligations as a *Burns* successor employer under the Act. (ALJD 4:31-33). In these circumstances, Respondent's Exception No. 2 should be rejected.

Respondent's Exception Nos. 3 and 4

In Exception No. 3, Respondent takes issue with the Judge's finding that it had not demonstrated that obtaining a license to operate the facility or completing the transfer of the facility was less than a "respectable certainty" when it began operating the facility on an interim basis on August 8, 2007.[2] Respondent argues that the five month period it

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1 *NLRB v Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

2 All dates herein refer to calendar year 2007 unless otherwise indicated.

took for it to actually obtain a license to operate the facility demonstrates the difficulty and uncertainty of acquiring a license. In Exception No. 4, Respondent argues that the record contains no showing that it "harbored any 'certitude'" that a license to operate the facility would be granted and that the five month period that elapsed before it obtained a license demonstrates that fact. Respondent's Exception Nos. 3 and 4 should be rejected.

In *Golden Cross Healthcare of Fresno,* 314 NLRB 1201 (1994), the Board adopted the finding of the administrative law judge that successorship can occur during a transition period after finalization of an enterprise's purchase but before ownership or entrepreneurial control actually changes hands. In that case, the administrative law judge, citing *East Belden Corp.*, 239 NLRB 776, 791 (1978), enfd. Mem. 634 F.2d 635 (9th Cir 1980), noted that any "assertion that 'there cannot be successorship without ownership' is contrary to the law," inasmuch as an acquiring "employer may be subject to successorship obligations despite the fact that there has been no transfer of title to the assets." 314 NLRB at 1205. Citing the Supreme Court's decision in *Burns Security Services*, the administrative law judge reasoned that this is so because the successorship doctrine exists not as a mere consequence or incident of ownership interest but, rather the doctrine promotes the statutory policy of avoiding, or minimizing industrial strife to facilitate the flow of commerce. Noting that the Board's traditional test for determining successorship status "is whether there is a continuity in the employing enterprise," the administrative law judge concluded that "If such continuity is being maintained by an acquiring employer during an interim or transition period before ownership actually changes hands, then that acquiring employer is obliged during that interim or transition period to observe

statutory bargaining obligations imposed under the successorship doctrine." 314 NLRB at 1205.

In *Golden Cross Health Care*, notwithstanding that legal ownership of the facility at issue had not been transferred and the successor employer's license to operate the facility had not been granted, the administrative law judge found that there was ample basis for concluding that a license to operate the healthcare facility at issue would be granted because the employer had experience in the profession and industry, possessed written agreements to lease the facility at issue and was actually operating the facility. In these circumstances, the administrative law judge, with Board approval, concluded that securing a license to operate the facility should have been viewed as a relative certainty. 314 NLRB 1205-1206.

Like the situation in *Golden Cross*, the evidence in the instant case establishes that Respondent had experience in the business of providing residential nursing care to patients and was licensed to operate and was operating another nursing home in the State of California providing such care. Respondent was bound by a written agreement (the Transfer Agreement) to assume the predecessor's lease to operate the facility and to acquire all assets owned by the predecessor at the facility associated with operation of the facility except for certain executory contracts or unexpired personal property leases and related assets (Joint Exh. 1, para 2, Exh. B, Articles I and II). Respondent had also taken control and possession and begun operating the facility on August 8. In view of the foregoing, and as Respondent presented no record evidence that any problems related to its license application for the facility existed, General Counsel submits that the Judge properly found that there was at the very least, a "respectable certainty" that Respondent

would obtain a license from the State of California to operate the facility. In these circumstances, Respondent's Exception Nos. 3 and 4 should be rejected.

Respondent's Exception No. 5

In Exception No. 5, Respondent excepts to what it refers to as "the ALJ's speculation in footnote 9 . . . to support a hypothetical assertion that employees would decline an offer of employment followed by the ALJ's hypothetical response to his own hypothetical speculation." Footnote 9 follows the Judge raising the issue as to whether Respondent's offer of "90-day probationary employment, during which the employees will be receiving no health insurance or continuation of other contractual benefits previously enjoyed, constitutes an announcement and establishment of new terms and conditions of employment within the meaning and rationale of *Spruce Up.*" (ALJD 6:31-35). To this extent footnote 9 is not the Judge's speculation, but is rather the Judge's proper elaboration as to why Respondent's communications to employees on August 8 were not a clear announcement of initial terms and conditions to employees as required under *Spruce Up Corp.*, 209 NLRB 194 (1974). Accordingly, Respondent's Exception 5 should be rejected.

Respondent's Exception No. 6

In Exception No. 6, Respondent claims that the Judge, by noting in his decision that Board has found that the status of former permanent employees who are initially hired by a successor employer as temporary or probationary employees is not changed for purposes of determining union majority, misstated the Board's holding in *S&F Market*

Street Healthcare LLC d/b/a Windsor Convalescent Center of North Long Beach, 351 NLRB No. 44 slip op. (September 30, 2007). In support of this exception, Respondent argues that the *Windsor* Board discounted the denomination of employees as temporary and/or probationary because the employer had failed to satisfy the *Spruce Up* requirement of informing them of the terms and conditions of employment prior to or at the time of their hire. However, a reading of the Board's *Windsor* decision reveals that it is Respondent who is mistaken. In *Windsor*, the Board upheld the findings of the administrative law judge that the establishment of a 90-day probationary period did not create doubt about the makeup of a work force sufficient to defer a work-force-continuity determination until after completion of the 90-day period. 351 NLRB No. 44 slip op. page 4. In so doing the Board noted:

> Citing *Sahara Las Vegas Corp.*, 284 NLRB 337 fn. 4 (1988), enfd. *NLRB v. Sahara Las Vegas Corp.*, 886 F.2d 1320 (9th Cir. 1989) for the proposition that a work force continuity determination is not deferred until after completion of a probationary period, the judge reasoned that the *Burns* work force continuity requirement must be assessed as of July 1, the date the Respondent began operating the facility. Because, on July 1, both bargaining units were "overwhelmingly composed of former Candlewood employees who had been represented by the Union," the Judge found that a bargaining obligation attached as of that date.
>
> We agree with this analysis. We find no merit in the respondent's exceptions regarding the "temporary" status of the former Candlewood employees and the date a "substantial and representative complement of regular employees" was achieved. Accordingly, for the reasons stated by the judge, we affirm the judge's findings that the Respondent incurred a Burns successor's duty to bargain with the Union as of July 1. 351 NLRB No. 44 slip op. page 4.

In view of the foregoing, it is plain that the Judge did not misstate the Board's holding in this case. Accordingly, Respondent's Exception No. 6 must be rejected.

Respondent's Exception No. 7

In Exception No. 7, Respondent excepts to the Judge's conclusion that "there seem to be no compelling reason to conclude that the employee complement inherited by the Respondent was generally less qualified and more likely to be replaced than any other complement of employees or to conclude that a special exception, under *Burns* and its progeny, should be carved out for successors who elect to acquire businesses through bankruptcy auctions." (ALJD 7:35-43).

The Judge's findings in this regard highlight: 1) that under Board law, as explained above in the discussion of *Windsor*, the probationary nature of a successor employer's initial hire of employees does not create doubt as to the makeup of a work force sufficient to defer a work-force-continuity determination until after completion of the 90-day period, and there are no special facts concerning the qualifications of the employees herein to suggest any deviation from *Windsor* should be contemplated; and 2) that there exists no special exception to the law of *Burns* and its progeny for businesses acquired through bankruptcy auctions, nor compelling reasons presented herein to indicate that there should be. The Judge's findings in this regard were correctly based on Board law as applied to the facts herein, and Respondent's Exception 7 is thus without merit.

Respondent's Exception Nos. 8 and 9

In Exception No. 8, Respondent takes exception to the Judge's recommended finding that although it was not a perfectly clear *Burns* successor on August 8, the day it commenced operations, a bargaining obligation attached prior to the expiration of the 90-day probationary period. In Exception No. 9, Respondent excepts to the Judge's findings

that the Union's majority status was established prior to November 8, when it offered permanent employment to its probationary employees and that Respondent's bargaining obligation attached at some point between September 14, the date the Union requested recognition and bargaining and November 8, when Respondent unilaterally established terms and conditions of employment for its then permanent employees. Respondent's contentions in Exception Nos. 8 and 9 should be rejected.

In his decision, the Judge found that Respondent assumed interim operation of the predecessor's facility on August 8 at which time it informed all of the individuals employed by the predecessor that they were hired on a 90-day probationary basis and they would continue to receive their regular pay during the probationary period but would not receive health or other benefits. (ALJD 2:45-3:2). The Judge also found that upon assuming operations of the facility, Respondent continued to provide nursing care to the patients at the facility in essentially unchanged form from the predecessor's operations, with the same employee compliment. The Judge further found that on September 14, the Union requested that Respondent recognize and bargain with it as the collective-bargaining representative of the unit and that Respondent did not reply to this request until about December 3, when, by letter it agreed to recognize the Union provided it had been licensed to purchase the facility, employed persons directly as a healthcare employer, and a majority of the currently employees were previously employed by the predecessor. The Judge further found that upon the conclusion of the 90-day probationary period, November 8, Respondent hired all but six of the 85 non-supervisory/managerial employees who had previously been employed at the facility by the predecessor as permanent employees and, on the same date announced and

unilaterally established terms and conditions of employment covering wages, holidays, health insurance, overtime, sick leave and no-call/no-show policy. (ALJD 3:8-33)

In *Burns Security Services*, supra, the Supreme Court held that a successor employer has a duty to recognize and bargain with an incumbent union where two factors are present: continuity of the enterprise and continuity of the work force. There is no dispute that the first *Burns* factor has been met in the instant case. General Counsel submits that the Judge correctly found that the second *Burns* factor, continuity of the work force, also exists in the instant case despite Respondent's labeling of the former employees of the predecessor as "probationary employees." Contrary to Respondent, the Board has long held that a workforce continuity determination is not deferred until after completion of a probationary period but must be assessed as of the date a successor employer begins operating the facility, in this case August 8. See *Windsor Convalescent Center of North Long Beach, supra.*

A successor employer generally is free to set initial terms and conditions of employment for its newly-hired workforce, except in instances where "it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Burns,* 406 U.S. at 294-95. In such situations, as the Board established in *Spruce Up Corp.,* 209 NLRB 194 (1974), in order lawfully to set initial terms and conditions unilaterally, a successor employer must "clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Id.* at 195. Its failure to do so will forfeit its right to set initial terms and conditions of employment. *Id.*

In *Spruce Up,* the successor employer indicated only a "general willingness to hire the barbers employed by the former employer." *Id.* The new employer also made it clear from the outset, by the distribution of a form letter to the barbers several days before taking over operations, that he "intended to set his own initial terms, and that whether or not he would in fact retain the incumbent barbers would depend on their willingness to accept those terms." *Id.* at 194-95. In such circumstances, the *Spruce Up* Board stated that "we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court." *Id.* at 195 (quoting *Burns,* 406 U.S. at 294-95).

Here, however, Respondent expressed an unequivocal willingness to hire all of the predecessor's employees, telling the former-Pleasant Care employees when it took over operations of the Facility on August 8, that they were all hired on a 90-day probationary basis (Joint Exh. 1, para. 4). At such time, however, Respondent "did not state that it was setting initial terms and conditions of employment," but merely stated that the employees "would continue to receive their regular pay during the probationary period, but would not receive health or other benefits" when Respondent took over operation of the Facility (Joint Exh. 1, para. 4). Such statements clearly evince that Respondent planned to retain all of the employees in the Pleasant Care bargaining unit, but did not clearly indicate an intent to establish a new set of terms and conditions of employment.

Moreover, Respondent did not even indicate when it took over operations on August 8, that it would at some future time implement a new set of terms and conditions of employment, which would have been insufficient in any event under *Windsor*

Convalescent Center, supra. Rather, Respondent sought to reassure employees by informing them that their wages would remain the same, despite the discontinuation of their benefits, in order to induce them to accept employment with Respondent when it took over operations, given Respondent's obligation to provide residential nursing care to the patients. As in *Windsor Convalescent Center,* the bargaining unit employees in the instant case were denied the ability to make an informed choice as to whether to accept employment with Respondent.

Thus, there was a continuity of the enterprise and continuity of the work force, upon Respondent's takeover of operations of the facility on August 8, and Respondent at no time clearly announced a new set of terms and conditions of employment as required under *Spruce Up.* Accordingly, Exceptions 8 and 9 are without merit.

Respondent's Exception No. 10

In its Exception No. 10, Respondent takes exception to the Judge's conclusion that its refusal to recognize and bargain with the Union from sometime prior to November 8 until January 8, 2008, is violative of Section 8(a)(5) and (1) of the Act. In so doing, Respondent argues that the record does not support a date earlier than November 8 for determining the presence or absence of a majority of the predecessor's employees because the employees were hired on a probationary basis. This Exception is without merit for the reasons discussed above in regard to Exceptions 6, 8 and 9, because in successorship cases the Board does not defer a workforce continuity determination until after completion of a probationary period, but rather makes such an assessment as of the date a

successor employer begins operating the facility, in this case August 8. See *Windsor Convalescent Center of North Long Beach, supra.*

Respondent's Exception Nos. 11-13

In Exceptions 11-13, Respondent takes exception to the Judge's conclusion of law that Respondent violated Section 8(a)(5) and (1) as found in the decision; to the Judge's recommended remedy that Respondent be required to rescind its unlawful unilateral changes; and to the Judge's Order in its entirety. For all of the reasons stated above, as well as for the reasons set forth in Counsel for the General Counsel's Brief in Support of the ALJD and Brief in Support of General Counsel's Limited Exceptions to the ALJD, Respondent's Exceptions 11-13 should be rejected.

For the foregoing reasons, General Counsel respectfully submits Respondent's exceptions should be denied in their entirety.

DATED AT San Francisco, California, this 29th day of August, 2008.

/s/ Micah Berul

Micah Berul
Counsel for the General Counsel of the
National Labor Relations Board
901 Market Street, Suite 400
San Francisco, California 94103-1735

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

A & C HEALTHCARE SERVICES, INC.

and

Cases 20-CA-33588
20-CA-33780

SEIU, UNITED HEALTHCARE WORKERS - WEST

GENERAL COUNSEL'S LIMITED EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel of the National Labor Relations Board files the following exceptions to the Decision of Administrative Law Judge Gerald A. Wacknov, herein called the Judge, such decision having issued on July 18, 2008.

No.	Page	Lines	Exception
1.	8	1-4	General Counsel takes exception to the Judge's failure to find that Respondent was a "perfectly clear" *Burns* successor.
2.	9	40-47	General counsel takes exception to the Judge's finding that because of language in the Operations Transfer Agreement (OTA) "the matter of Respondent's health care obligations is an open issue" to be resolved in a compliance proceeding.
3.	3. 8 9.	16-20 20-24 6-12, 40-47	General Counsel takes exception to the Judge's failure to order Respondent to rescind any departure from employees' terms and conditions of employment covering health insurance and to resume contributions retroactively pursuant to the medical and dental provisions of the Pleasant Care CBA, given that the Judge found on page 3, lines 16-20, that on November 8, 2007, Respondent announced and unilaterally established terms and conditions of employment, including those covering health insurance, and given that the Judge concluded on page 8, lines 20-24, that the changes to the employees' terms and conditions of employment made

Exh. 11(a)

on or after November 8, 2007 constituted unilateral changes in violation of Section 8(a(5) and (1) of the Act

DATED AT San Francisco, California, this 15th day of August, 2008.

Respectfully submitted,

/s/ Micah Berul

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

A & C HEALTHCARE SERVICES, INC.

and

Cases 20-CA-33588
20-CA-33780

SEIU, UNITED HEALTHCARE WORKERS - WEST

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN SUPPORT OF LIMITED EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. INTRODUCTION

General Counsel's limited exceptions to the Administrative Law Judge's Decision (the ALJD) focus on 1) the Administrative Law Judge's (the Judge) failure to find that Respondent was a "perfectly clear" successor; 2) the Judge's finding that because of language in the Operations Transfer Agreement (OTA) "the matter of Respondent's health care obligations is an open issue" to be resolved in a compliance proceeding, and; 3) the Judge's failure to order that Respondent be required to rescind any departure from terms and conditions of employment covering health insurance and to resume contributions retroactively pursuant to the medical and dental provisions of the Pleasant Care CBA (GC Exh. 2), given that the Judge found (ALJD 3, lines 16-20) that on November 8, 2007, Respondent announced and unilaterally established terms and conditions of employment, including those covering health insurance, and given that the Judge concluded (ALJD 8, lines 20-24) that the changes to the employees' terms and conditions

Exh. 11(b)

of employment made on or after November 8, 2007 constituted unilateral changes in violation of Section 8(a)(5) and (1) of the Act.

II. FACTS

Because the General Counsel is filing only limited exceptions to the ALJD, just the facts relevant to those limited exceptions are set forth herein.

This case concerns Respondent's successorship obligations arising from its acquisition of a nursing home, located in Milbrae, California (the "Facility"). The Facility had been operated for many years by Pleasant Care Corporation ("Pleasant Care"), the predecessor employer in this case; and the predecessor had been in a collective-bargaining relationship with the Union during that time period. The collective-bargaining agreement with the Union had a term of October 1, 2006, through June 15, 2008 (the Pleasant Care CBA) (ALJD at 3).[1] Pleasant Care, however, filed for Bankruptcy under Chapter 11 of the United States Bankruptcy Code; and in July 2007, Respondent was the winning bidder for the nursing home. On August 8, 2007, Respondent began its operations of the Facility, pending the completion of the transaction.

General Counsel and Respondent entered a detailed stipulation, which establishes most of the facts in the case concerning the business transformation from Pleasant Care to A & C and the changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees. (Joint Exh. 1)

The Facility, located at 33 Mateo Drive in Millbrae, California, provides residential nursing care to patients (Joint Exh. 1, para. 1). The predecessor employer, Pleasant Care, had a

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[1] Unless noted by transcript reference ("Tr.) or by a reference to joint exhibits ("Joint Exh.") or to Counsel for the General Counsel's exhibits at the hearing ("GC Exh."), the statement of facts is based on facts found in the ALJD and noted by reference ("ALJD").

collective-bargaining agreement with the Union with a term of October 1, 2006, through June 15, 2008 (the "Pleasant Care CBA") (GC Exh. 2). The Union represents a bargaining unit of about 85 employees who work at the Facility, consisting of licensed vocational nurses, cooks, nursing assistants, certified nursing assistants, restorative nursing assistants, housekeepers, laundry workers, kitchen helpers, and maintenance workers (GC Exh. 2). The Union and predecessor Pleasant Care had been in a collective-bargaining relationship since 1995, when Pleasant Care began operations of the Facility (Tr. 27).

By order dated July 6, 2007 (the "Bankruptcy Court Order"), the United States Bankruptcy Court, Central District of California (Los Angeles Division) deemed Respondent the winning bidder for the Facility, and approved the transfer of the debtor's (Pleasant Care) assets, including the assignment of the Facility's lease and sale of related assets, to the buyer (Respondent), effective on the date that Respondent obtained an operating license from the California Department of Health (Joint Exh. 1, para. 2, Exh. A). Pending issuance of that license, Respondent would operate the Facility under an interim management agreement, and if Respondent did not obtain its license by December 31, 2007, then Pleasant Care had the right to "unwind" the sale (Joint Exh. 1, para. 2, Exh. A). Interim management of the Facility was transferred from Pleasant Care to the Employer on July 26, 2007, pursuant to an Operations Transfer Agreement (the "Transfer Agreement") between Pleasant Care and Respondent (Joint Exh. 1, para. 3, Exh. B). Section 2.5 of the Transfer Agreement required the Respondent to hire all the Pleasant Care employees on a probationary basis and provided that the collective-bargaining agreement would control the terms and conditions of employment unless waived by

the Union or rendered unenforceable by law or order of the Bankruptcy Court. (Joint Exh. 1, Exhibit B).

On August 8, 2007, Respondent assumed interim operation of the Facility and informed all of the individuals who were previously employed by predecessor employer Pleasant Care that they were being hired by Respondent on a 90-day probationary basis (Joint Exh. 1, para. 4). Respondent did not tell the employees that it was setting initial terms and conditions of employment, merely stating that the employees would continue to receive their regular pay during the probationary period, but would not receive health or other benefits (Joint Exh. 1, para. 4).[2] "Upon assuming operations of the Facility, Respondent continued to operate the Facility in basically unchanged form from that of Pleasant Care's operation of the Facility, providing residential nursing care to patients at the Facility" (Joint Exh. 1, para. 5). On September 14, 2007, the Union made a request for recognition and demand for bargaining. The Respondent didn't respond to this request for several months.[3]

When the 90-day probationary period of employment had ended, "[o]n November 8, 2007, Respondent informed all but six of the 85 non-supervisory/managerial employees, who were previously employed by Pleasant Care working at the Facility, that they had passed their probationary period and were eligible to become, and did become, regular non-probationary employees" (Joint Exh. 1, para. 6). At this time, Respondent announced certain "terms and

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2 Section 34, Health and Dental Insurance, of the Pleasant Care CBA (GC Exh. 2) provides that the employer shall provide certain medical and dental insurance and employer shall make contributions. Respondent stopped providing those benefits to employees and ceased making contributions soon after it assumed interim operation of the Facility and did not resume those contributions on November 8, 2007 or anytime thereafter (Joint Exh. 1. para. 4 and 14).

3 The Judge correctly concluded that Respondent refused to recognize and bargain with the Union until January 8, 2008, in violation of Section 8(a)(5) and (1) of the Act (ALJD 8).

conditions of employment covering wages, holidays, health insurance, overtime, sick leave, and no-call/no-show policy, to all assembled workers who had passed probation and wished to be employed by Respondent in permanent regular positions" (Joint Exh. 1, para. 7). Respondent, since August 8, 2007, has made no contributions pursuant to the medical and dental provisions of the Pleasant Care CBA (Joint Exh. 1, para. 14). It did not resume those contributions on November 8, 2007, when it established terms and conditions of employment for its permanent employees, including those covering health insurance.

III. ARGUMENT

(A) THE JUDGE SHOULD HAVE FOUND THAT RESPONDENT WAS A "PERFECTLY CLEAR" *BURNS* SUCCESSOR.

The Judge correctly concluded that Respondent became a *Burns* successor as of August 8, 2007, when it took over operations at the Facility. Respondent therefore had a duty to recognize and bargain with the Union as of August 8, 2007. See, e.g., *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). The Judge erred, however, in failing to find that Respondent was a "perfectly clear" *Burns* successor and that Respondent therefore was not privileged to establish new terms and conditions of employment, because it did not clearly state to employees its intent to do so before offering them employment. The Judge stated that "under the circumstances herein, it seems to make no difference whether the Respondent is a *Burns* "perfectly clear successor." The Judge was incorrect.

A successor employer generally is free to set initial terms and conditions of employment for its newly-hired workforce, except in instances where "it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."

Burns, Id. at 294-95. In such situations, as the Board established in *Spruce Up Corp.*, 209 NLRB 194 (1974), in order lawfully to set initial terms and conditions unilaterally, a successor employer must "clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Id.* at 195. Its failure to do so will forfeit its right to set initial terms and conditions of employment. *Id.*

In *Spruce Up,* the successor employer indicated only a "general willingness to hire the barbers employed by the former employer." *Id.* The new employer also made it clear from the outset, by the distribution of a form letter to the barbers several days before taking over operations, that he "intended to set his own initial terms, and that whether or not he would in fact retain the incumbent barbers would depend on their willingness to accept those terms." *Id.* at 194-95. In such circumstances, the *Spruce Up* Board stated that "we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court." *Id.* at 195 (quoting *Burns,* 406 U.S. at 294-95).

Here, however, Respondent expressed an unequivocal willingness to hire all of the predecessor's employees, telling the former-Pleasant Care employees when it took over operations of the Facility on August 8, 2007, that they were all hired on a 90-day probationary basis (Joint Exh. 1, para. 4). At such time, however, Respondent "did not state that it was setting initial terms and conditions of employment" to become effective after the probationary period but merely stated that the employees "would continue to receive their regular pay during the probationary period, but would not receive health or other benefits" when Respondent took over operation of the Facility (Joint Exh. 1, para. 4). Such statements clearly evince that Respondent planned to retain all of the employees in the Pleasant Care bargaining unit, but did not clearly

indicate an intent to establish a new set of terms and conditions of employment for regular, non-probationary employees.

As with the finding of successor status under *Burns*, the probationary nature of Respondent's August 8, 2007, hire of all of the Pleasant Care employees does not affect the determination that Respondent is a "perfectly clear" *Burns* successor. The Board has considered whether a successor employer may avoid a "perfectly clear" successor finding when its initial hires – like almost all new employees – are hired on a probationary basis. In this regard, the Board applies the "perfectly clear" exception when a successor indicates that it will be hiring all of its predecessor's employees, even if on a probationary basis. See *Canteen Company,* 317 NLRB 1052, 1053 (1995). In *Canteen Company,* the Board found the employer to be a "perfectly clear" successor, holding that:

> When the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. . . Therefore, as it was 'perfectly clear' on [that date] that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.
> *Id.* at 1053.

In *Canteen Co.,* the Board reasoned that the successor employer, by notifying the union of its desire for the predecessor's employees to serve on a probationary basis, but without stating it would set new initial terms and conditions of employment, was not privileged to implement unilaterally new wage rates the next day. *Id.* at 1053-54. Similarly, in *Windsor Convalescent Center,* 351 NLRB No. 44, the Board held the employer to be a "perfectly clear" *Burns* successor, because the employer did not discuss in its interviews with employees that it would be changing their terms and conditions of employment, and the evidence failed to establish that employees had received, as the employer asserted, letters stating that new terms of employment

would be forthcoming in an employee handbook. *Windsor Convalescent Center,* 351 NLRB No. 44, slip op. at 7-8. The Board further found that, even if those letters were received before the employees began work, a general statement that new terms will be set subsequently is insufficient to meet the *Spruce Up* obligation. *Id.* at 8. The Board reasoned that the successor had deprived the unit employees of the ability to make an informed choice as to whether to accept employment and therefore was "precluded' from later imposing new terms without bargaining.[4] *Id.* at 8-9.

As set forth above, Respondent did not inform the bargaining unit employees when it hired all of them on a probationary basis on August 8, 2007, that it was setting initial post-probationary terms and conditions of employment. (Joint Exh. 1, para. 4). Respondent did not even indicate when it took over operations on August 8, 2007, that it would at some future time implement a new set of terms and conditions of employment, which would have been insufficient in any event under *Windsor Convalescent Center. See id.* Rather, Respondent sought to reassure employees by informing them that their wages would remain the same, despite the discontinuation of their benefits, in order to induce them to accept employment with Respondent when it took over operations, given Respondent's obligation to provide residential nursing care to the patients. As in *Windsor Convalescent Center,* the bargaining unit employees in the instant case were denied the ability to make an informed choice as to whether to accept employment with Respondent.

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[4] See also *Dupont Dow Elastomers LLC,* 332 NLRB 1071, 1074-75 (2000), enfd. 296 F.3d 495 (6th Cir. 2002) (announcement of changes after the hiring and acceptance process was underway was too late because employees might have foregone other employment opportunities in reliance on the promise of continued employment under unchanged conditions); *Morris Healthcare & Rehabilitation Center,* 348 NLRB No. 96, slip op. at 5-6 (2006) (respondent did not convey wage or benefit information during the application and interview stages, and employees did not receive handbooks with new employment terms until their orientation sessions); *Freemont Ford,* 289 NLRB 1290 (1988) (holding the successor's stated desire to institute a flat rate and to change the seniority system insufficient for successor to lawfully implement new terms and conditions of employment).

A successor employer's entire course of conduct may also lead to a finding of "perfectly clear" successor status. See *Hilton's Environmental, Inc.*, 320 NLRB 437 (1995). In *Hilton's Environmental,* the Board held that the employer was a "perfectly clear" successor and was, accordingly, not free to set initial terms and conditions. In *Hilton's Environmental,* the successor employer knowingly bid to provide services to the Army under a contract that incorporated terms and conditions of the predecessor employer's pre-existing collective-bargaining agreement. See *id.* at 437-39. The successor employer's "entire course of dealing with the employees," the Board held, which included soliciting letters of intent that stated the employees would work for the successor at the pre-existing contractual wage rate, did not indicate it intended to set new terms and conditions of employment. See *id.* at 437-39.

Similarly, here, Respondent's entire course of conduct, including its communications to employees, indicates an intent to retain all of Pleasant Care's employees under the existing terms and conditions. Section 2.5 of the OTA expressly required Respondent to retain the predecessor employees under the pre-existing terms and conditions. (Joint Exh. 1, Exhibit B). Respondent knowingly undertook this obligation by making the winning bid in the bankruptcy proceeding and entering the Transfer Agreement, just as the successor employer in *Hilton's Environmental* knowingly bid to provide services to the Army under the terms required by the Army. Respondent's entire course of conduct did not indicate an intention to set new initial terms and conditions of employment for regular, non-probationary employees. Its entire course of conduct adds further support for the finding that Respondent was a "perfectly clear" *Burns* successor as of August 8, 2007.

(B) THE JUDGE ERRED BY FINDING THAT THE MATTER OF RESPONDENT'S HEALTH CARE OBLIGATIONS IS AN OPEN ISSUE TO BE RESOLVED IN A COMPLIANCE PROCEEDING

In the Remedy section of his decision, after finding that Respondent violated Section 8(a)(5) by unilaterally changing employees' health insurance, the Judge noted that Section 2.5(f) of the Operations Transfer Agreement, entered into by the predecessor Pleasant Care and Respondent pursuant to Bankruptcy proceedings, may have excluded the subject of Respondent's health care obligations from Respondent's bargaining obligations, indicating the matter should be resolved in a compliance proceeding (ALJD at 9, fn 14). As noted above, the ALJ also stated that "under the circumstances herein, it seems to make no difference whether the Respondent is a *Burns* perfectly clear successor" (ALJD at 8). The Judge was incorrect. Thus, even assuming that the Judge's reading of the OTA to permit the Employer to establish a new health plan is correct, the National Labor Relations Act requires successors to bargain with the union before changing existing terms and conditions of employment. Any argument that the OTA, reached pursuant to the Bankruptcy proceedings, relinquishes any of Respondent's successorship obligations under the NLRA must fail.

The record evidence supports a finding that Respondent was a "perfectly clear" *Burns* successor as of August 8, 2007, when it hired all of Pleasant Care's bargaining unit employees and began operations of the Facility. The Union made a demand for bargaining on September 14, 2007, and thereafter the Respondent was obligated to bargain about any changes in terms and conditions under *Burns*. Even if, as the Judge seems to suggest in footnote 14, the Respondent's November announcement of a new health plan could be considered an "initial term," the Respondent was precluded from unilaterally setting initial terms because it was a "perfectly clear" successor. Accordingly, Respondent's failure to resume contributions pursuant to the medical and dental provisions of the Pleasant Care CBA (GC. Exh.2), as pf November 8, 2007, constituted an unlawful unilateral change and is not an open issue let for compliance.

(C) THE JUDGE SHOULD HAVE ORDERED RESPONDENT TO RESCIND ANY DEPARTURE, AS OF NOVEMBER 8, 2007, FROM EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT COVERING HEALTH INSURANCE AND TO RESUME CONTRIBUTIONS PURSUANT TO THE MEDICAL AND DENTAL PROVISIONS OF THE PLEASANT CARE CBA.

Given that the Judge found that on November 8, 2007, Respondent announced and unilaterally established terms and conditions of employment, including those covering health insurance (ALJD 3, lines 16-20), and given that the Judge concluded that the changes to the employees' terms and conditions of employment made on or after November 8, 2007, constituted unilateral changes in violation of Section 8(a)(5) and (1) of the Act (ALJD 8, lines 20-24), it follows that the Judge should have ordered Respondent to rescind any departure from employees' terms and conditions of employment covering health insurance that would have existed for permanent employees on November 8, 2007. Respondent should also be ordered to resume contributions pursuant to the medical and dental provisions of the Pleasant Care CBA (GC Exh. 2) and to retroactively restore said term and condition of employment until such time as the parties reach a collective-bargaining agreement or a bargaining impasse. The Judge ordered the correct remedy with respect to other unilateral changes he found to be unlawful (ALJD 9), but erred in failing to apply the same remedy to the unlawful unilateral change concerning health insurance.

III. CONCLUSION

For all of the reasons discussed, Counsel for the General Counsel respectfully requests that the Board sustain the General Counsel's Limited Exceptions to the Administrative Law Judge's Decision.

DATED AT San Francisco, California, this 15th day of August, 2008.

/s/ Micah Berul

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

A & C HEALTHCARE SERVICES, INC.

and

Cases 20-CA-33588
20-CA-33780

SEIU, UNITED HEALTHCARE WORKERS - WEST

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF THE ADMINISTRATIVE LAW JUDGE'S DECISION

Submitted by
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Exh. 12

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I. INTRODUCTION

This case is before the Board upon Administrative Law Judge Gerald A. Wacknov's[1] July 18, 2008, Decision (the "ALJD"), which found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with SEIU, United Healthcare Workers – West (the "Union"), when Respondent became a successor employer under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 278-81 (1972); and by making unilateral changes to the wages, hours, and other terms and conditions of employment of the bargaining unit employees.[2]

This case concerns Respondent's successorship obligations arising from its acquisition of a nursing home, located in Milbrae, California (the "Facility"). The Facility had been operated for many years by Pleasant Care Corporation ("Pleasant Care"), the predecessor employer in this case; and the predecessor had been in a collective-bargaining relationship with the Union during that time period. Pleasant Care, however, filed for Bankruptcy under Chapter 11 of the United States Bankruptcy Code; and in July 2007, Respondent was the winning bidder for the nursing home. On August 8, 2007, Respondent began its operations of the Facility, pending the completion of the transaction.

General Counsel and Respondent entered a detailed stipulation, which establishes most of the facts in the case concerning the business transformation from Pleasant Care to A & C and the changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees. As the ALJ found, Respondent is a *Burns* successor, and its refusal to recognize

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1 Hereinafter, the Judge or ALJ.

2 Counsel for the General Counsel has filed a limited exception to the Judge's failure to find that Respondent became a "perfectly clear" *Burns* successor as of August 8, 2007.

and bargain with the Union until January 3, 2008, violated Section 8(a)(5) and (1). In addition, as the Judge found, Respondent's implementation of numerous changes to employees' terms and conditions of employment without bargaining constituted unlawful unilateral changes.

II. FACTS[3]

The Facility, located at 33 Mateo Drive in Millbrae, California, provides residential nursing care to patients (ALJD at 2; Joint Exh. 1, para. 1). The predecessor employer, Pleasant Care, had a collective-bargaining agreement with the Union with a term of October 1, 2006, through June 15, 2008 (the "Pleasant Care CBA") (ALJD at 3; GC Exh. 2). The Union represents a bargaining unit of about 85 employees who work at the Facility, consisting of licensed vocational nurses, cooks, nursing assistants, certified nursing assistants, restorative nursing assistants, housekeepers, laundry workers, kitchen helpers, and maintenance workers (ALJD at 3; GC Exh. 2). The Union and predecessor Pleasant Care had been in a collective-bargaining relationship since 1995, when Pleasant Care began operations of the Facility (Tr. 27).

By order dated July 6, 2007 (the "Bankruptcy Court Order"), the United States Bankruptcy Court, Central District of California (Los Angeles Division) deemed Respondent the winning bidder for the Facility, and approved the transfer of the debtor's (Pleasant Care) assets, including the assignment of the Facility's lease and sale of related assets, to the buyer (Respondent), effective on the date that Respondent obtained an operating license from the California Department of Health (ALJD at 2; Joint Exh. 1, para. 2, Exh. A). Pending issuance of

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[3] Unless noted by transcript reference ("Tr.) or by a reference to joint exhibits ("Joint Exh.") or to Counsel for the General Counsel's exhibits at the hearing ("GC Exh."), the statement of facts is based on facts found in the ALJD and noted by reference ("ALJD").

that license, Respondent would operate the Facility under an interim management agreement, and if Respondent did not obtain its license by December 31, 2007, then Pleasant Care had the right to unwind the sale (ALJD at 2; Joint Exh. 1, para. 2, Exh. A). Respondent operates one other nursing facility in California (Joint Exh. 1, para. 1), and there is no evidence in the record that Respondent had any reason to believe that it would not obtain the license required to operate the Facility (ALJD at 5). Although the Bankruptcy Court Order states that "buyers are not successors of the Debtors, and the buyer shall have no successor liability as a result of purchasing any of the Debtors' facilities" it does not address successorship obligations arising under the National Labor Relations Act[4] (Joint Exh. 1, para. 2, Exh. A).

Interim management of the Facility was transferred from Pleasant Care to the Employer on July 26, 2007, pursuant to an Operations Transfer Agreement (the "Transfer Agreement") between Pleasant Care and Respondent (ALJD at 2; Joint Exh. 1, para. 2, Exh. A).

On August 8, 2007, Respondent assumed interim operation of the Facility and informed all of the individuals who were previously employed by predecessor employer Pleasant Care that they were being hired by Respondent on a 90-day probationary basis (ALJD at 2; Joint Exh. 1, para. 4). Respondent did not tell the employees that it was setting initial terms and conditions of employment, merely stating that the employees would continue to receive their regular pay during the probationary period, but would not receive health or other benefits (ALJD at 2-3; Joint Exh. 1, para. 4). "Upon assuming operations of the Facility, Respondent continued to operate the Facility in basically unchanged form from that of Pleasant Care's operation of the Facility, providing residential nursing care to patients at the Facility" (ALJD at 3; Joint Exh. 1, para. 5).

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[4] Hereafter referred to as the Act or the NLRA.

When the 90-day probationary period of employment had ended, "[o]n November 8, 2007, Respondent informed all but six of the 85 non-supervisory/managerial employees, who were previously employed by Pleasant Care working at the Facility, that they had passed their probationary period and were eligible to become, and did become, regular non-probationary employees" (ALJD at 3; Joint Exh. 1, para. 6). At this time, Respondent announced certain "terms and conditions of employment covering wages, holidays, health insurance, overtime, sick leave, and no-call/no-show policy, to all assembled workers who had passed probation and wished to be employed by Respondent in permanent regular positions" (ALJD at 3; Joint Exh. 1, para. 7).

By letter dated, December 3, 2007, Respondent agreed to recognize the Union "on condition that: 1) Respondent had been licensed by the Department of Health and thereby able to close its purchase of the Facility; 2) employ persons directly as a healthcare employer; 3) and a majority of employees currently employed were previously bargaining unit employees of the former employer. Respondent also agreed subject to the above conditions to meet and bargain with the Union on January 3, 2008" (ALJD at 3; Joint Exh. 1, para. 8).

On "January 3, 2008, Respondent recognized the Union as the exclusive collective-bargaining representative of the Unit employees employed by Respondent" (ALJD at 3; Joint Exh. 1, para. 9).

Since taking over operations of the Facility on August 8, 2007, Respondent has made numerous changes to the bargaining unit employees' wages, hours and other terms of conditions of employment (ALJD at 2-3):

- Respondent has not provided the wage increases scheduled in the Pleasant Care CBA (Joint Exh. 1, para. 12).

- Respondent has not abided by the seniority provision of the Pleasant Care CBA (Joint Exh. 1, para. 13).
- Respondent has made no contributions pursuant to the medical, dental and pension provisions of the Pleasant Care CBA (Joint Exh. 1, para. 14).[5]
- Respondent has not abided by the paid holiday provision of the Pleasant Care CBA, and instead, about September 3, 2007, provided Unit employees seven paid holidays (Joint Exh. 1, para. 15).
- Respondent has not processed workplace disputes concerning wages, hours and other terms and conditions of employment through the grievance mechanism established under the Pleasant Care CBA (Joint Exh. 1, para. 16).
- Respondent has not abided by the Union representative access provisions of the Pleasant Care CBA (Joint Exh. 1, para. 17).
- Respondent has not abided by the paid sick day provision of the Pleasant Care CBA, and instead, about November 8, 2007, provided Unit employees six paid sick days (Joint Exh. 1, para. 18).
- Respondent has not recognized the vacation days accrued by Unit employees under the Pleasant Care CBA (Joint Exh. 1, para. 19).
- Respondent has not provided two weeks notice to Unit employees of changes to their work schedules, as provided for under the Pleasant Care CBA, and about January 7, 2008,

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[5] General Counsel has filed limited exceptions to the Judge's finding that, because of language in the OTA, "the matter of Respondent's health care obligations is an open issue" to be resolved in a compliance proceeding, and to the Judge's failure to order the Respondent be required to rescind any departure from employees' terms and conditions of employment covering health

suspended employee Sandra Mejia Batlle for three days after she failed to report to work on January 6, 2008, after her work schedule had been changed by Respondent without two weeks notice (Joint Exh. 1, para. 20).

- Respondent has not abided by the modified duties provision of the Pleasant Care CBA (Joint Exh. 1, para. 21).
- Respondent has not abided by the starting wage rate for unit employees as provided for in the Pleasant Care CBA, and commencing in January 2008, has hired certified nursing assistants at a starting wage of $11 per hour (Joint Exh. 1, para. 22).
- Respondent has not abided by the notice of hiring provision of the Pleasant Care CBA, and commencing in January 2008, has hired new employees without prior notice to the Union (Joint Exh. 1, para. 23).
- About January 15, 2008, Respondent issued an Employee Handbook, which, *inter alia:*

(i) establishes wage rates and bonuses;

(ii) classifies Unit employees as at-will employees;

(iii) provides Respondent has right to unilaterally revise wages, hours and other terms and conditions of employment;

(iv) establishes disciplinary procedures;

(v) establishes requirements for physical examinations and other health requirements;

(vi) creates meal and rest periods;

(vii) establishes hours of work and overtime policies;

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insurance and to resume contributions retroactively pursuant to the medical and dental provisions of the Pleasant Care CBA (GC Exh. 2).

(viii) establishes accommodations for disabled employees;

(ix) establishes an anti-harassment policy;

(x) establishes an employee dress code;

(xi) establishes attendance rules;

(xii) establishes procedures for evaluating the performance of Unit employees; and

(xiii) establishes a leave of absence and vacation policies.

(Joint Exh. 1, para. 24).

Respondent and the Union held bargaining sessions for an initial collective-bargaining agreement on January 15, 2008, January 30, 2008, March 7, 2008, and April 4, 2008 (ALJD at 3; Joint Exh. 1, para. 10). During the January 30, 2008, bargaining session Respondent withdrew recognition of the Union as the exclusive collective-bargaining representative of the bargaining unit, "but rescinded its withdrawal of recognition to Union Director of Nursing Home Division John Vellardita, on about January 31, 2008, or February 1, 2008" (Joint Exh. 1, para. 11). There is no evidence that the parties bargained to a good faith impasse prior to Respondent making the changes to employees' wages, hours, and other terms of conditions listed above. Respondent has not declared impasse, nor has it stated it would implement a "last, best and final offer" (Tr. 30).

III. ARGUMENT

A. RESPONDENT VIOLATED SECTION 8(a)(5) AND (1) BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION UNTIL JANUARY 3, 2008, AND MAKING UNILATERAL CHANGES

Respondent became a *Burns* successor, by hiring a substantial complement of the predecessor employees and substantially continuing the business operations of the predecessor Pleasant Care. Respondent therefore had a duty to recognize and bargain with the Union upon its

demand for recognition. See, e.g., *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972). Respondent therefore, as the ALJ found, violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union until January 3, 2008, and by instituting unilateral changes without bargaining to impasse with the Union (ALJD at 8-9).

1. RESPONDENT IS A *BURNS* SUCCESSOR

An employer becomes a successor employer under Act when a majority of its employees, consisting of a substantial and representative complement in an appropriate bargaining unit, are former employees of the predecessor, and if there is substantial continuity between the two enterprises. See, e.g., *Burns,* 406 U.S. at 278-81 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 41-43, 52 (1987).

In the instant case, it is undisputed that there was substantial continuity in the operations of the Millbrae facility. "Upon assuming operations of the Facility, Respondent continued to operate the Facility in basically unchanged form from that of Pleasant Care's operation of the Facility, providing residential nursing care to patients at the Facility." (ALJD at 3; Joint Exh. 1, para. 5).

Additionally, Respondent hired all of the 85 Pleasant Care bargaining unit employees on a probationary basis when it commenced operations on August 8, 2007 (ALJD at 2; Joint Exh. 1, para. 4). As the ALJ discussed (ALJD at 5-6), recently, in *Windsor Convalescent Center of North Long Beach,* 351 NLRB No. 44, slip op. at 4 (2007), the Board confirmed that a successorship determination "is not deferred until after completion of a probationary period" *Id.* The duty to bargain attached in *Windsor Convalescent Center*, the Board held, when the successor took over operations and hired its predecessor's employees, even though they were

hired only as "temporary" employees subject to review during a 90-day period. *Id.* (citing *Sahara Las Vegas Corp.*, 284 NLRB 337, 337, n.4 (1987), *enfd.*, 886 F.2d 1320 (9th Cir. 1989)). As noted above, on November 8, 2007, Respondent ultimately hired on a regular basis nearly all of predecessor Pleasant Care's bargaining unit employees (Joint Exh. 1, para. 6).

Respondent's lack of a license, as the Judge found (ALJD at 5-6), does not alter the conclusion that Respondent became a *Burns* successor on August 8, 2007, when it took over operations of the Facility. In *Golden Cross Health Care of Fresno,* the Board held that successorship status attached upon the takeover of operations, even though Golden Cross's license application was pending, because: Golden Cross had written agreements to lease the facility at issue; Golden Cross was actually operating the facility; and there was a "respectable certainty" that Golden Cross would secure a license. See *Golden Cross Health Care of Fresno*, 314 NLRB 1201, n. 2, 1206 (1994).

Likewise, here, Respondent was bound by the Transfer Agreement to assume Pleasant Care's lease and acquire related assets (Joint Exh. 1, para. 2, Exh. B, Articles I and II); Respondent controlled operations of the Facility as of August 8, 2007; and approval of Respondent's license application was a "respectable certainty," given the Employer's operation of another nursing home in the State of California, as well as the absence of any evidence to suggest there were any doubts concerning Respondent's ability to obtain its license.

Any argument that Respondent's successorship obligations under the NLRA were extinguished by the language in the Bankruptcy Court Order fails. Unlike the EEOC discrimination claims at issue in *TWA, In re Trans World Airlines, Inc. (TWA)*, 322 F.3d 283 (3RD Cir. 2003) , successor obligations under the NLRA cannot be reduced to, or satisfied by, monetary awards, as they entail a bargaining relationship between Respondent and the Union,

carrying forward obligations on the part of Respondent into the future that affect the Section 7 rights of all of the members of the bargaining unit. The Judge correctly determined that there seems to be "no compelling reason. . . to conclude that a special exception, under *Burns* and its progeny, should be carved out for successors who elect to acquire businesses through bankruptcy auctions" (ALJD at 7).

2. RESPONDENT WAS NOT FREE TO SET INITIAL TERMS AND CONDITIONS OF EMPLOYMENT

A successor employer generally is free to set initial terms and conditions of employment for its newly-hired workforce, except in instances where "it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Burns,* 406 U.S. at 294-95. In such situations, as the Board established in *Spruce Up Corp.,* 209 NLRB 194 (1974), in order lawfully to set initial terms and conditions unilaterally, a successor employer must "clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Id.* at 195. Its failure to do so will forfeit its right to set initial terms and conditions of employment. *Id.*

In *Spruce Up,* the successor employer indicated only a "general willingness to hire the barbers employed by the former employer." *Id.* The new employer also made it clear from the outset, by the distribution of a form letter to the barbers several days before taking over operations, that he "intended to set his own initial terms, and that whether or not he would in fact retain the incumbent barbers would depend on their willingness to accept those terms." *Id.* at 194-95. In such circumstances, the *Spruce Up* Board stated that "we do not think it can fairly be

said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court." *Id.* at 195 (quoting *Burns,* 406 U.S. at 294-95).

Here, however, Respondent expressed an unequivocal willingness to hire all of the predecessor's employees, telling the former-Pleasant Care employees when it took over operations of the Facility on August 8, 2007, that they were all hired on a 90-day probationary basis (ALJD at 2-3; Joint Exh. 1, para. 4). At such time, however, Respondent "did not state that it was setting initial terms and conditions of employment," but merely stated that the employees "would continue to receive their regular pay during the probationary period, but would not receive health or other benefits" when Respondent took over operation of the Facility (ALJD at 2-3; Joint Exh. 1, para. 4). Such statements clearly evince that Respondent planned to retain all of the employees in the Pleasant Care bargaining unit, but did not clearly indicate an intent to establish a new set of terms and conditions of employment.

As with the finding of successor status under *Burns*, the probationary nature of Respondent's August 8, 2007, hire of all of the Pleasant Care employees does not affect the determination that Respondent is a "perfectly clear" *Burns* successor. The Board has considered whether a successor employer may avoid a "perfectly clear" successor finding when its initial hires – like almost all new employees – are hired on a probationary basis. In this regard, the Board applies the "perfectly clear" exception when a successor indicates that it will be hiring all of its predecessor's employees, even if on a probationary basis. See *Canteen Company,* 317 NLRB 1052, 1053 (1995). In *Canteen Company,* the Board found the employer to be a "perfectly clear" successor, holding that:

> When the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. . .

> Therefore, as it was 'perfectly clear' on [that date] that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.
> *Id.* at 1053.

In *Canteen Co.,* the Board reasoned that the successor employer, by notifying the union of its desire for the predecessor's employees to serve on a probationary basis, but without stating it would set new initial terms and conditions of employment, was not privileged to implement unilaterally new wage rates the next day. *Id.* at 1053-54. Similarly, in *Windsor Convalescent Center,* discussed above, the Board held the employer to be a "perfectly clear" *Burns* successor, because the employer did not discuss in its interviews with employees that it would be changing their terms and conditions of employment, and the evidence failed to establish that employees had received, as the employer asserted, letters stating that new terms of employment would be forthcoming in an employee handbook. *Windsor Convalescent Center,* 351 NLRB No. 44, slip op. at 7-8. The Board further found that, even if those letters were received before the employees began work, a general statement that new terms will be set subsequently is insufficient to meet the *Spruce Up* obligation. *Id.* at 8. The Board reasoned that the successor had deprived the unit employees of the ability to make an informed choice as to whether to accept employment and therefore was "precluded' from later imposing new terms without bargaining.[6] *Id.* at 8-9.

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[6] See also *Dupont Dow Elastomers LLC,* 332 NLRB 1071, 1074-75 (2000), enfd. 296 F.3d 495 (6th Cir. 2002) (announcement of changes after the hiring and acceptance process was underway was too late because employees might have foregone other employment opportunities in reliance on the promise of continued employment under unchanged conditions); *Morris Healthcare & Rehabilitation Center,* 348 NLRB No. 96, slip op. at 5-6 (2006) (respondent did not convey wage or benefit information during the application and interview stages, and employees did not receive handbooks with new employment terms until their orientation sessions); *Freemont Ford,* 289 NLRB 1290 (1988) (holding the successor's stated desire to institute a flat rate and to change the seniority system insufficient for successor to lawfully implement new terms and conditions of employment).

As set forth above, Respondent did not inform the bargaining unit employees when it hired all of them on a probationary basis on August 8, 2007, that it was setting initial terms and conditions of employment. (ALJD at 2-3; Joint Exh. 1, para. 4). Respondent did not even indicate when it took over operations on August 8, 2007, that it would at some future time implement a new set of terms and conditions of employment, which would have been insufficient in any event under *Windsor Convalescent Center. See id.* Rather, Respondent sought to reassure employees by informing them that their wages would remain the same, despite the discontinuation of their benefits, in order to induce them to accept employment with Respondent when it took over operations, given Respondent's obligation to provide residential nursing care to the patients. As in *Windsor Convalescent Center,* the bargaining unit employees in the instant case were denied the ability to make an informed choice as to whether to accept employment with Respondent.

A successor employer's entire course of conduct may also lead to a finding of "perfectly clear" successor status. See *Hilton's Environmental, Inc.,* 320 NLRB 437 (1995).

As noted above, Counsel for the General Counsel has taken a limited exception to the Judge's failure to find that Respondent was a "perfectly clear" successor. Here, Respondent's entire course of conduct, including its communications to employees, indicates an intent to retain all of Pleasant Care's employees under the existing terms and conditions. Respondent knowingly undertook this obligation by making the winning bid in the bankruptcy proceeding and entering the Transfer Agreement, just as the successor employer in *Hilton's Environmental* knowingly bid to provide services to the Army under the terms required by the Army. Respondent's entire course of conduct did not indicate an intention to set new initial terms and conditions of

employment, and, accordingly, as the ALJ found, it was not privileged to set new initial terms and conditions of employment (ALJD 8-9).

3. RESPONDENT'S CHANGES TO WAGES, HOURS AND OTHER TERMS AND CONDITIONS OF EMPLOYMENT EXISTING UNDER THE PREDECESSOR EMPLOYER'S COLLECTIVE-BARGAINING AGREEMENT CONSTITUTE UNLAWFUL UNILATERAL CHANGES

An employer's duty to maintain existing wages, hours and other terms and conditions of employment continues unless and until the employer has bargained to a good-faith impasse concerning the proposed changes. See, e.g., *NLRB v. Katz,* 369 U.S. 736, 743-748 (1962). Because Respondent was a "perfectly clear" *Burns* successor as of August 8, 2007, as established above, when it took over operations of the Facility, Respondent could not lawfully set new initial terms and conditions for bargaining unit employees. Even if Respondent is not found to be a "perfectly clear" successor, and Respondent is held to have been privileged to set initial terms and conditions of employment, the changes it made to the bargaining unit employees' wages, hours, and other terms and conditions of employment violated Section 8(a)(5) and (1) nevertheless, because they were not *initial* terms and conditions of employment. Rather, Respondent made unilateral changes to the bargaining unit employees' wages, hours, and other terms and conditions of employment on an ad seriatim basis, *after* its August 8, 2007, takeover of operations of the Facility, extending through January 15, 2008, when it implemented an Employee Handbook covering many additional new terms and conditions of employment.

Respondent thus had a duty to bargain to impasse with the Union before making changes to the bargaining unit employees' wages, hours, and other terms and conditions of employment

existing under the Pleasant Care CBA,[7] and violated Section 8(a)(5) when it unilaterally changed those terms and conditions. The Board defines impasse "as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. . . Both parties must believe that they are at the end of their rope." *A.M.F. Bowling Co.,* 314 NLRB 969 (1994). The Board does not lightly find an impasse, and the burden to establish that the parties were at impasse is on the party asserting there was an impasse. See, e.g., *CJC Holdings, Inc.,* 320 NLRB 1041 (1996).

As noted above, Respondent and the Union held bargaining sessions for an initial contract on January 15, 2008, January 30, 2008, March 7, 2008, and April 4, 2008 (ALJD at 3; Joint Exh. 1, para. 10), but there is no evidence that the parties reached an impasse in negotiations. Respondent did not declare impasse, nor did it state that it would implement a "last, best and final offer" (Tr. 30) before making the following unlawful unilateral changes to the bargaining unit's wages, hours and other terms and conditions of employment (ALJD at 8-9):[8]

- Failing and refusing to provide the wage increases scheduled in the Pleasant Care CBA;[9]
- Failing and refusing to abide by the seniority provision of the Pleasant Care CBA;[10]

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7 It should be stressed that General Counsel is not arguing that Respondent adopted the Pleasant Care CBA, as in cases such as *Atrium Plaza Health Care Ctr.,* 317 NLRB 606 (1995). Thus, Respondent is not bound by certain provisions of the Pleasant Care CBA that constitute mandatory topics of bargaining, such as the dues checkoff clause or union security clause, which depend on a collective-bargaining agreement being in effect. See *Hacienda Hotel, Inc.*, 351 NLRB No. 32 (2007); *U.S. Can*, 305 NLRB 1127 (1992). Respondent, however, was obligated under the Act, for all of the reasons set forth above, to maintain all of the predecessor employees' other existing terms and conditions of employment corresponding to mandatory topics of bargaining.

8 The Judge found Respondent unilaterally changed all of the terms and conditions alleged in the Consolidated Complaint. (ALJD at 8-9).

9 Wages constitute a mandatory subject of bargaining. 29 U.S.C. § 158(d).

- Failing and refusing to make contributions pursuant to the medical, dental and pension provisions of the Pleasant Care CBA;[11]
- Failing and refusing to abide by the paid holiday provision of the Pleasant Care CBA, and instead, about September 3, 2007, provided Unit employees seven paid holidays;[12]
- Failing and refusing to process workplace disputes concerning wages, hours and other terms and conditions of employment through the grievance mechanism established under the Pleasant Care CBA;[13]
- Failing and refusing to abide by the Union representative access provisions of the Pleasant Care CBA;[14]
- Failing and refusing to abide by the paid sick day provision of the Pleasant Care CBA, and instead, about November 8, 2007, provided Unit employees six paid sick days;[15]
- Failing and refusing to recognize the vacation days accrued by Unit employees under the Pleasant Care CBA;[16]

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10 Seniority is a mandatory subject of bargaining. See *Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB No. 111 (2006).

11 Health insurance, dental insurance and pensions are mandatory subjects of bargaining. See *Garrett Flexible Products*, 276 NLRB 704 (1985); *Keeler Brass Co.*, 327 NLRB 585 (1999); *Electrical Workers IBEW Local 412 (Kansas City Power)*, 282 NLRB 1068 (1987).

12 Paid holidays constitute a mandatory subject of bargaining. See *Centro Medico De Arecibo*, 300 NLRB 890 (1990).

13 Whether to submit workplace disputes to a grievance procedure constitutes a mandatory subject of bargaining. See *Erler Corp.*, 311 NLRB No. 2 (1993).

14 A union representative's access to the employer's place of business for purposes of representing the bargaining unit employees is a mandatory subject of bargaining. See *Appelbaum Industries*, 294 NLRB 981 (1989).

15 Sick leave is a mandatory subject of bargaining. See *Pine Brook Care Center, Inc.*, 322 NLRB 740 (1996).

- Failing and refusing to provide two weeks notice to Unit employees of changes to their work schedules, as provided for under the Pleasant Care CBA, and about January 7, 2008, suspending employee Sandra Mejia Batlle for three days for her failure to report to work on January 6, 2008, after her work schedule had been changed by Respondent without two weeks notice;[17]
- Failing and refusing to abide by the modified duties provision of the Pleasant Care CBA;[18]
- Failing and refusing to abide by the starting wage rate for unit employees as provided for in the Pleasant Care CBA, and commencing in January 2008, has hired certified nursing assistants at a starting wage of $11 per hour;[19]
- Failing and refusing to abide by the notice of hiring provision of the Pleasant Care CBA, and commencing in January 2008, hiring new employees without prior notice to the Union;[20] and
- About January 15, 2008, without having bargained with the Union to a good faith impasse, by issuing an Employee Handbook,[21] which, *inter alia:*

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16 Paid vacation is a mandatory subject of bargaining. See *Pine Brook Care Center, Inc.*, 322 NLRB 740 (1996).

17 Employees' work schedules constitute a mandatory subject of bargaining. See *Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB No. 111 (2006). In addition, employees are entitled under the Act to be made whole for discipline issued as a result of an unlawful unilateral change. See, e.g., *Delta Tube & Fabricating Corp.*, 323 NLRB 856, 863 (1997).

18 The Board generally finds changes in work assignments and duties to be mandatory subjects of bargaining. See generally, *A.M.F. Bowling Co.*, 303 NLRB 167 (1991).

19 Wages constitute a mandatory subject of bargaining. 29 U.S.C. § 158(d).

20 An employer's selection of sources from which it will hire employees is a mandatory subject of bargaining. See *McClatchy Newspapers*, 307 NLRB No. 122 (1992).

(i) establishes new wage rates and bonuses;[22]

(ii) classifies Unit employees as at-will employees;[23]

(iii) gives Respondent the right to unilaterally revise wages, hours and other terms and conditions of employment;[24]

(iv) establishes new disciplinary procedures;[25]

(v) establishes new requirements for physical examinations and other health requirements;[26]

(vi) creates new meal and rest periods;[27]

(vii) establishes new hours of work and overtime policies;[28]

(viii) establishes new accommodations for disabled employees;[29]

(xiv) establishes a new anti-harassment policy;[30]

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21 To the extent an employee handbook covers mandatory subjects of bargaining, its implementation without bargaining to impasse violates Section 8(a)(5). See *United Cerebral Palsy of New York City,* 347 NLRB No. 60 (2006).

22 Wages constitute a mandatory subject of bargaining. 29 U.S.C. § 158(d).

23 Whether employees are subject to the employer's unilateral workplace rules, as an at-will designation by the employer renders them, is a mandatory subject of bargaining. See *California Offset Printers, Inc.,* 349 NLRB No. 71 (2007).

24 Respondent's unilateral assignment to itself the right to revise unilaterally all mandatory subjects of bargaining is by definition a unilateral change.

25 Disciplinary procedures constitute a mandatory subject of bargaining. See *Boland Marine and Manufacturing Co., Inc.,* 225 NLRB 824 (1976).

26 Physical examinations and requirements constitute mandatory subjects of bargaining. See *Chicago Tribune Co.,* 304 NLRB 495 (1991).

27 Meal and rest breaks are mandatory subjects of bargaining. See *Harris-Teeter Super Markets,* 293 NLRB 743 (1989); *Production Plastic,* 254 NLRB 560 (1981).

28 Hours and overtime are mandatory topics of bargaining. 29 U.S.C. § 158(d); *United Technologies Corp.,* 300 NLRB No. 122 (1990).

29 Unilaterally changing work policies for disabled employees violates Section 8(a)(5). See *Southern California Edison Co.,* 284 NLRB 1205 (1987).

(xv) establishes a new employee dress code;[31]

(xvi) establishes new attendance rules;[32]

(xvii) establishes new procedures for evaluating the performance of Unit employees;[33] and

(xviii) establishes new leave of absence and vacation policies.[34]

Because the Union did not make a demand for recognition and bargaining until September 14, 2007, the Judge found that Respondent was free to set/alter employees' terms and conditions of employment during the probationary period only (ALJD at 8). However, because Respondent did not, on or before August 8, 2007, announce new initial terms and conditions for the employees after they became permanent, the ALJ found that Respondent violated the Act by unilaterally changing the pre-August 8 terms and conditions for the employees who became permanent employees after the completion of their probationary period on November 8, 2007 (ALJD at 8-9).

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30 Such topics constitute mandatory subjects of bargaining. See *McClatchy Newspapers,* 307 NLRB No. 122 (1992).

31 Dress code is a mandatory subject of bargaining. See *Yellow Enterprise Systems, Inc.*, 342 NLRB No. 77 (2004).

32 Attendance policy is a mandatory subject of bargaining. See *Pirelli Cable Corp.,* 323 NLRB 1009 (1997).

33 Employee evaluations constitute a mandatory subject of bargaining. See *J.W. Rex Co.,* 308 NLRB 473 (1992).

34 Such topics constitute mandatory subjects of bargaining. See *Pine Brook Care Center, Inc.,* 322 NLRB 740 (1996).

IV. CONCLUSION

It is respectfully submitted that the credibility rulings of the Judge were correctly based upon witness demeanor and should not be disturbed, and that the Judge's findings of fact and conclusions of law were fully supported by the record evidence, exclusive of the limited exceptions filed by Counsel for the General Counsel. To this extent, accordingly, the Decision and Recommended Order should be adopted by the Board.

DATED AT San Francisco, California, this 15th day of August, 2008.

Respectfully submitted,

/s/ Micah Berul

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

A & C HEALTHCARE SERVICES, INC., Case Nos. 20-CA-33588
20-CA-33780

and

SERVICE EMPLOYERS INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST,

RESPONDENT'S REPLY BRIEF TO COUNSEL FOR GENERAL COUNSEL'S BRIEF

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Attorney for
A & C HEALTHCARE SERVICES

Exh. 13

RESPONDENTS (R) REPLY BRIEF TO COUNSEL FOR GENERAL COUNSEL'S (CGC) BRIEF

1. R is not bound to the prior employer's Collective Bargaining Agreement

CGC directly misquotes the actual language of the Operations Transfer Agreement (hereinafter "OTA."). As is quickly discernible, section 2.5 "Employees" does not impose, or even imply any terms of a pre-existing collective bargaining agreement would become binding on R as "New Operator" during the life of the OTA. The OTA specifically states it constitutes a document regulating the transfer of the bankrupt property from the debtor to the successful bidder pending the bidder's acquisition of an appropriate business license to be a healthcare employer in California.

The actual concluding language of section 2.5 of the OTA states: "However nothing herein shall be interpreted, construed or implied to mean that New Operator is legally bound to any term or provision within the CBA." This sentence of section 2.5 of the OTA is a complete refutation of CGC's erroneous statement that the OTA "... provided that the collective bargaining agreement would control the terms and conditions of employment unless specifically waived by the union or rendered unenforceable by Loral or order of the Bankruptcy Court."

2. R properly established and articulated a new initial terms of employment

CGC admits R established, prior to offering employment, terms and conditions of employment very different from the former employer in that no benefits of any description were being offered for the initial 90 day probationary period. [1]

[1] All dates hereinafter are in the year 2007 unless otherwise noted.

R had no obligation to state its wage and benefit offer in any specific form provided it was "clear" to potential applicants. There was no lack of clarity in R's statement to employees they were being offered the same pay rates as they had been earning but none of the benefits previously received from the prior employer. CGC has not stated or produced any evidence any potential applicant found respondents offer to be unclear in any respect. Therefore, the Judge's (hereinafter ALJ) conclusion insofar as it does not find R to be a "perfectly" clear successor" was correct and satisfied both Burns and Spruce Up which require a "clear announcement" of new conditions prior to offering employment.

3. Offer of permanent positions extended only to successful probationary workers

Probationary workers were also informed that only employees who successfully completed probationary employment would be offered work as permanent employees at the conclusion of their probationary employment at terms which would be announced on or before November 8th, their final day of probation.

4. R did nothing to suggest it planned to retain all of the employees of the prior employer

R disputes CGC statement on page 6 of his brief: "Such statements (i.e. "the continuation of prior pay and not receive health or other benefits") clearly evince that R planned to retain all of the employees in the Pleasant Care bargaining unit but did not clearly indicate an intent to establish a new set of terms and conditions of employment for regular, non-probationary employees." This statement is incorrect factually and inferentially.

To suggest the creation of a 90 day probationary period, which resulted in the termination of six probationary employees, under terms of employment devoid of any benefits logically creates or suggests any intent by R to "retain all of the employees in the Pleasant Care bargaining unit" is illogical and erroneous. Such terms and conditions infer quite the contrary, i.e. the

incoming employer is adopting a very cautious approach to its hiring requirements and is certainly not evincing any intent to offer employment on a group basis to all employees formerly employed by the prior employer. Had it wished to do so R would have simply dispensed with the probationary period, initiated terms and conditions applicable to permanent employees and welcomed them to the new company. There would be no reason to do otherwise and none is suggested by CGC.

5. The ALJ's conclusion R was not a perfectly clear successor is correct

The conclusion of the ALJ that R was not a perfectly clear successor is correct for reasons perhaps not sufficiently articulated in the recommended decision but nevertheless quite accurate.

Contrast the context of the typical "perfectly clear" two party succession with acquisition by bankruptcy auction purchase procedures. They are antithetical. In anticipation of the former, potential employers generally conduct a thorough inspection of the seller's business, spend time observing its operations, watching and evaluating employees, going through the books and records, etc. The seller and the buyer control access to information, the timing of sale, and transfer of ownership. Due diligence by both parties is normally comprehensive.

In a bankruptcy proceeding creditors have forced a sale of a business at auction to the highest bidder under Chapter 7. A bankruptcy sale is a very highly regulated business transaction especially when it involves the sale of healthcare services to post-surgical and residential and elderly patients generally receiving state and federal financial support. Moreover, healthcare as provided in California is conducted under the most strict monitoring by the California Department of Health and various other federal and state agencies.

6. Bankruptcy liquidation transactions compared with typical private business sale

The primary actors in a Bankruptcy transaction are not the owner and the prospective buyer. The owner has turned over the business property to its creditors under the supervision of the Bankruptcy Court and has little, if any residual control over the fate of the business or the assets received from its sale. Moreover, the healthcare facility must continue to operate up to the highest standards throughout the liquidation process to prevent de-licensing which could reduce its value immediately to near zero. In short, the bankrupt seller has relinquished control of the sale of the business to the creditors who, along with the court, formulate the OTA which directs the manner and means by which the successful bidder is required to operate the business prior to becoming the owner upon satisfaction of all contingencies.

In the instant case R became the successful bidder on July 28 but was unable to obtain a Health Department License until mid-December. This, of course, delayed the transfer of the business from the seller to R for this period of time and placed more responsibility on the Bankruptcy Court to monitor compliance with the OTA. During the interim R became an "Operator" under the OTA but not an owner. The former employer continued to handle all finances, accounting books and records, and business transactions pending closure of the sale.

In effect, the R was acting as an agent of the debtor who remained the license holder and ultimately responsible to the state and federal authorities for the operation of the facility and the quality of healthcare being administered to patients. It was manifestly understood by employees of the debtor that if the sale failed for any reason the next highest bidder would take over from the R as interim operator pending license acquisition and begin anew under the terms of a similar OTA. No probationary employee would have the slightest doubt as to the continued ownership by the debtor and R's efforts to satisfy contingencies, most especially acquisition of a license to

employee healthcare employees in order to close the sale before it would be required to forfeit its purchase price and deposit at December 31st.

There was never any hint or suggestion of finality to R's acquisition of the business or a closure of the sale until early December long after the period of probationary employment had transpired and permanent employment offered and accepted with, of course, the understanding that they are permanent employment would be subject to R's success in closing the sale.

In this context it would defy belief to suggest that on August 8, the first date R was allowed to enter the facility, R could have been understood to have made any promises, express or implied, of permanent employment or guarantees as to the finality of the pending transaction to assembled employees and their collective bargaining representatives who were in the audience and who had served on the Bankruptcy Court's Creditor Committee for the sale of the facility.

Under these circumstances it clear the assembled employees and their representatives knew there was much to be done by R before the sale would close during which they would be employed on a 90 probationary basis according to the OTA pending completion of the sale. Moreover, they were also aware probationary periods for new employees in the healthcare occupation are common practice because of the role healthcare employees play in life and death decisions of the ill and elderly unable to care for themselves.

There would be absolutely no reason for any employee, much less a majority to believe that because R did not state "We are hereby setting initial terms and conditions of your employment" before actually stating in a few clear words the wages being offered during probationary period would be the same as formerly earning working for debtor and no benefits paid in additions. Far from implying offers of permanent employment, R was proceeding very cautiously recognizing a serious error made by one of the persons present and unknown to R

could cause Health Department concerns which would prejudice and possibly scuttle the acquisition of a Health Department license and closure of the purchase.

The passage of time proved the accuracy of R's reservations because six of the debtor's employees were unable to pass probation despite having seriously flawed prior employment histories with the former employer but continued in debtor's employment.

The terms and procedures of the evaluations conducted by R were investigated by the region in connection with an ULP filed by the employees' bargaining representative. A thorough review of all records and procedures relating to the probationary process were reviewed and a dismissal of the charge was issued by the Region.

7 Contrary to the position of the CGC, the ALJ erred in concluding R had hired a full complement of permanent employees before November 8th.

There were no mid-probationary period statements made by R and no events which occurred which suggest a basis for the ALJ's finding that the employer "...knew prior to November 8 the number of employees it intended to discharge and, if necessary replace." (P.8 lines 12-13 of the recommended decision.) The ALJ provides no indication of the evidence upon which he relies to support his conclusion as to the then president mental processes of R which is highly dubious particularly in view of the fact no employee had been, or would be offered permanent employment until November 8th. Consequently, the ALJ's statement can only be regarded as unsupported speculation and must be rejected.

Similarly, there is no indication what evidence supports a finding R would have known less than half way into the probation period which employees would succeed and thereafter be offered and would accept employment as permanent workers to support the conclusion "Accordingly, the Respondent's permanent employee complement and the union's majority

status having been established prior to November 8, I find that it's bargaining obligation attached at some point between September 14, the date the Union requested that Respondent recognize and bargain collectively with the Union and prior to November 8..."(p. 8 lines, 13-18 of the recommended decision)

Neither the ALJ nor CGC cite any authority for the proposition stated by ALJ herein that an employer somehow "knows" mid-term who will succeed as a probationary employee, who will be offer permanent employment and who will accept permanent employment and must act upon this "knowledge" in determining the majority status of the prior employer's employees and recognizes the prior employer's union as the majority representative of a permanent workforce which has not yet been selected. In reaching this conclusion the ALJ herein simply discounted entirely the probationary status of the prior employer's employees subordinating it to what he speculates the R respondent "knew" before November 8 as to how many of the probationary employees would end up in its employment in the immediate future subject to terms of employment which had not been formulated or announced by R until November 8.

There appears to be no underlying rationale for an early determination by way of speculation other than it serves herein as a platform for compelling R to bargain before, rather than after November 8, regarding the wages and working conditions of permanent employees. This finding appears to be ipse dixit reasoning at best and tailored to impose a bargaining obligation on R before it hired permanent employees.

However, this result raises additional problems not addressed by the ALJ. If R had been required to recognize and bargain with the prior employer's union before the conclusion of the probationary status of facility employees what would be status of the recognition if less than a

majority defied his speculation and failed the probationary status or elected not to accept employment as permanent employees, or both?

No objective reason is advanced as to justify a premature conclusion as to a recognition obligation and a corresponding imposition of a bargaining obligation before it can be truly proved that the employer has hired a "permanent employee complement" a majority of which were employees of the former employer. Such a showing by definition could not occur until permanent employees were hired by R. However, following the teaching of Burns and Spruce Up to do so properly in such a way as to preserve the employer's rights to set its own initial terms and conditions of employment, the employer must formulate such terms in advance of hiring and clearly state them to applicants.

Thus, the issues take on circular justification. In the exercise of its Burns obligation to establish in advance of hiring, the terms and conditions being offered and to clearly articulated them to successful probationary interested in possible permanent employment they, of course, be formulated. However if the Union is presumed entitled to recognition and participation in bargaining over the formulation of the initial terms and conditions based on the ALJ's speculation as to what the employer "knew" in advance of the fact, then the employer has lost its rights to set its own initial terms and conditions of employment in the process of exercising them. It seems quite clear that the chicken and the egg cannot arrive at the same time.

Finally, there were no hires of any former employees of the prior employer into any other category of permanent employee prior to November 8. Therefore, there is no basis for a finding by the ALJ that the employer had hired a full complement of employees a majority of which were composed of the prior employer's employees and which imposed on R the legal obligation

to bargain with the predecessor union over the terms which it would offer to successful probationary workers to become permanent employees.

8. No finding of any unlawful conduct by R in connection with the hiring of probationary workers or permanent workers.

There was absolutely no finding or even suggestion of any illegal conduct, such as manipulations of the employment status of various employees to avoid the timing or occurrence of a majority showing and thus no basis upon which to conclude R had in any way forfeited or diminished its Burns right to set its own initial terms and conditions of employees hired. This fact plainly distinguishes the case from many cited by CGC including Windsor and Canteen.

CONCLUSIONS

R takes issue with the CGC and submits the following as conclusions herein supported by the facts and the law of the case:

1. R had the right, and properly exercised it, to set initial terms and conditions for the employment of 90 day probationary workers hired on August 8.
2. Probationary worker's terms expired on November 8. No other workers were hired during the probationary period and no probationary workers were elevated to the position of permanent worker prior to November 8.
3. A full complement could not be, and was not determinable until November 8 when unsuccessful probationary workers dropped out of consideration for permanent employment and successful probationary employees were informed of the terms and conditions being offered by R and who thereafter indicated their acceptance of employment.

4. On or after November 8, a majority status of the former employees was apparent in the full complement of Respondent's permanent workforce and an obligation to bargain over new or changed terms and conditions was created provided R thereafter became licensed to employ healthcare workers in California which occurred in December.
5. On December 3, R agreed to recognize the union as a majority representative subject to having become licensed to employ workers in the healthcare industry by that date.
6. Bargaining commenced Jan 3, 2008 and continues to date.

Dated: August 27, 2008

Respectfully Submitted,

By: Robert M. Cassel/ar

Robert M. Cassel

PROOF OF SERVICE

I declare I am at least eighteen years of age and not a party to this action. My business address is 60 Mirabel, Mill Valley, California 94941. I am readily familiar with the business's practice for collecting and processing correspondence for mailing. On August 28, 2008, I served a copy of the following documents:

RESPONDENT'S REPLY BRIEF
TO COUNSEL FOR GENERAL COUNSEL'S BRIEF

To the following person at the address listed below:

On Behalf of the General Counsel:
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To:	Micah Berul, Esq. NLRB Region 20	**From:**	Robert M. Cassel
Fax:	(415) 356-5156	**Pages:**	(13) including cover page
Phone:		**Date:**	August 28, 2008
Re:	Case No. 20-CA-33588, 20-CA-33780 Respondent's Reply Brief	**cc:**	

Please see attached Respondent's Reply Brief to Counsel for General Counsel's Brief.

FORM NLRB-501
(09-07)

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
20-CA-35111	6/21/2010

INSTRUCTIONS

File an original together with four copies and a copy for each additional charged party in Item 1 with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
A & C Healthcare Center

b. Number of workers employed

c. Address (*street, city, state, ZIP code*)
33 Mateo Avenue, Millbrae, CA 94030

d. Employer Representative
Robert M. Cassel
60 Mirabel Ave.
Mill Valley, CA 94941

e. Telephone No.
Contact: 415-383-0200

Fax No.
Contact: 415-383-7007

f. Type of Establishment (*factory, mine, wholesaler, etc.*)
Healthcare Center

g. Identify principal product or service
Medical Care

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (*list subsections*), and 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (*set forth a clear and concise statement of the facts constituting the alleged unfair labor practices*)

Within the last six months immediately preceding the filing of this charge the above-named employer, by and through its agents, violated Sections 8(a)(1) and 8(a)(5) of the Act, when it failed and refused to bargain in good faith and made unilateral changes to terms and conditions of employment.

The Union requests that this charge block Case No. 20-RC-18218.

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By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (*if labor organization, give full name, including local name and number*)
SEIU United Healthcare Workers - West

4a. Address (*street and number, city, state and ZIP code*)
560 Thomas L. Berkley Way, Oakland, CA 94612

4b. Telephone No.
(510) 251-1250

Fax No.
(510) 763-2680

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (*to be filled in when charge is filed by a labor organization*)
Service Employees International Union

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Bruce A. Harland
(*signature of representative or person making charge*)

Bruce A. Harland, Attorney
(*print/type name and title or office, if any*)

Address 1001 Marina Village Pkwy., Ste. 200 Alameda, CA 94501

(Fax) (510) 337-1023
(510) 337-1001
(*Telephone No.*)

June 21, 2010
(*Date*)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of this information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

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Exh. 14(a)

FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A&C Healthcare Center and SEIU United Healthcare Workers-West	CASE 20-CA-35111 **DATE OF MAILING:** June 22, 2010

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

Served by regular mail:

Mr. Robert M. Cassel
A &C Healthcare Center
60 Mirabel Ave.
Mill Valley, CA 94941

Subscribed and sworn to before me **this 22nd day of June, 2010**	DESIGNATED AGENT KATE JABLONSKI **NATIONAL LABOR RELATIONS BOARD**

Exh. 14(b)