

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

THE FREMONT-RIDEOUT
HEALTH GROUP d/b/a FREMONT
MEDICAL CENTER AND RIDEOUT
MEMORIAL HOSPITAL

and

Cases 20-CA-34194
20-CA-34227

CALIFORNIA NURSES
ASSOCIATION, AFL-CIO

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

Now comes Cecily Vix, 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-34194 was filed by the Union on November 21, 2008, and a copy was served by first-class mail on Respondent on November 25, 2008. A copy of the charge in Case 20-CA-34194 is attached as Exhibit 1(a); and a copy of the affidavit of service is attached as Exhibit 1(b).

(b) The charge in Case 20-CA-34227 was filed by the Union on December 16, 2008, and a copy was served by first-class mail on Respondent on December 19, 2008. A copy of the charge in Case 20-CA-34227 is attached as Exhibit 2(a); and a copy of the affidavit of service is attached as Exhibit 2(b).

2. On February 4, 2009, following completion of the investigation of the matters raised by the charges listed above, the Regional Director for Region 20 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 20-CA-34194 and Case 20-CA-34227, alleging that Respondent was violating Section 8(a)(1) and (5) of the Act by unlawfully withdrawing recognition from the Union; and by making unilateral changes to employees' terms and conditions of employment. A copy of the Consolidated Complaint is attached as Exhibit 3(a); and a copy of the affidavit of service is attached as Exhibit 3(b).

3. On February 23 and 24, 2009, a hearing was held before Administrative Law Judge William N. Cates, who issued a decision and recommended order (the ALJD) on April 29, 2009, finding Respondent violated Section 8(a)(1) and (5) of the Act, by unlawfully withdrawing recognition from 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 4.

4. Respondent filed exceptions to the ALJD with a brief in support thereof dated May 26, 2009. Copies of Respondent's exceptions and brief in support of exceptions are attached as Exhibits 5(a) and 5(b). Counsel for the General Counsel filed an answering brief to Respondent's exceptions dated June 9, 2009. A copy of the Counsel for the General Counsel's answering brief is attached as Exhibit 6. The Charging Party Union also filed an answering brief to Respondent's exceptions on June 9, 2009. A copy of the Union's answering brief is attached as Exhibit 7. Respondent filed a reply brief in support of exceptions, and a motion to strike portions of the Counsel for the General Counsel's answering brief on June 23, 2009. Respondent's reply brief in

support of exceptions is attached as Exhibit 8 and Respondent's motion to strike is attached as Exhibit 9. Counsel for the General Counsel filed a response to Respondent's motion to strike portions of the Counsel for the General Counsel's answering brief to exceptions on June 25, 2009. Counsel for the General Counsel's response to Respondent's motion to strike is attached as Exhibit 10. Respondent filed a reply [sic] in support of its motion to strike portions of the Counsel for the General Counsel's answering brief to exceptions on July 1, 2009. Respondent's reply [sic] in support of its motion to strike is attached as Exhibit 11.

5. On August 27, 2009, Chairman Liebman and Member Schaumber issued a decision adopting the ALJD, including the recommended Order (354 NLRB No. 68 "*Fremont 1*"). The ALJ's order, as adopted by the Board, requires Respondent to: 1. Cease and desist from (a) Failing and refusing to bargain with the Union as the exclusive representative of its employees in the unit described below. (b) Withdrawing recognition from the Union as the exclusive representative of its employees in the following unit:

All full-time and regular part-time and per diem Registered Nurses in positions requiring a Registered Nurse (RN) license and who provide direct patient care and are employed by Respondent at and out of Fremont Medical Center located at 970 Plumas Street, Yuba City, CA and/or Rideout Memorial Hospital located at 726 Fourth Street, Marysville, California; excluding all non-professional employees, non-Registered Nurses, Traveler Registered Nurses, Registry Registered Nurses, Care Coordinators (discharge planning), Physician's Assistants (PAs), RN Clinical Systems Analysts, RN Program Coordinators in Cardiac Rehab, RN Focus Review Patient Account Nurse Auditors, RN Focus Review Medical Records Analysts, ICU Outcome Coordinators, RN Education Coordinators, Clinical Nurse Specialists, Infection Control Nurses, RN midwives, managerial employees, confidential employees, guards and supervisors as defined in the Act.

(c) Unilaterally: changing wages, health insurance contributions, health insurance deductibles, matching contributions to employees' 403(b) plans, and cashing out paid time off. (d) Refusing to bargain with the Union about the effects of its implementing new emergency department protocols, reinstating rapid medical evaluation processes, and adding an intake nurse assignment in the interview area of the emergency department.

(e) Prohibiting, contrary to its past practice, union representatives from accessing the Hospital's properties and facilities. (f) 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.

6. On June 17, 2010, the United States Supreme Court issued its 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. ____; 130 S.Ct. 2635 (2010). Among these decisions was *Fremont I*.

7. On January 29, 2009, Administrative Law Judge John J. McCarrick issued a decision and recommended order in Cases 20-CA-33521, 20-CA-33649, 20-CA-33801, and 20-CA-34017, finding that Respondent violated Section 8(a)(5) by making unilateral changes to employees' terms and conditions of employment, by engaging in direct dealing with employees, and by failing to provide information to the Union. Judge McCarrick ruled that Respondent committed additional 8(a)(1) violations. Judge McCarrick dismissed other Section 8(a)(1) and 8(a)(3) allegations. On December 30, 2011, the Board issued its decision in Cases 20-CA-33521, 20-CA-33649, 20-CA-33801, and 20-CA-34017, reversing in part and agreeing in part with Judge McCarrick's rulings.

357 NLRB No. 158 "*Fremont 2*". In particular, the Board agreed with Judge McCarrick that Respondent violated Section 8(a)(5) by removing work from bargaining unit employees without bargaining with the Union. *Fremont 2*, slip op. at 1 and 10. (The conduct giving rise to the charges in *Fremont 2* predated the unlawful withdrawal of recognition charge in *Fremont 1*.) The Board's order, in relevant part, requires Respondent to:

1. Cease and desist from (a) Restricting an employee's "talk about the Union" to the break room during her breaktime. (b) Advising an employee that her supervisor was "to stop all union activities" at the workplace. (c) Coercively interrogating its employees about their union and other protected concerted activities. (d) Engaging in unlawful surveillance of its employees' Section 7 activities. (e) Threatening its employees that they would not be scheduled for work if they engaged in protected concerted activity. (f) Repromulgating and enforcing its access policy in retaliation for employees' union activities. (g) Disciplining employees because of their support for and activities on behalf of the California Nurses Association, AFL-CIO (the Union), or any other labor organization. (h) Refusing to schedule for work its employee Hau Dao because she engaged in protected concerted activity. (i) Unlawfully changing its employees' working conditions by unilaterally installing surveillance cameras. (j) Unlawfully transferring the Rideout ICU staff scheduling duties from its unit employees. (k) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

8. On August 1, 2012, the Union filed a new charge in Case 20-CA-86606, alleging that Respondent, during the six months prior to the filing of the charge, failed and refused to bargain in good faith with the Union by unilaterally implementing what

the Respondent characterized as its “last, best and final” offer absent a valid impasse and by failing to provide information relevant to bargaining. A copy of the charge in Case 20-CA-86606 is attached as Exhibit 12(a); and a copy of the affidavit of service is attached as Exhibit 12(b). On September 27, 2012, the Regional Director for Region 20 issued a Complaint and Notice of Hearing in Case 20-CA-86606 alleging that Respondent’s unilateral implementation of its last, best, and final offer, in the absence a valid impasse, violated Section 8(a)(5) of the Act (“*Fremont 3*”). The Complaint in Case 20-CA-86606 is attached as Exhibit 13(a); and a copy of the affidavit of service is attached as Exhibit 13(b).

9. A valid determination by the Board that Respondent violated Section 8(a)(5) and (1), as tentatively found in the decision and order in *Fremont 1*, would materially assist in establishing a history of Respondent’s recidivism and would furnish the basis for broader remedies. In addition, enforcement of the Board’s order in *Fremont 1* would provide a basis for future contempt proceedings if warranted.

WHEREFORE, Counsel for the Acting General Counsel respectfully requests that the Board issue a Decision and Order on the previously-filed record in *Fremont 1*.

Dated at San Francisco, California this 2nd day of October, 2012.

Respectfully submitted,



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

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

THE FREMONT-RIDEOUT HEALTH GROUP d/b/a FREMONT
MEDICAL CENTER AND RIDEOUT MEMORIAL HOSPITAL

and

CALIFORNIA NURSES ASSOCIATION, AFL-CIO

Cases 20-CA-34194
20-CA-34227

DATE OF MAILING October 2, 2012

**AFFIDAVIT OF SERVICE OF 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:

LAURENCE R. ARNOLD, Esq.
FOLEY & LARDNER
1 MARITIME PLZ FL 6
SAN FRANCISCO, CA 94111-3404

PAMELA ALLEN, Legal Counsel
CALIFORNIA NURSES
ASSOCIATION/NATIONAL NURSES UNITED
CNA LEGAL DEPARTMENT
2000 FRANKLIN STREET, SUITE 300
OAKLAND, CA 94612

Subscribed and sworn to before me on

October 2, 2012

DESIGNATED AGENT

Susie Louie

NATIONAL LABOR RELATIONS BOARD

INTERNET
FORM NLRB-501
(11-84)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE	
Case 20-CA-34194	Date Filed 11/21/2008

INSTRUCTIONS:

File an original and 4 copies of this charge 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 The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital	b. Number of Workers Employed 1100
c. Address (street, city, State, ZIP, Code) c/o Fremont-Rideout Health Group 989 Plumas Street, Yuba City, CA 95991	d. Employer Representative Andy Mesquit, Human Resources Director
	e. Telephone No. (530) 749-4680 Fax No. (530) 749-4693
f. Type of Establishment (factory, mine, wholesaler, etc.) Acute Care Hospital	g. Identify Principal Product or Service Healthcare
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 and continuing to date, while the Association has been engaged in an effort to negotiate an initial contract, the Employer, by and through its officers, agents, and representatives, has violated the Act by withdrawing recognition as the exclusive representative from the below-named union on the basis of a claimed loss of majority support allegedly reflected by signatures on a petition which bargaining unit nurses were coerced to sign by implied promises of benefits in an environment tainted by multiple unfair labor practices, including failing and refusing to provide notice and an opportunity to bargain before implementing changes in terms and conditions of employment. By the above and other acts, the above-named employer, by its officers, agents, and representatives has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.	
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) California Nurses Association	
4a. Address (street and number, city, State, and ZIP Code) 2000 Franklin Street Oakland, CA 94612	4b. Telephone No. (510) 273-2298 Fax No. (510) 663-5712
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)	
B. 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 <u>Pamela Allen</u> (Signature of representative or person making charge)	Pamela Allen, CNA Legal Counsel (Title, if any)
Address <u>2000 Franklin Street, Suite 300, Oakland, CA 94612</u>	Fax No. <u>(510) 663-5712</u> <u>(510) 273-2271</u> (Telephone No.)
	Date <u>11/21/08</u>

ORIGINAL

RECEIVED
NLRB, REGION 20
2008 NOV 21 P 4:44
SAN FRANCISCO, CA

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

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

The Fremont-Rideout Health Group d/b/a
Fremont Medical Center and
Rideout Memorial Hospital

and

California Nurses Association

CASE 20-CA-34194

Board Agent: Matt.Peterson

DATE OF MAILING: November 25, 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:

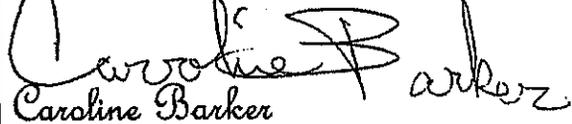
Served by regular mail:

Fremont-Rideout Health Group
Andy Mesquit, Human Resources Director
989 Plumas Street
Yuba City CA 95991

Subscribed and sworn to before me this

25th day of November, 2008

DESIGNATED AGENT


Caroline Barker

NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 20-CA-34227	Date Filed 12/16/2008

INSTRUCTIONS:

File an original and 4 copies of this charge 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 The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital	b. Number of Workers Employed 1100
c. Address (street, city, State, ZIP, Code) c/o Fremont-Rideout Health Group 989 Plumas Street, Yuba City, CA 95991	d. Employer Representative Andy Mesquit, Human Resources Director
	e. Telephone No. (530) 749-4680 Fax No. (530) 749-4693
f. Type of Establishment (factory, mine, wholesaler, etc.) Acute Care Hospital	g. Identify Principal Product or Service Healthcare
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 (1st subsections) (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.)	
<p>Within the last six months and continuing to date, while the Association has been engaged in an effort to negotiate an initial contract, the Employer, by and through its officers, agents, and representatives, has violated the Act by failing and refusing to provide notice and an opportunity to bargain before implementing changes in terms and conditions of employment.</p> <p>By the above and other acts, the above-named employer, by its officers, agents, and representatives has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.</p>	
<p>ORIGINAL</p> <p>RECEIVED NLRB, REGION 20 2008 DEC 17 P 4: 21 SAN FRANCISCO, CA</p>	
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) California Nurses Association	
4a. Address (street and number, city, State, and ZIP Code) 2000 Franklin Street Oakland, CA 94612	4b. Telephone No. (510) 273-2271 Fax No. (510) 663-4822
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)	
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 <u>Pamela Allen</u> (Signature of representative or person making charge)	Pamela Allen, CNA Legal Counsel (Title, if any)
Address <u>2000 Franklin Street, Suite 300, Oakland, CA 94612</u>	Fax No. <u>(510) 663-4822</u> (Telephone No.)
	<u>12/15/08</u> Date

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

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

The Fremont-Rideout Health Group d/b/a Fremont
Medical Center and Rideout Memorial Hospital

and

California Nurses Association

CASE 20-CA-34227

Board Agent: Cecily Vix

DATE OF MAILING: December 19, 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:

Fremont Medical Center Rideout Memorial Hospital
c/o Fremont-Rideout Health Group
Andy Mesquit, Human Resources Director
989 Plumas Street
Yuba City CA 95991

<p>Subscribed and sworn to before me this</p> <p>19th day of <u>December</u>, 2008</p>	<p>DESIGNATED AGENT</p>  <p>Caroline Barker</p> <p>NATIONAL LABOR RELATIONS BOARD</p>
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

THE FREMONT-RIDEOUT
HEALTH GROUP d/b/a FREMONT
MEDICAL CENTER AND RIDEOUT
MEMORIAL HOSPITAL

and

Cases 20-CA-34194
20-CA-34227

CALIFORNIA NURSES
ASSOCIATION, AFL-CIO

ORDER CONSOLIDATING CASES,
CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Upon a charge filed by California Nurses Association, AFL-CIO, herein called the Union, in Case 20-CA-34194, a Complaint and Notice of Hearing issued on December 23, 2008, against The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital, herein called Respondent; and the Union has charged in Case 20-CA-34227 that 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 Board's Rules and Regulations, 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-34194 was filed by the Union on November 21, 2008, and a copy was served by first-class mail on Respondent on November 25, 2008.

(b) The charge in Case 20-CA-34227 was filed by the Union on December 16, 2008, and a copy was served by first-class mail on Respondent on December 19, 2008.

2. (a) At all material times, Respondent, a California non-profit corporation with offices and places of business in Yuba City and Marysville, California, herein called Respondent's facilities, has been engaged in business as a health care institution in the operation of acute-care hospitals and related facilities.

(b) During the calendar year ending December 31, 2007, Respondent, in conducting its business operations described above in subparagraph 2(a), derived gross revenues in excess of \$250,000.

(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 Yuba City and Marysville, California facilities, goods and materials valued in excess of \$5,000 which originated from points located outside the State of California.

3. 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.

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

5. 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:

Terri Smith	-	Administrative Director, Human Resources and Labor Relations
Andy Mesquit	-	Director of Human Resources
Steve Booth	-	Labor Relations Manager
Theresa Hamilton	-	Chief Executive Officer
Tresha Moreland	-	Vice President Human Resources
Traci Sizemore	-	Emergency Department Supervisor
Brandi Cherry	-	Emergency Department Supervisor

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

All full-time and regular part-time and per diem Registered Nurses in positions requiring a Registered Nurse (RN) license and who provide direct patient care and are employed by Respondent at and out of Fremont Medical Center located at 970 Plumas Street, Yuba City, CA and/or Rideout Memorial Hospital located at 726 Fourth Street, Marysville, California; excluding all non-professional employees, non-Registered Nurses, Traveler Registered Nurses, Registry Registered Nurses, Care Coordinators (discharge planning), Physician's Assistants (PAs), RN Clinical Systems Analysts, RN Focus Review Medical Records Analysts, ICU Outcome Coordinators, RN Education Coordinators, Clinical

Nurse Specialists, Infection Control Nurses, RN midwives, managerial employees, confidential employees, guards and supervisors as defined in the Act.

(b) On September 20, 2006, the Union was certified in Case 20-RC-18092 as the exclusive collective-bargaining representative of the Unit.

(c) At all times since September 20, 2006, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

7. About November 14, 2008, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the Unit.

8. (a) From about November 17, 2008 to January 2009, Respondent:

- (i) granted two 5 ½% wage increases to Unit employees;
- (ii) reduced Unit employee contributions for health premiums by 50%;
- (iii) waived 100% percent of health insurance deductibles for Unit employees;
- (iv) matched by thirty-three and one-third cents on the dollar, up to the first 3% of a Unit employee's contribution to their 403(b);
- (v) implemented a policy of cashing out paid time off, up to 80 hours per calendar year, for Unit employees; and
- (vi) changed its grievance procedure for Unit employees to the "Fair Treatment Program."

(b) From an unknown date in about December 2008 through an unknown date in about January 2009, Respondent:

(i) implemented new Emergency Department protocols;
(ii) reinstated a rapid medical evaluation process; and
(iii) added an intake nurse assignment in the interview area of the Emergency Department lobby.

(c) Since about November 18, 2008, and contrary to its past practice, Respondent has prohibited Union representatives from accessing Respondent's property and facility.

9. (a) The subjects set forth above in paragraph 8 relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(b) Respondent engaged in the conduct described above in paragraph 8, 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.

10. By the conduct described above in paragraph 7 and subparagraph 9(b), 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 Sections 8(a)(1) and (5) of the Act.

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

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 February 18, 2009, or postmarked on or before February 17, 2009.** 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.nlr.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.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on the 23rd day of February, 2009, at 9:00 a.m., and on consecutive days thereafter until concluded, a hearing will be conducted at Yuba County Government Center, Conference Room 2, 915 Eighth Street, Marysville, 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.

DATED AT San Francisco, California, this 4th day of February, 2009.

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

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

THE FREMONT-RIDEOUT HEALTH GROUP d/b/a FREMONT
MEDICAL CENTER AND RIDEOUT MEMORIAL HOSPITAL

and

CALIFORNIA NURSES ASSOCIATION, AFL-CIO

Cases 20-CA-34194
20-CA-34227

DATE OF MAILING February 4, 2009

**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

Andy Mesquit, Human Resources Director
c/o Fremont-Rideout Health Group
989 Plumas Street
Yuba City, CA 95991
Phone: 530-749-4680
Fax: 510-749-4693
(Cert. No. 7007 2560 0001 5710 2902)

Pamela Allen, Legal Counsel
California Nurses Association
2000 Franklin Street, Suite 300
Oakland, CA 94612
Phone: 510-273-2271
Fax: 510-663-5712

VIA REGULAR MAIL

Laurence R. Arnold, Esq.
Foley & Lardner
One Maritime Plaza, Suite 600
San Francisco, CA 94111-3409
Phone: 415-984-9819
Fax: 415-434-4507

<p>Subscribed and sworn to before me on</p> <p>February 4, 2009</p>	<p>DESIGNATED AGENT</p> <p>/s/ Susie Louie NATIONAL LABOR RELATIONS BOARD</p>
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JD(ATL)-6-09
Marysville, CA
Yuba City, CA

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

THE FREMONT-RIDEOUT HEALTH GROUP
d/b/a FREMONT MEDICAL CENTER AND
RIDEOUT MEMORIAL HOSPITAL

and

CASES 20-CA-34194
20-CA-34227

CALIFORNIA NURSES ASSOCIATION,
AFL-CIO

Cecily A. Vix, Esq., and Kathleen C. Schneider, Esq.,
for the Government.¹

Laurence R. Arnold, Esq., and Jean C. Kosela, Esq.,
for the Hospital.²

Pamela Allen, Esq., for the Charging Party.³

DECISION

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge. These are withdrawal of recognition and unilateral changes in wages, hours and other conditions of employment cases. I heard these cases in trial in Marysville, California, on February 23 and 24, 2009. The cases originate from charges filed by the California Nurses Association, AFL-CIO (Union) on November 21, 2008, in Case 20-CA-34194 and on December 16, 2008, in Case 20-CA-34227 against The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital (Hospital). The prosecution of these cases was formalized on February 4, 2009, when the Regional Director for Region 20 of the National Labor Relations Board (Board), acting in the name of the Board's General Counsel, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) against the Hospital.

¹ I shall refer to Counsel for General Counsel's as Counsel for the Government or Government.

² I shall refer to Counsel for the Hospital as Counsel for the Hospital or Hospital.

³ I shall refer to Counsel for the Charging Party as Counsel for the Union or Union.

5 The Complaint alleges on or about November 14, 2008, the Hospital withdrew
 recognition of the Union as the exclusive representative of the Unit [a full description of the
 Unit is set forth elsewhere herein]. It is also alleged that from about November 17, 2008 to
 10 January 2009 the Hospital: granted two 5½ percent wage increases to Unit employees;
 reduced Unit employees' contributions for health premiums by 50 percent; waived 100
 percent of health insurance deductibles for Unit employees; matched by 33½ cents on the
 dollar, up to the first 3 percent of a Unit employee's contribution to their 403(b); and,
 implemented a policy of cashing out paid time off, up to 80 hours per calendar year for Unit
 15 employees. It is alleged that from an unknown date in December 2008 through an unknown
 date in January 2009, the Hospital: implemented new Emergency Department protocols;
 reinstated a rapid medical evaluation process; and, added an intake nurse assignment in the
 interview area of the Emergency Department lobby without bargaining with the Union about
 the effects of these changes. Finally, it is alleged since about November 18, 2008, and
 contrary to past practice, the Hospital has prohibited Union representatives from accessing the
 Hospital's properties and facilities. It is alleged the Hospital's actions violate Section 8(a)(5)
 and (1) of the National Labor Relations Act, as amended (Act).

20 The Hospital, in a timely filed Answer to the Complaint, admitted various allegations
 in the Complaint, but denied having violated the Act in any manner alleged in the Complaint.

25 The parties were given full opportunity to participate, to introduce relevant evidence,
 to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor
 of the witnesses as they testified. I have studied the whole record, the post-trial briefs, and the
 authorities cited therein. Based on more detailed findings and analysis below, I conclude and
 find the Hospital violated the Act substantially as alleged in the Complaint.

Findings of Fact

I. Jurisdiction, Labor Organization, and Supervisor/Agency Status

30 The Hospital, a California non-profit corporation, with offices and places of business
 in Marysville and Yuba City, California, has been engaged in the operation of hospitals and
 medical clinics providing inpatient and outpatient medical care. During the past 12 months,
 35 the Hospital, in conducting its business operations, derived gross revenues in excess of
 \$250,000 and purchased and received goods valued in excess of \$5,000 which originated
 outside the State of California. The Hospital admits, and I find, it is an employer engaged in
 commerce within the meaning of Section 2(2), (6), and (7) of the Act.

40 The parties admit, the evidence establishes, and I find, the Union is a labor
 organization within the meaning of Section 2(5) of the Act.

45 Theresa Hamilton is Chief Executive Officer, Tresha Moreland is Vice President
 Human Resources, Andy Mesquit is Director of Human Resources, Steve Booth is Director of
 Emergency Services, and Tracie Sizemore and Brandi Cherry are Emergency Department
 Supervisors for the Hospital. Each are admitted supervisors and agents of the Hospital within
 the meaning of Section 2(11) and 2(13) of the Act.

II. Alleged Unfair Labor Practices

A. Facts

5

1. Background

10 The Hospital operates hospitals providing acute and outpatient care services. The facilities involved herein are Fremont Medical Center located in Yuba City, California, and Rideout Memorial Hospital located in Marysville, California. Rideout Memorial has an Emergency Room but Fremont Medical Center does not. Fremont Medical Center has a Labor and Delivery Department but Rideout Memorial does not; otherwise, the two facilities offer the same services. The two hospitals are approximately 2½ miles apart.

15 The Union was certified on September 20, 2006, as the exclusive representative of the Hospitals' approximately 450 full time, regular part-time and per diem registered nurses who provide direct patient care at the Hospitals' above-described locations. As earlier noted, a full description of the Unit is set forth elsewhere in this Decision.

20 The parties commenced negotiations for a first collective-bargaining agreement in late November or early December 2006. Labor Representative Glen Sharp, at pertinent times herein, served as chief negotiator for the Union. The parties actively negotiated for a little over a year. A Representation Petition, 20-RD-2448, was filed on October 12, 2007, and remained pending but blocked by unfair labor practice charges (20-CA-33520, 20-CA-33510 and 20-CA-33586) until the petition was withdrawn on November 21, 2008. It is stipulated that at the January 8, 2008, bargaining session, the Hospital made, in writing, its last, best and final offer. The parties stipulated the Union thereafter engaged in a strike on March 21, 2008, and made its last offer for the bargaining Unit to the Hospital in writing on May 14, 2008. The Hospital in a May 21, 2008 letter rejected the Union's last offer. 25 Thereafter, the Union made information requests and communicated with the Hospital regarding changes in terms and conditions of employment of Unit employees, requesting to bargain about such changes and related issues.

30 The parties stipulated there have been no bargaining sessions held on a collective-bargaining agreement for the Unit employees after January 8, 2008, and no strikes after March 21, 2008.

35 A Representation Petition, 20-RD-2468, was filed on November 17, 2008, and withdrawn on November 21, 2008.

40

45 On November 13, 2008, the Hospital received certain evidence it asserts established the Union had lost majority status. On November 14, 2008, the Hospital notified the Union in writing it had been presented with a petition signed by a majority of the Unit employees requesting the Hospital withdraw recognition of the Union as the exclusive representative for the Unit employees. The signatures on the petition had been utilized in support of the RD petitions referenced herein. The Hospital stated in its November 14, 2008, letter to the Union

that faced with actual evidence of the Union's loss of majority status, it was withdrawing recognition from the Union as the exclusive representative of the Unit employees "effective immediately."

5 On November 17, 2008, Hospital CEO Hamilton notified Unit employees in writing the Hospital had withdrawn recognition of the Union on November 14, 2008, as their exclusive representative and the Hospital announced the implementation of wage increases and other beneficial enhancements of working conditions.

10 It is stipulated the number of employees in the Unit who met the hours and specified weeks of work requirements immediately preceding November 14, 2008 was 452. It is further stipulated that as of November 14, 2008, 234 employees in the Unit had signed the anti-union petition. It is undisputed that of the 234 signatures on the anti-union petition, 112 were 7 months old or older and of those 112 signatures, 72 were over a year old. It is
 15 undisputed the Union did not notify the Hospital prior to November 14, 2008, that it had signature cards from 18 Unit employees revoking their signatures on the anti-union petition and reaffirming their support for the Union. The Hospital acknowledges it was aware at the time it withdrew recognition the Union was circulating revocation and reaffirmation cards among Unit employees. The Government notified the Hospital of the revocation and
 20 reaffirmation cards on December 15, 2008, and the Hospital first saw the cards at trial herein.

2. The 18 Executed Revocation and Reaffirmation Cards

25 The question of whether the Union had lost the support of a majority of the Unit employees on November 14, 2008, and whether the Hospital could validly withdraw recognition from the Union on that date turns on the validity or authenticity of the 18 executed revocation cards. The Government contends 18 Unit employees who had previously signed the anti-union petition had after signing the petition but before November 14, 2008, revoked their signatures on the anti-union petition and reaffirmed their support for the Union.
 30 The Hospital contends it was never notified of any revocations or reaffirmations before it withdrew recognition on November 14, 2008.

The Union, fully aware of the anti-union petition and the representation filings, attempted through its organizers and Unit employees to shore up its support. For example,
 35 Union Organizer Trena Camara testified she came to the Hospital after the representation election to continue to organize and work toward obtaining "a good first collective bargaining agreement." Camara also testified the Union actively sought to have Unit employees sign cards reaffirming their support for the Union and revoking their signatures on the anti-union petition. Camara conducted a meeting with certain Unit employees on October 1, 2008, at
 40 which she gave instructions to employees in soliciting signature cards from their co-workers. She instructed those soliciting signatures to be courteous, never coercive, and to explain in detail what the card means and if a Unit employee chose to sign a card have them fill it out legibly, sign, date, and return the card. Although a number of Unit employees attended, Camara specifically recalled that Katherine Zubal and Glenda Hrones were present for this
 45 instructional meeting.

The signature cards utilized by the Union were green in color, and often referred to as “the green cards.” The cards reflect:

5 I, _____ (print name) hereby revoke my signature on any card,
petition, or other document I may have signed at any time repudiating or
disowning support for the California Nurses Association (CNA) as my
representative with respect to the terms and conditions of my employment with
the Fremont-Rideout Health Group and hereby affirm and/or reaffirm my
support for CNA.

10 Dated: _____

(signature)

15 Registered nurse Rosanna Sanders testified that on about September 30 and October
15, 2008, she created approximately 65 flyers on each occasion to educate nurses in the
Emergency Department and throughout the Hospital what the Union had done for them and
why it was a good idea to keep the Union. Sanders placed the flyers in the mailboxes for Unit
employees as well as on bulletin boards and in employee restrooms.

20 The Hospital acknowledges being aware of the Union’s efforts to have Unit
employees reaffirm support for the Union. In fact, the Hospital in a flyer dated October 7,
2008, in part, asked Unit employees, why the Union was asking for signatures from nurses to
reaffirm their support for the Union. The Hospital answered that question in its flyer by
25 suggesting the Union was concerned by nurses who were trying to decertify the Union. The
Hospital advised Unit employees in the flyer they were under no obligation to sign anything
reaffirming their support for the Union. [The flyer of the Hospital was offered by the
Government as Exhibit No. 33. I rejected the exhibit inasmuch as Hospital counsel
acknowledged the Hospital was aware of the reaffirmation efforts of the Union. The
30 Government asked that I reconsider my ruling and accept the exhibit. I am persuaded the
exhibit casts additional light on the card signing events at the time in question. According, I
grant the Government’s request and accept G.C. Exhibit 33.]

35 In light of the above, I examine the 18 executed cards. Union Organizer Camara met
with certain nurses at the Hospital’s Marysville, California, location on November 6, 2008.
Camara specifically met with registered nurses Antonietta Cabrera and Vivienne Tuekpe and
explained the purpose of the signature cards telling them if they signed the cards they would
be showing their support for the Union and would be removing their names from the
decertification petition. Camara testified both of the nurses signed and dated the cards in her
40 presence and returned the executed cards to her.

45 Camara testified on cross-examination that others were present when she spoke with
Cabrera and Tuekpe. Camara was accompanied by Union Organizer Eleanor Godfrey.
Camara stated Unit employee Nancy Finlay was present and she believed Nilo Morga was
also present.

Union Organizer Godfrey testified she was present on November 6, 2008, and “witnessed the entire process” of Cabrera and Tuekpe signing the green cards. Godfrey testified “we told them about these revocation cards and asked if they would like to sign, and they said they did.”

5

Registered Nurse Nancy Finlay testified she worked on November 6, 2008, and was present when Camara and Godfrey spoke with certain Unit employees on that date.

10 The Hospital called Human Resources Compliance Analyst Kim Triplett who identified timecards for Nancy Finlay and Nilo Morga, which Hospital counsel, contends shows neither worked at the Hospital on November 6, 2008.

15 I am fully persuaded Cabrera’s and Tuekpe’s cards were executed by them on November 6, 2008, and they were advised of and knew the purpose for the cards at the time they signed and returned the cards to Union Organizer Camara. The time cards of Finlay and Morga do not require, and I do not make, any inference that Cabrera’s and Tuekpe’s cards are other than valid or that the cards were signed at any time or place other than indicated. Simply stated, I specifically credit Camara’s and Godfrey’s testimony regarding the signing of the two cards in question.

20

Registered nurse Katherine Zubal testified she was trained by Union Representative Sharp to solicit Unit employees to sign cards to revoke their signatures on the previously signed decertification petition and reaffirm support for the Union. Zubal solicited four Unit employees to sign revocation cards.

25

Zubal spoke with Mandeep Nijjar on October 1, 2008, at the Hospital asking if she had an interest in signing a card for the Union. According to Zubal, Nijjar accepted a card which she reviewed, dated, signed in Zubal’s presence and returned to Zubal who in turn provided the card to the Union.

30

I credit Zubal’s testimony and find Nijjar’s card properly executed and valid. I reject the Hospital’s contention Zubal’s testimony should be disregarded because she recalled with great detail how individuals signed their cards but exhibited general vagueness with respect to other surrounding circumstances and events. Zubal impressed me as attempting to testify truthfully about the events in question and I credit her testimony.

35

Zubal spoke with Unit employee Helen Santos at the Hospital on October 2, 2008, as Zubal was coming on shift and Santos was going off shift. Zubal said she did not know what Santos’ position was on the Union so she explained what the cards were and asked if she wanted to sign one. Santos wanted to think about it because she was uncertain how long she might continue working for the Hospital but nonetheless took one of the cards. Zubal testified before Santos left work she came back and said she had signed the card and gave it to Zubal. Zubal looked at the card and observed it was filled out, dated (October 2, 2008), and signed. I find Helen Santos’ card to be valid.

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45

Zubal testified she encountered Unit employee Parm Kaur on September 30, 2008, at

5 the Hospital as Kaur was completing her shift for that day. Zubal asked Kaur if she wanted to sign a union card. According to Zubal, Kaur accepted, reviewed, dated, signed in Zubal's presence, and returned the card to Zubal. Zubal said she and Kaur had on several previous occasions discussed the Union. Zubal gave Kaur's executed card to the Union. I find Kaur's card valid.

10 Registered nurse Art Orteza testified he overheard Unit employees Kristin York and Jane Nu talking about whether York had signed the right form or card for the Union. Orteza said he jumped into the conversation and handed York the proper card which he called a confirmation card and which she called a revocation card. Orteza testified he observed York look at, sign, date (October 26, 2008), and return the card to him which he then gave to the Union. I credit Orteza's undisputed testimony and find York signed and dated the card as described by Orteza and is a valid card.

15 Registered nurse Diane DeLange testified she obtained blank union cards from Union Representative Sharp who instructed her to be friendly and non-confrontational when asking co-workers to reaffirm their support for the Union by signing one of the cards. DeLange solicited card signers in late September and October 2008. DeLange said she specifically met with Nissa Cardenas between shifts at the Hospital on October 28, 2008. DeLange met with
20 Cardenas and others inside the Hospital but moved to the Hospital's parking lot as the work shift changed. DeLange told the employees present she had green cards and asked if they knew what they were for. All present said they did and Cardenas asked for one of the cards to sign. DeLange gave Cardenas a card and watched as Cardenas filled out the card on that date, signed it in her presence, and returned the card to DeLange who gave it to the Union. I credit
25 DeLange's undisputed testimony and conclude she has properly authenticated Cardenas' valid card.

30 Registered nurse Darren Cordoza testified he was trained by one of the Union's organizers to solicit signature cards from employees who had signed the decertification petition. Cordoza stated that at work around noon on October 5, 2008, Lila Davalos, a friend of his, stated she had heard he was giving out signature cards confirming support for the Union. Cordoza said Davalos had in the past been anti-union but on this occasion she continued to ask questions giving him the impression she was becoming pro-union. Cordoza did not give Davalos a card that day because she asked to meet with him later away from
35 work and talk more. Cordoza said they met again twice on October 17, 2008, first at the Nurses Skills Fair. Cordoza said they went to lunch together and later to Starbucks for coffee where they talked more about the Union. Cordoza testified Davalos seemed more interested in signing a card for the Union at that point. Cordoza testified Davalos explained she had
40 been called in by the Hospital on several grievance procedures and she now recognized the value of having union representation and explained she never wanted to be in a situation like that again without union representation. Cordoza gave Davalos a card which they read through and she signed, dated, and returned the card to him.

45 The Hospital presented a timecard for Davalos that indicated she did not work that day.

5 I credit Cordoza's testimony regarding the circumstances of Davalos signing a union card on October 17, 2008. I detected no indication from Cordoza, while he was testifying, that in any way indicated a faulty or inaccurate recollection on his part. I am fully persuaded Cordoza and Davalos met, and took the actions, as he testified, on October 17 notwithstanding the fact her timecard seems to reflect she was not working at the time of the Skills Fair. I note the timecard in question is unclear on its face regarding the number of hours Davalos may have worked that week in question. Simply stated, I do not find the timecard entries on Davalos' timecard to detract from Cordoza's detailed testimony. I find Davalos' reaffirmation card to be authenticated and valid.

10 Registered nurse Glenda Hrones testified Paulina Landa asked her for one of the green cards supporting the Union. Hrones gave Landa a card and testified a co-worker, Maureen, not further identified, followed through with Landa. Hrones said Landa signed the card in her presence and Maureen later returned the card to Hrones. Hrones said she returned the card to the Union through Heather Avalos.

15 On cross-examination, Hrones did not recall saying in her pre-trial Board affidavit that Landa signed the card in her presence and returned it to her right then rather than as she testified at trial that the card was returned to her by Maureen. Hrones attempted to explain there were two cards from Landa, one she thought might have been misplaced so a second card was signed.

20 While Hrones' testimony regarding Landa's card is not crystal clear, I am persuaded she saw Landa sign the card as she testified, on October 31, 2008. I find Landa's card valid. Hrones observed other union cards signed by other co-workers and those card signers, as will be set forth hereafter, corroborated Hrones' stated method of getting union cards signed.

25 Registered nurse Lissette Willard testified she signed the decertification petition of the Union but "felt intimidated" when she did and thereafter wanted to take some action to revoke her signature. Willard spoke with co-worker Maureen Bartlett who told her about the green signature cards, of which she could sign and revoke her signature from the document she signed decertifying the Union. Bartlett gave Willard a card which Willard read, dated, signed, and immediately returned to Bartlett on October 15, 2008. I credit Willard's uncontested testimony and find her card valid.

30 Registered nurse Erin Erickson testified co-worker Liz Hawkins gave her a card to reaffirm her support for the Union. Erickson read, signed, dated, and returned the card to Hawkins on September 26, 2008. Erickson testified she had signed the decertification petition "out of frustration" but in signing the Union card she was reaffirming her support for the Union. I credit Erickson's undisputed testimony and find her card valid.

35 Registered nurse Zubal testified she spoke with co-worker Brent Penn about the Union cards between shifts at the Hospital on September 30, 2008. Penn asked for a card to sign. Zubal testified Penn reviewed the card, signed it in her presence, and returned it to her and she in turn gave the card to the Union. Penn testified he signed a card reaffirming his support for the Union on September 30, 2008. Penn said Zubal did not need to say much about the card

because he knew what it was for when he signed it. Penn said he signed the card because of some things that happened to a co-worker causing him to conclude it would be better to have a union and have someone behind the employees. I find Penn's card valid.

5 Registered nurse Christine Correa testified she was given green signature cards for the Union. She said she spoke with one nurse, Helena Domanski, in the recovery room about signing a card. According to Correa, Domanski had just come back to work from a leave of absence and was disgruntled about "something ... "going off" in the operating room and said "this is when I feel like we need a union." Correa asked Domanski if she wanted to sign a
10 union card and Domanski looked it over, signed, and returned the card to Correa. Domanski testified she signed, dated (October 1, 2008), and returned the card to Correa "because I like her and I was having some issue[s] with my supervisor." Domanski, on cross-examination, stated she did not sign the card because she wanted the Union.

15 I credit Domanski's testimony and find she signed her Union card on October 1, 2008, in part because she was having issues with her supervisor. I do not find her testimony regarding whether she did or did not want the Union to detract from the validity of her card. She signed the Union card, in part, because of concerns with working conditions. I find Domanski's card valid.

20 Registered nurse Glenda Hrones testified she was contacted by Aman Johal in October 2008. Johal asked Hrones if she had cards supporting the Union, that four of the nurses would like her to come up to Four Main of the Marysville facility because they wanted to sign the cards. The other three were Mara Rzemieniak, Manisha Sharma, and Gurpreet Gill. Hrones
25 took Johal and the other three nurses' signature cards. Hrones testified the four told her they wanted to sign the cards because they were disappointed with management at the Hospital.

Hrones testified nurses Gurpreet Gill, Aman Johal, Manisha Sharma, and Mara Rzemieniak filled out, signed, and dated the union cards in her presence at the Hospital on
30 October 25, 2008. Sharma testified she signed her card to support the Union because she believed in strength in unity. Gill testified Hrones gave her a card which she read, signed, and returned to Hrones on October 25, 2008. Johal testified she signed the Union card because she had a change of mind after having signed the decertification petition. Johal testified that after reading the Union card given to her, as best she could recall by Hrones, she signed,
35 dated, and returned the card immediately to Hrones. Rzemieniak testified she dated and signed her card reaffirming support for the Union after she had an opportunity to read it. I credit the testimony of Gill, Johal, Sharma, and Rzemieniak regarding their signing the Union cards. Each appeared, as they testified, to be testifying truthfully. I find their cards valid.

40 Registered nurse Hrones testified she spoke with Maribel Dela Cruz about the green signature card supporting the Union. Hrones testified Dela Cruz "said she wanted to sign the green card, she supported the Union." Hrones testified she later received Dela Cruz's signed card from nurse Beth Borremeo. Registered nurse Dela Cruz testified she read and signed a card reaffirming her support for the Union on October 27, 2008. Dela Cruz first testified
45 about a "lot of viciousness going on" at the Hospital and that nurses might be fired so she signed the card. On cross-examination, Dela Cruz said she signed the reaffirmation card for

the Union because she could get fired if she did not. However, when thereafter recalled as a witness, Dela Cruz explained she decided to sign the card reaffirming her support for the Union because she had a bad work experience with a different hospital and decided to support the Union. Dela Cruz also testified that when she previously signed the decertification petition she did so because she was told if she did not she might be fired. Dela Cruz explained the comments about being fired referred to what might happen if she failed to sign the decertification petition not if she failed to sign the card reaffirming her support for the Union.

Although Dela Cruz at times appeared to be confused as she testified, I am, nevertheless, persuaded she did so truthfully. I find her card valid.

I am fully persuaded the 18 cards signed by the Unit employees, as outlined above, revoking their signatures on the prior anti-union decertification petition are valid. I find the cards were signed by the 18 Unit employees on the dates reflected thereon, and that the cards clearly expressed the Unit employees were reaffirming their support for the Union. There is absolutely no showing that those soliciting signatures for the cards misrepresented the purpose or use to be made of the cards.

3. Withdrawal of Recognition

Having found the 18 reaffirmation of the Union cards valid, I turn to the issue of whether the Hospital lawfully withdrew recognition from the Union on November 14, 2008. First, I note it is clear, as set forth herein, the Hospital had before it, as of November 13, 2008, a petition reflecting 51.8 percent of the Unit employees no longer desired to have the Union as their exclusive representative. It is also clear the Hospital announced its withdrawal of recognition of the Union effective November 14, 2008, based on the anti-union petition. It is also clear the Union did not present the Hospital with the 18 reaffirmation cards prior, or near in time, to the Hospital's announced withdrawal of recognition.

The Board in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2201) carefully outlined whether and under what circumstances an employer may lawfully withdraw recognition unilaterally from an incumbent union. In *Levitz* at 717, the Board stated:

We therefore hold that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees.

Under our new standard, an employer can defeat a post withdrawal refusal allegation if it shows, as a defense, the union's actual loss of majority status.

The Board continued in *Levitz* at 723:

In our view, there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority

support has been lost. Accordingly, we shall no longer allow an employer to withdraw recognition unless it can prove that an incumbent union has, in fact, lost majority status.

5 The Board in *Levitz* at 723 also observed:

10 The fundamental policies of the Act are to protect employees' right to choose or reject collective-bargaining representatives, to encourage collective bargaining, and to promote stability in bargaining relationships. If employees' exercise of the right to choose union representation is to be meaningful, their choices must be respected by employers. That means that employers must not be allowed to refuse to recognize unions that are, in fact, the choice of a majority of their employees. It also means that collective-bargaining relationships must be given an opportunity to succeed without continual baseless challenges. These considerations underlie the presumption of continuing majority status.

The Board in *Levitz* at 725 emphasized:

20 that an employer with objective evidence that the union has lost majority support – for example, a petition signed by a majority of the employees in the bargaining unit – withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5) [footnote omitted].

30 We think it entirely appropriate to place the burden of proof on employers to show actual loss of majority support.

The Board summed up its holdings in *Levitz* at 725:

35 ... unless an employer has proof that the union has actually lost majority support, there is simply no reason for it to withdraw recognition unilaterally.

40 Did the Hospital demonstrate it had knowledge of an actual loss of majority status for the Union at the time it withdrew recognition from the Union on November 14, 2008? The evidence clearly establishes it did not. Of the 234 signatures on the petitions, 18 were revoked prior to the withdrawal of recognition. Subtracting those 18 signatures from the 234 on the anti-union petition results in only 216 valid signatures remaining. This is clearly less than 50 percent [47.8 percent] of the 452-employee bargaining unit.

45 Although the Hospital was aware the Union was attempting to gather revocations of the disaffection signatures, the Hospital did not ask for and was not offered proof of the revocations at the time it withdrew recognition. Did the Union have any obligation or burden

5 to advise the Hospital of the 18 reaffirmation signature cards prior to the Hospital's withdrawing recognition or immediately after the Hospital announced its withdrawal? I find the Union had no burden nor was it obligated, in any way, to notify or advise the Hospital of the 18 cards in its possession which were executed prior to the withdrawal of recognition by the Hospital. I note the Hospital learned of the number of signatures on the anti-union petition one day and the very next day announced it was withdrawing recognition of the Union as the Unit employees' exclusive representative. The Union had no time to respond even if it had desired to do so. In *HQM of Bayside, LLC*, 348 NLRB 758 at 759 (2006), the Board stated:

10 The Union does not have to demonstrate conclusively to the employer prior to withdrawal of recognition that it still has majority status. Rather, it is the employer's burden to show an actual loss of the union's majority support at the time of the withdrawal of recognition. [Footnote omitted]

15 Examining the issue further, first I note, as earlier explained, the evidence the Hospital relied on in withdrawing recognition did not demonstrate the Union's actual loss of majority status because 18 of those signing the anti-union petitions had revoked their signatures and reaffirmed their support for the Union before the Hospital's withdrawal of recognition. 20 Second, the Union was under no obligation to notify the Hospital, even if it had time and an opportunity, of its continued majority status by way of the reaffirmation cards it had obtained. The Hospital's withdrawal of recognition herein was at its peril. The Union contested the withdrawal of recognition and the Hospital failed to prove, at trial, by a preponderance of the evidence, the Union had in fact lost majority support at the time it withdrew recognition. 25 Accordingly, I find the Hospital has not rebutted the Union's majority status, and its withdrawal of recognition on November 14, 2008, violates Section 8(a)(5) and (1) of the Act. The Hospital must recognize and bargain with the Union.

30 The Government argues the anti-union petition is also further invalid and may not be relied upon by the Hospital to establish a loss of majority status because 112 of the signatures predate November 14, 2008, by at least seven months and of those 112 signatures, 72 were more than a year old. The Government argues Board law precludes such "stale" signatures from being relied upon to support a withdrawal of recognition.

35 The Hospital argues the Board has never adopted a time rule of "staleness," in the absence of changed circumstances, be it seven months, a year, or more, to invalidate a disaffection petition signature.

40 I note the facts underlying the staleness issue are not in dispute and the parties addressed the issue in their post trial briefs. I nevertheless find it unnecessary to reach the staleness of signatures' issue inasmuch as the Hospital never demonstrated a loss of majority status of the Union even including the signatures the Government contends were too stale to count.

45

4. The Unilateral Changes

As fully set forth elsewhere herein, it is alleged at paragraph 8 of the Complaint the Hospital, without notice to the Union, and without an opportunity for the Union to bargain with the Hospital, unilaterally granted a wage increase, reduced health premiums for Unit employees, waived 100 percent of health insurance deductible for Unit employees, established a 403(b) matching funds program, and implemented a paid time-off cash-out policy of up to 80 hours per year.

Hospital CEO Hamilton, on November 17, 2008, sent a memorandum to all Unit employees stating a majority of the Unit employees had spoken and as a result thereof the Hospital had withdrawn "recognition of CNA as your collective bargaining representative, effective November 14, 2008." CEO Hamilton continued "We are gratified that nurses have chosen a relationship that allows us to work together – collectively and individually – to our mutual benefit." CEO Hamilton continued:

As you know, changes to the terms and conditions of employment were, until now, subject to the outcome of collective bargaining negotiations. Although we only recently received your petition we are already looking to the future. Precisely how we proceed from here must be carefully considered, as CNA has already announced that they will not accept your decision and will attempt to invalidate it. However, in order to maintain our competitiveness with other comparable area hospitals, we are implementing wage increases and benefit enhancements. Details are attached.

On November 18, 2008, the Hospital provided Unit employees the details in a memorandum advising them specifically of changes it was implementing. The memorandum captioned "Wages, Benefits and Programs Available to Eligible Nurses" announced, in part: two 5½ percent wage increases; it was matching 33⅓ cents on the dollar, up to the first 3 percent of a Unit employee's contribution to their 403(b); it was reducing Unit employees' contributions for health premiums by 50 percent; it was waiving 100 percent of health insurance deductibles for Unit employees; and, it was implementing a policy of cashing out paid time off, up to 80 hours per calendar year for Unit employees.

The Hospital acknowledges it implemented the above changes in question on or after November 17, 2008, but contends, in its post-trial brief, the facts establish, with respect to each of the above-described changes, the Union not only had notice, but did in fact "thoroughly bargain with the [Hospital] to the point of impasse, regarding the terms of every change implemented."

With regard to the wage increases the Hospital asserts the increases were exactly as proposed by both the Hospital and Union and were contained in the Hospital's last, best and final offer to the Union. The Hospital asserts the other changes at issue here were also set forth in its last, best and final offer.

The Hospital, as noted elsewhere herein, made its last, best and final offer to the

Union on January 8, 2008. On May 14, 2008, the Union responded to the Hospital's last, best and final offer with a "significantly modified" proposal of its own. The Union's cover letter with its lengthy proposal stated in part:

5 This modified proposal is made in a good faith effort to resolve our remaining differences and as a renewed request for the [Hospital] to return to the bargaining table and negotiate a settlement which will benefit RNs, patients and the community.

10 The Hospital in a May 21, 2008 letter to the Union, acknowledged the Union's counter proposal and expressed appreciation for the Union's accepting the Hospital's proposals regarding education leave and Safe Floating, as well as certain other movements by the Union, but added:

15 Apart from those changes, however, the [Hospital] sees little if anything in the latest document that is changed from CNA's previous proposals. It is abundantly clear that CNA has not agreed to the [Hospital's] Last, Best & Final Offers, and that, in addition to all the other outstanding fundamental differences, there are other remaining differences too numerous to recount in
20 this letter. Thus, while your proposal did reflect some movement, it hardly resolves the remaining differences.

25 The Government and Hospital stipulated there have been no bargaining sessions held on a collective-bargaining agreement for the Unit employees since January 8, 2008.

30 The Hospital asserts and the Government, in its post-trial brief, appears to concede the parties, were at impasse on the above changes. The Hospital argues that having reached a legitimate impasse in all areas after engaging in good faith bargaining it was free to lawfully implement the proposals contained in its last, best and final offer regardless of the Union's status, and therefore could have effected the very changes alleged in the instant charges even
35 absent clear proof that the Union had lost its majority status by November 2008.

40 The Government argues that because the Hospital could not lawfully withdraw recognition from the Union, the changes to Unit employees' terms and conditions of
45 employment implemented since the withdrawal are unlawful.

50 First, it is clear the Hospital, after it had withdrawn recognition from the Union, implemented the above outlined changes on or about November 17, 2008. Second, the Hospital gave no advance notice to the Union of its implementation of the changes. Third, I
55 assume, without deciding, based on the Government conceding the point, that the parties were at impasse in negotiations as of May 2008. In light of all the facts, I am persuaded the Hospital may not unlawfully withdraw recognition from the Union and then attempt to have its unilateral actions after withdrawal of recognition be justified because the parties were at
60 impasse before the unlawful withdrawal of recognition. Once the Hospital unlawfully destroyed its bargaining relationship with the Union by withdrawing recognition from the
65 Union, it forfeited any good-faith impasse implementation of its proposals privilege. Stated

5 differently, and in agreement with Government Counsel, once the Hospital entered into a bad-faith posture by its unlawful withdrawal of recognition on November 14, 2008, the Hospital lost its privilege to unilaterally implement the terms of its last, best and final offer. Accordingly, I find the Hospital violated Section 8(a)(5) and (1) of the Act when on November 17, 2008, it unilaterally implemented the changes addressed above without notice to, or bargaining with the Union, regarding the changes and the effects of the changes.

10 It is alleged at paragraph 8(b) of the Complaint that from an unknown date in December 2008 through an unknown date in January 2009 the Hospital implemented, without affording the Union an opportunity to bargain with it about the effects of its new Emergency Department protocols, its reinstatement of a rapid medical evaluation process and the adding of an Intake nurse assignment in the interview area of the Emergency Department lobby. The parties stipulated that after the withdrawal of recognition the Hospital implemented Emergency Department changes through protocols, reinstated a rapid medical evaluation process and added an Intake nurse assignment to the department.

15 Hospital Director of Emergency Services Booth notified Union Representative Sharp in writing on November 11, 2008, the Hospital intended to implement the changes in question in the Emergency Department. Booth advised Sharp "While these changes primarily relate to the classification of patients and initiation of assessment procedures, there will likely be an impact on the working conditions of bargaining unit nurses." Booth requested that Sharp:

20 Please advise me at your earliest opportunity if you would like to meet to negotiate over the potential impact of the changes. As the ED Medical Staff is eager to implement these changes, I would appreciate your efforts to advise me of your wishes by Wednesday, November 19, 2008.

25 The Union responded in writing on November 17, 2008, expressing a desire to negotiate regarding the changes, requested information related to the changes, and suggested meeting dates for negotiations.

30 On November 18, 2008, Director of Emergency Services Booth notified the Union that in view of the fact the Hospital had withdrawn recognition of the Union on November 14, 2008, "we will not be negotiating with CNA regarding the proposed changes in the Emergency Department and will not be providing the information requested."

35 Union Representative Sharp testified regarding areas he would have sought effects bargaining on would have been how the Hospital came about deciding the new assignments, whether new work duties were added to the department, whether the new assignments were made by seniority or some other method and whether any bargaining unit work was taken away or eliminated by the changes.

40 Emergency Department registered nurse Sanders testified that prior to the new protocols being implemented on December 20, 2008, the nurses followed standing orders related to emergency room patient care. Sanders testified that pursuant to the standing orders the charge nurse would order certain procedures such as "some blood work, diagnostics such

as x-rays, that sort of thing.” Sanders stated that pursuant to the newly implemented protocols “initiatives are a little more comprehensive, they entail the diagnostics, the x-rays, the blood work, whether or not someone gets an IV, whether or not they get oxygen, whether or not they get a Foley catheter placed, whether or not their urine samples are required, much more indepth.” According to Sanders, the staff nurses still clear procedures with the charge nurse but are called upon to make determinations and recommendations on a much wider range of procedures.

Emergency Department registered nurse Sanders testified that about January 26, 2009, an Intake registered nurse position was added in the lobby of the Emergency Department. The Intake nurse does “a quick registration that entails name and what they’re there for.” The Intake nurse looks over the patient and “immediately” makes a determination as to the level of acuity for the patient. If the Intake nurse determines a high acuity for the patient, the Intake nurse escorts the patient immediately to a higher acuity level of the Emergency Department. Sanders testified that prior to this change, a patient came to the lobby of the Emergency Department proceeded to register and then waited until called to the triage nurse who took the patient’s vitals and then decided what level of acuity the patient warranted. Sanders testified that when the Intake nurse position was established, the Hospital did not add a new registered nurse to the Emergency Department. Sanders testified the triage process also changed in that under the new procedures a nurse practitioner or physician’s assistant was now involved in the process and “also writes initial orders of what they think would best address the patients’ issues” Prior to this change, nurse practitioners and physician’s assistants had not been involved at this point in the Emergency Department.

First, the Hospital asserts it notified the Union of the anticipated Emergency Department changes and offered to meet and negotiate the impact of the changes. Second, the Hospital argues there was no impact on Unit employees asserting nothing actually changed involving their hours or working conditions.

It is clear the Hospital gave notice to the Union about the changes in the Emergency Department and offered to bargain about the effects thereof. The Hospital even asked the Union to inform it if the Union wished to negotiate the effects and to respond by a certain date. The Union timely notified the Hospital it desired to negotiate regarding the effects but the very next day the Hospital declined in writing to do so stating it had withdrawn recognition of the Union. I find the Hospital clearly did not fulfill its obligations regarding effects bargaining. I reject the Hospital’s assertion the changes did not impact the working conditions of the Unit employees. First, I note when the Hospital notified the Union of the changes even it recognized the “likely” impact on the working conditions of the Unit employees. Union Representative Sharp alluded to various concerns he would have been raised in negotiations, such as, whether additional and/or new duties were being added to the Unit employees; whether seniority applied in selecting the Intake nurse; and, whether any work duties were removed from the Emergency Department. It is clear the duties of the staff nurses in the Emergency Department changed with respect to triage procedures. It appears triage employees were required to make additional decisions and undertake greater actions than before with regard to patient care. These changes are substantial and material and impact the terms and conditions of employment of Unit employees. The Hospital was and is required

to bargain about the effects of these changes and I so find. The Hospital's refusal to do so violates Section 8(a)(5) and (1) of the Act.

5 It is alleged at paragraph 8(c) of the Complaint that the Hospital, since about November 18, 2008 and, contrary to its past practice, has prohibited Union representatives from accessing the Hospital's property and facilities.

10 The parties stipulated that after the withdrawal of recognition, the Hospital implemented changes to the Union's access to the sidewalk on the Hospital's property at G Street and in the cafeteria. Union Organizer Camara testified, without contradiction, that prior to the withdrawal of recognition, the Union's representatives were allowed access to the sidewalks in front of the Hospital and specifically to the cafeteria at the Hospital. Camara stated that after the withdrawal of recognition, the Union was "moved out of being in front of the Hospital and out to H Street."

15 The Hospital acknowledges it prohibited non-employee Union solicitors from access to G Street on and after November 19, 2008. The Hospital acknowledges it prohibited Union representatives from soliciting and distributing literature in the cafeterias after the withdrawal of recognition but did allow Union representatives to come to its cafeterias for food or drink as it would any other non-employee.

20 The Hospital argues the Unit employees have no right to have Union representatives on the premises to speak with them, distribute literature to them or meet with them, and, the Union has no derivative right under Section 7 of the Act to such access.

25 I find the Hospital violated the Act by changing its past practice of allowing Union representatives access to its sidewalks and cafeterias after its withdrawal of recognition. I need not address access issues beyond that the Hospital changed its established practice without notice to, or bargaining with, the Union. I find the Hospital's actions violate Section 8(a)(5) and (1) of the Act.

5. Affirmative Bargaining Order

30 My recommended affirmative bargaining Order will vindicate the Section 7 rights of the Unit employees who were denied the benefits of collective bargaining by the Hospital's withdrawal of recognition on November 14, 2008.

35 Because the Hospital committed unfair labor practices, an affirmative bargaining Order is necessary. I note the Hospital committed unfair labor practices before and after its withdrawal of recognition on November 14, 2008. The unfair labor practices before the withdrawal of recognition are set forth in Judge John J. McCarrick's decision *The Fremont-Rideout Health Group et. al. and California Nurses Association, AFL-CIO*, JD(SF)-05-09 involving the same parties herein. Judge McCarrick found the Hospital violated Section 8(a)(1), (3) and (5) of the Act beginning August 24, 2007 and concluding February 29, 2008. Among Judge McCarrick's findings, which are on appeal to the Board, are: 1) A removal of scheduling duties from bargaining unit employees without providing notice and opportunity to

bargain; 2) Direct dealing with bargaining unit employees by soliciting their interest in having Saturday shifts staffed as regular shifts rather than on-call shifts; 3) Refusing to provide information regarding written discipline of a unit employee; and 4) Installing a hidden surveillance camera without notice or opportunity to bargain.

5

The unfair labor practices after withdrawal include unilateral changes to Unit employees' benefits and Union access to its facilities without notice and bargaining and changes in the Emergency Department without bargaining regarding the effects of the changes. In light of these circumstances, it is necessary to restore the *status quo ante* and require the Hospital to bargain with the Union for a reasonable time so the Unit employees' Section 7 rights can be vindicated. During this time of bargaining, the Unit employees can assess the Union's effectiveness as their exclusive representative and decide whether their best interests are served by having the Union continue to represent them.

10

15

My recommended bargaining Order will reinstate the Union to its position as the Unit employees chosen representative, a position the Union held before the Hospital's unlawful actions. This restoration serves the purposes of the Act by enhancing industrial peace and bringing about good faith meaningful collective bargaining.

20

I am persuaded an alternative remedy would be totally inadequate to correct the Hospital's withdrawal of recognition and refusal to bargain with the Union because it would destroy the efforts of the Unit employees to have their chosen representative bargain for them toward a labor agreement.

25

I find an affirmative bargaining Order is absolutely essential to remedy the violations found herein.

On the basis of the above findings of fact, partial conclusions of law, the record as a whole and Section 10(c) of the Act, I make the following additional conclusions of law.

30

Additional Conclusions of Law

35

1. The Hospital violated Section 8(a)(5) and (1) of the Act since November 14, 2008, by failing and refusing to bargain with the Union as the exclusive collective bargaining representative of its employees in the following appropriate unit:

40

45

All full-time and regular part-time and per diem Registered Nurses in positions requiring a Registered Nurse (RN) license and who provide direct patient care and are employed by Respondent at and out of Fremont Medical Center located at 970 Plumas Street, Yuba City, CA and/or Rideout Memorial Hospital located at 726 Fourth Street, Marysville, California; excluding all non-professional employees, non-Registered Nurses, Traveler Registered Nurses, Registry Registered Nurses, Care Coordinators (discharge planning), Physician's Assistants (PAs), RN Clinical Systems Analysts, RN Program Coordinators in Cardiac Rehab, RN Focus Review Patient Account Nurse Auditors, RN Focus Review Medical Records Analysts, ICU Outcome

Coordinators, RN Education Coordinators, Clinical Nurse Specialists, Infection Control Nurses, RN midwives, managerial employees, confidential employees, guards and supervisors as defined in the Act.

5 2. The Hospital violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on November 14, 2008.

 3. The Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally:

- 10 (a) Granting two 5½ percent wage increases to Unit employees;
 (b) Reducing Unit employee's contributions for health premiums by 50 percent;
 (c) Waiving 100 percent of health insurance deductibles for Unit employees;
15 (d) Matching by 33⅓ cents on the dollar up to the first 3 percent of a Unit employee's contribution to their 403(b);
 (e) Implementing a policy of cashing out paid time off, up to 80 hours per calendar year for Unit employees';

20 4. The Hospital violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union regarding the effects of changes implemented in the Emergency Department, which changes were:

- 25 (a) Implementing new Emergency Department protocols;
 (b) Reinstating a rapid medical evaluation process; and,
 (c) Adding an intake nurse assignment in the interview area of the Emergency Department lobby.

30 5. The Hospital violated Section 8(a)(5) and (1) of the Act by, since on or about November 18, 2008, and contrary to its past practice, prohibiting Union representatives from accessing the Hospital's properties and facilities.

35 6. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

The Remedy

40 Having found the Hospital has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

45 Having found the Hospital unlawfully withdrew recognition of the Union, and thereafter unlawfully refused to bargain with the Union as the exclusive representative of the Unit employees, I recommend the Hospital be ordered to recognize and bargain collectively, upon request, with the Union as the exclusive representative of the Hospital's Unit employees with respect to wages, hours, and other terms and conditions of employment and, if an

agreement is reached, embody it in a signed document.

5 Having found, as specifically set forth above, the Hospital made unilateral changes in the terms and conditions of employment of its Unit employees, I recommend the Hospital, if requested by the Union, rescind any unilateral changes to wages, benefits and conditions of employment implemented since the withdrawal of recognition on November 14, 2008. Nothing in this recommendation shall be construed to require the Hospital to withdraw any benefits previously granted, unless requested by the Union.

10 Having found the Hospital unlawfully, and contrary to its past practice, prohibited Union representatives from accessing the Hospital's properties and facilities, it is recommended the Hospital be ordered to restore access to the Union's representatives to the extent permitted prior to November 18, 2008.

15 Having found the Hospital unlawfully refused to bargain about the effects of changes made to the Emergency Department, it is recommended the Hospital be ordered to bargain about the effects of such changes.

20 On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:⁴

ORDER

25 The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

30 (a) Failing and refusing to bargain with the Union as the exclusive representative of its employees in the Unit described below.

(b) Withdrawing recognition from the Union as the exclusive representative of its employees in the following Unit:

35 All full-time and regular part-time and per diem Registered Nurses in positions requiring a Registered Nurse (RN) license and who provide direct patient care and are employed by Respondent at and out of Fremont Medical Center located at 970 Plumas Street, Yuba City, CA and/or Rideout Memorial Hospital located at 726 Fourth Street, Marysville, California; excluding all
40 non-professional employees, non-Registered Nurses, Traveler Registered

45 ⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 Nurses, Registry Registered Nurses, Care Coordinators (discharge planning), Physician's Assistants (PAs), RN Clinical Systems Analysts, RN Program Coordinators in Cardiac Rehab, RN Focus Review Patient Account Nurse Auditors, RN Focus Review Medical Records Analysts, ICU Outcome Coordinators, RN Education Coordinators, Clinical Nurse Specialists, Infection Control Nurses, RN midwives, managerial employees, confidential employees, guards and supervisors as defined in the Act.

10 (c) Unilaterally: changing wages, health insurance contributions, health insurance deductibles, matching contributions to employees' 403(b) plans, and cashing out paid time off.

15 (d) Refusing to bargain with the Union about the effects of its implementing new Emergency Department protocols, reinstating rapid medical evaluation processes, and adding an intake nurse assignment in the interview area of the Emergency Department.

20 (e) Prohibiting, contrary to its past practice, Union representatives from accessing the Hospital's properties and facilities.

(f) 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.

25 2. Take the following affirmative action designed to effectuate the policies of the Act:

30 (a) Recognize and, on request, bargain in good faith with the California Nurses Association, AFL-CIO, as the exclusive representative of the Hospital's employees in the Unit, described above, with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

35 (b) If the Union requests: cancel the two wage increases unlawfully granted the Unit employees; reinstate the 50 percent reduction of Unit employees' contributions for health premiums; rescind the 100 percent waiver of health insurance deductibles for Unit employees; rescind the matched contributions to the Unit employees' 403(b) plans; rescind the policy of cashing out paid time off, up to 80 hours per calendar year for Unit employees; and, upon the Union's request, bargain regarding the effects of implementing new Emergency Department protocols, reinstating a rapid medical evaluation process and adding an intake nurse assignment in the Emergency Department.

40 (c) Reinstate access by Union representatives to the Hospital's properties and facilities to the extent permitted before November 18, 2008.

45 (d) Within 14 days after service by the Region, post at its Yuba City,

California and its Marysville, California facilities copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Hospital's authorized representative, shall be posted by the Hospital immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Hospital to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Hospital has gone out of business or closed the facilities involved in these proceedings, the Hospital shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Hospital at any time since November 14, 2008.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Hospital has taken to comply.

Dated, Washington, D.C., April 28, 2009

William N. Cates
Associate Chief Judge

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⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

45

APPENDIX

NOTICE TO EMPLOYEES

5

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

10 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

15

- 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.

20

WE WILL NOT refuse to recognize and bargain in good faith with California Nurses Association, AFL-CIO as the exclusive representative of our employees in the following appropriate unit:

25

All full-time and regular part-time and per diem Registered Nurses in positions requiring a Registered Nurse (RN) license and who provide direct patient care and are employed by Respondent at and out of Fremont Medical Center located at 970 Plumas Street, Yuba City, CA and/or Rideout Memorial Hospital located at 726 Fourth Street, Marysville, California; excluding all non-professional employees, non-Registered Nurses, Traveler Registered Nurses, Registry Registered Nurses, Care Coordinators (discharge planning), Physician's Assistants (PAs), RN Clinical Systems Analysts, RN Program Coordinators in Cardiac Rehab, RN Focus Review Patient Account Nurse Auditors, RN Focus Review Medical Records Analysts, ICU Outcome Coordinators, RN Education Coordinators, Clinical Nurse Specialists, Infection Control Nurses, RN midwives, managerial employees, confidential employees, guards and supervisors as defined in the Act.

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WE WILL NOT unilaterally grant wage increases, reduce contributions for health premiums, waive health insurance deductibles, match a certain percentage of employee contributions to their 403(b) plans, cash out paid time off up to 80 hours per calendar year, or other terms and conditions of employment without notifying the Union and giving it an opportunity to bargain about these changes.

WE WILL NOT prohibit Union representatives from accessing our property.

45

WE WILL NOT implement new Emergency Department protocols, reinstate a rapid medical evaluation process or add an intake nurse assignment in the Emergency Department without

bargaining with the Union about the effects of such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

5

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of our employees in the above Unit with respect to wages, hours, and other terms and conditions of employment, and, if an agreement is reached, embody it in a signed document.

10

WE WILL, on the Union's request, cancel and/or rescind the wage increases, reduced contributions for health premiums, waiver of health insurance deductibles, matching a certain percentage of employee contributions to 403(b) plans, cashing out paid time off up to 80 hours per calendar year, and **WE WILL**, upon request of the Union, bargain with the Union about the effects of our having implemented new Emergency Department protocols, reinstating a rapid medical evaluation process and adding an intake nurse assignment in the Emergency Department.

15

WE WILL reinstate our past practice of allowing Union representatives to access our property.

20

**THE FREMONT-RIDEOUT HEALTH GROUP
d/b/a FREMONT MEDICAL CENTER AND
RIDEOUT MEMORIAL HOSPITAL**

(Employer)

25

Dated _____ **By** _____
(Representative) **(Title)**

30

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

35

901 Market Street, Suite 400, San Francisco, California 94103-1735
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m. (PST)

40

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 BY
ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR
COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5183.

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UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

THE FREMONT-RIDEOUT HEALTH GROUP d/b/a
FREMONT MEDICAL CENTER AND RIDEOUT MEMORIAL HOSPITAL

And

Case No. 20-CA-34194
20-CA-34227

CALIFORNIA NURSES ASSOCIATION, AFL-CIO,

RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE

FOLEY & LARDNER LLP
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SFCA_1560044.1

1

Respondent Fremont Rideout Health Group ("Respondent") files its exceptions to the April 28, 2009 decision of Administrative Law Judge William N. Cates (the "ALJ") pursuant to Sections 102.46 and 102.11 through 102.114 of the Rules and Regulations of the National Labor Relations Board (the "NLRB" or "Board").

1

Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the "NLRA" or "Act") by failing and refusing to bargain with California Nurses Association, AFL-CIO ("CNA") as the exclusive collective bargaining representative of a bargaining unit of Respondent's employees (the "Unit") since November 14, 2008 and/or by withdrawing recognition of CNA on November 14, 2008. [ALJ Dec. 18; Tr. 15:14-16:17; 17:11-19:25; 21:19-22:24; 23:2-12; 26:20-22; 287:8-19; 290:13-20; GC Exh. 2, 3a, 4, 6, 7-11, 13-30; R. Exh. 3, 4, 15 & 23.]

2

Respondent excepts to the ALJ's conclusion that eighteen (18) Unit employees effectively revoked their signatures from anti-union petitions (the "Removal Petitions") prior to November 14, 2008 when Respondent withdrew recognition of CNA based upon the Removal Petitions. [ALJ Dec. 11-12; Tr. 15:14- 16:17; 21:19-22:24; 23:2-12; 26:20-22; 287:8-19; 290:13-20; GC Exh. 2, 3a, 13-30; R. Exh. 3 & 4; 15.]

3

Respondent excepts to the ALJ's conclusion that CNA did not have an obligation or burden to advise Respondent that eighteen (18) employees had signed cards ("Revocation Cards") revoking their signatures from the Removal Petitions prior to the time that Respondent withdrew recognition based upon the Removal Petitions in order for such Revocation Cards to be effective. [ALJ Dec. 11-12; Tr. 15:14- 16:17; 21:19-22:24; 23:2-12; 26:20-22; 287:8-19; 290:13-20; GC Exh. 2, 3a, 13-30; R. Exh. 3 & 4; 15.]

4

Respondent excepts to the ALJ's conclusion that CNA did not have time to advise Respondent of the existence of Revocation Cards in its possession prior to the time that Respondent withdrew recognition. [ALJ Dec. 12; Tr. 15:14- 16:17; 21:19-22:24; 23:2-12; 26:20-22; 287:8-19; 290:13-20; GC Exh. 2, 3a, 13-30; R. Exh. 3 & 4; 15.]

5

Respondent excepts to the ALJ's conclusion that, after it received the Removal Petitions, Respondent was obligated to offer or provide CNA time before withdrawing recognition based upon the Removal Petitions. [ALJ Dec. 12; Tr. 15:14- 16:17; 21:19-22:24; 23:2-12; 26:20-22; 287:8-19; 290:13-20; GC Exh. 2, 3a, 13-30; R. Exh. 3 & 4; 15.]

6

Respondent excepts to the ALJ's conclusion that Respondent failed to prove at trial by a preponderance of the evidence that CNA had in fact lost majority support at the time Respondent withdrew recognition. [ALJ Dec. 12; Tr. 15:14- 16:17; 21:19-22:24; 23:2-12; 26:20-22; 287:8-19; 290:13-20; GC Exh. 2, 3a, 13-30; R. Exh. 3 & 4; 15.]

7

Respondent excepts to the ALJ's failure to conclude that signatures on the Removal Petitions did not become "stale" or otherwise invalid because they were at least seven (7) or twelve (12) months old. [ALJ Dec. 12; Tr. 15:14- 16:17; 21:19-22:24; 23:2-12; 26:20-22; 287:8-19; 290:13-20; GC Exh. 2, 3a, 3b, 13-30; R. Exh. 3 & 4; 23.]

8

Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally granting two 5.5% increases to Unit employees, reducing Unit employees' contributions for health premiums by 50%, waiving 100% of health insurance deductibles for Unit employees, matching by 33.3 cents on the dollar up to the first 3% of a Unit employees' contribution to their 403(b), and implementing a policy of cashing out paid time off

2

up to 80 hours per calendar year for Unit employees. [ALJ Dec. 19; Tr. 17:11-19:25; GC Exh. 2, 4, 6-11; R. Exh. 15.]

9

Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with CNA over regarding the effects of changes implemented in its Emergency Department. [ALJ Dec. 19; Tr. 17:11-19:25; GC Exh. 2, 4, 6-11; R. Exh. 15.]

10

Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) and (5) of the Act by prohibiting CNA representatives from accessing its properties and facilities. [ALJ Dec. at 19; Tr. 17:11-19:25; GC Exh. 2, 4, 6-11; R. Exh. 15.]

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Respondent excepts to the remedy recommended by the ALJ on the grounds that Respondent did not violate the Act, and, therefore, no remedy was appropriate. [Tr. 15:14-16:17; 17:11-19:25; 21:19-22:24; 23:2-12; 26:20-22; 287:8-19; 290:13-20; GC Exh. 2, 3a, 4, 6, 7-11, 13-30; R. Exh. 3, 4, 15 & 23.]

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3

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to this action; my current business address is **One Maritime Plaza, Sixth Floor, San Francisco, CA 94111-3409.**

On May 26, 2009, I served the foregoing document(s) described as:

**RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE and
RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE (CASE NOS. 20-CA-34194 AND 20-CA-34227)** on the interested parties in this action as follows:

(2) BY EMAIL: I transmitted the document via electronic mail in pdf format, to the following persons at the indicated email addresses:

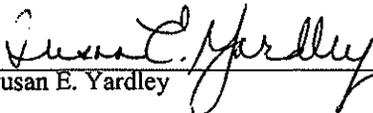
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Executed on May 26, 2009, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Susan E. Yardley

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

**THE FREMONT-RIDEOUT HEALTH GROUP d/b/a
FREMONT MEDICAL CENTER AND RIDEOUT MEMORIAL HOSPITAL**

And

**Case No. 20-CA-34194
20-CA-34227**

CALIFORNIA NURSES ASSOCIATION, AFL-CIO,

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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COMES NOW Fremont Rideout Health Group d/b/a Fremont Medical Center And Rideout Memorial Hospital, Respondent in the above referenced matter, and pursuant to Section 102.46 of the Board's Rules and Regulations, files this its Brief In Support Of Exceptions To The Decision Of The Administrative Law Judge.

I. INTRODUCTION

On November 13, 2008, Fremont Rideout Health Group, the Respondent herein, ("FRHG" or "Respondent") received petitions from a group of its employees who were members of a bargaining unit (the "Unit") represented by Charging Party California Nurses Association, AFL-CIO ("CNA" or the "Union"). The petitions stated that the signatory employees no longer wished to be represented by CNA and that they requested that Respondent immediately withdraw recognition of CNA. It is undisputed that the 234 signatures on the petitions constituted a majority of the 452 employee Unit. After verifying that the petitions had been signed by a majority of the members of the Bargaining unit, Respondent withdrew recognition as requested. CNA did not at that time make any claim that it possessed evidence that would cast doubt on the signatures on the petitions, nor did it produce any such evidence. Only a month later did Respondent learn that CNA even claimed to be in possession of the signatures of eighteen (18) employees indicating that, prior to the withdrawal of recognition, such employees had withdrawn their support from the Petitions upon which Respondent had relied, and Respondent was not shown the purported revocations until months later, at the hearing.

The principal question in this case is whether a union, faced with a majority-signed petition by employees it represents seeking to remove it as bargaining representative, may withhold evidence in its possession regarding whether employees continue to support the petition, only to disclose such evidence for the first time long after an employer has relied upon the facially valid petition to withdraw recognition. The controlling precedent of the National Labor Relations Board (the "NLRB" or the "Board") holds that it may not, and that an employee's revocation of support for an anti-union petition is not effective unless such revocation is communicated to the employer prior to the time it acts on the petition. Revocations

disclosed after that time are not effective and may not be used to invalidate an otherwise lawful withdrawal of recognition. Administrative Law Judge William N. Cates (the "ALJ"), misconstruing the applicable precedent, found otherwise. Respondent respectfully submits that his conclusion was incorrect and that the Board should find that Respondent's withdrawal of recognition was not unlawful under the National Labor Relations Act (the "NLRA" or the "Act").

Due to his conclusion that the eighteen (18) revocations retroactively invalidated Respondent's withdrawal of recognition, the ALJ did not reach the contention of Counsel for the General Counsel of the NLRB (the "General Counsel") that some of the signatures on the Petitions were "stale," and therefore invalid, solely because they were executed seven (7) or twelve (12) months prior to the withdrawal of recognition. When the Board properly reverses the ALJ's conclusion regarding the effectiveness of the revocations, this issue will be presented. Because the facts pertaining to the General Counsel's "staleness" argument are not disputed, Respondent submits that it is appropriate at this time for the Board to reject that argument and confirm, in accordance with the Board's past precedent, that age alone does not invalidate an employee's signature on a petition seeking the removal of a union as bargaining representative.

Finally, given that the ALJ's conclusion that Respondent's withdrawal of recognition was unlawful was incorrect, his conclusion that Respondent unlawfully failed to bargain over certain changes made after the withdrawal was also incorrect, and should be reversed.

II. STATEMENT OF THE CASE

A. The Parties

Respondent is a California non-profit corporation, which operates acute care and other medical facilities in Marysville and Yuba City, California. It is an employer under the Act. [ALJ Dec. 2.] CNA is a labor organization under the Act.¹ [ALJ Dec. 2.] The Unit represented

¹ References herein to the transcript of the hearing before the ALJ will be indicated by "Tr." References to the exhibits submitted by Respondent at the hearing (also referred to in the record as "employer's exhibits") will be indicated by "R. Exh." References to exhibits submitted by the General Counsel at the hearing will be indicated by "GC Exh." References to the ALJ's Decision will be indicated by "ALJ Dec."

by CNA comprised registered nurses employed by Respondent at its two (2) hospitals. [ALJ Dec. 3.] Respondent and CNA will sometimes be referred to collectively as the "Parties."

B. Factual Background

1. The Parties Bargained For An Initial Contract For Over A Year, But Eventually Reached Impasse

CNA was certified as the bargaining representative of the Unit on September 20, 2006. [ALJ Dec. 3.] Beginning in December 2006, the Parties commenced collective bargaining over an initial contract. [ALJ Dec. 3.] The Parties bargained for over a year but were unable to reach agreement on an overall contract. [ALJ Dec. 3.] At a bargaining session held on January 8, 2008, Respondent submitted in writing its last, best, and final offer (the "Final Offer"). [Tr. 23:13-24:1; ALJ Dec. 3.] On March 21, 2008, CNA engaged in a strike. [Tr. 24:17-24; ALJ Dec. 3.] On May 14, 2008, CNA made its own last offer in writing, which Respondent rejected on May 21, 2008. [Tr. 24:4-15; ALJ Dec. 3.] The parties have held no bargaining sessions since January 8, 2008. [Tr. 24:25-25:17; ALJ Dec. 3.]

2. Beginning In 2007, Unit Employees Circulated And Signed Petitions Seeking The Removal Of CNA As Bargaining Representative

Beginning in mid-2007, a Unit employee named Joyce Bybee, along with other employees, began an effort to have CNA removed as the bargaining representative. Ms. Bybee and the other employees began to circulate petitions titled "Petition To Remove Union As Representative." [R. Exh. 4.] (These petitions will be referred to herein as the "Removal Petitions" and Ms. Bybee and the other employees circulating them as the "Petition Circulators.") Each of the Removal Petitions contained the following language:

PETITION TO REMOVE UNION AS REPRESENTATIVE

The undersigned employees of FREMONT RIDEOUT HEALTH GROUP do not want to be represented by CALIFORNIA NURSES ASSOCIATION, hereinafter referred to as union.

Should the undersigned employees constitute 30% or more, but less than 50% of the bargaining unit represented by the union, the undersigned employees hereby petition the National Labor

Relations Board to hold a decertification election to determine whether the majority of employees also no longer wish to be represented by the union.

In addition, should the undersigned employees constitute 50% or more of the bargaining unit represented by the union, the undersigned employees hereby request that our employer immediately withdraw recognition from the union, as it does not enjoy the support of a majority of employees in the bargaining unit.

[R. Exh. 4; GC Exh. 3a.]

3. In October 2007, Unit Employees Filed A Petition For A Decertification Election

On October 12, 2007, Ms. Bybee, on behalf of a group of signatory employees, filed a decertification petition designated Case No. 20-RD-2448 with the NLRB. [Tr. 23:2-12; R. Exh. 3 & 4.] A set of Removal Petitions with employee signatures was submitted in support of the decertification petition. [R. Exh. 4.] Shortly after the filing of the decertification petition, CNA filed "blocking charges" that prevented the decertification election from taking place. [ALJ Dec. 3.]

4. On November 13, 2008, Unit Employees Presented Respondent With Evidence That CNA Had Lost The Support Of The Majority Of Unit Employees, And Respondent Withdrew Recognition

Despite having been temporarily thwarted in their efforts to decertify CNA through a Board election, the Petition Circulators continued to gather employee signatures on the Removal Petitions. The effort to remove CNA enjoyed broad support among Unit employees, and by November 2008, a majority of unit employees had signed the Removal Petitions. Accordingly, on November 13, 2008, the Petition Circulators presented the majority-signed Removal Petitions to Respondent.

It was stipulated, and the ALJ found, that at the time that the Removal Petitions were presented to Respondent, there were 452 employees in the unit for the purposes of determining majority support. [Tr.15:14-20; ALJ Dec. 4.] It was also stipulated, and the ALJ found, that, of

these eligible employees, 234 had signed the Removal Petitions – a majority of unit employees (51.8%). [Tr. 15:21-16:17; 21:19-22:15; ALJ Dec. 4.]

CNA was aware of the ongoing efforts to enlist support for its removal as bargaining representative and took steps to attempt to gather evidence of its continued majority support. In particular, CNA and its supporters began soliciting employees who had signed the Removal Petitions to sign cards revoking those signatures. These cards, referred to herein as “Revocation Cards” stated as follows:

I, _____ [print name], hereby revoke my signature on any card, petition, or other document I may have signed at any time repudiating or disowning support for the California Nurses Association (CNA) as my representative with respect to the terms and conditions of my employment with the Fremont-Rideout Health Group and hereby affirm and/or reaffirm my support for CNA.

[GC Exh. 13-30.] CNA’s efforts in this regard began in September 2008 (when the earliest Revocation Card was signed) and continued through early November 2008. However, although Respondent was, in fact, aware that CNA was asking employees to sign Revocation Cards, at no time prior to Respondent’s eventual withdrawal of recognition on November 14, 2008 did CNA submit the Revocation Cards to Respondent or to the Circulation Petitioners, or even make a claim that any Revocation Cards had actually been signed. [ALJ Dec. 4.]

Upon receiving and examining the Removal Petitions, it became apparent to Respondent that a majority of unit employees had indicated that they no longer supported CNA as the bargaining representative. In accordance with the Removal Petitions, which requested that Respondent withdraw recognition “immediately,” on November 14, 2008, Respondent sent a letter to CNA stating that “FRHG hereby withdraws recognition of CNA as the exclusive representative of this bargaining unit, effective immediately.” [GC Exh. 2.]

Despite having been notified of Respondent’s withdrawal of recognition, CNA still did not present any Revocation Cards to Respondent, or even disclose that it was in possession of

them.² [ALJ Dec. 4.] Indeed, it was not until December 15, 2008 – a month after the withdrawal of recognition – that Respondent was informed for the first time (by the General Counsel) of the existence of purported Revocation Cards. [ALJ Dec. 4; Tr. 287:8-19.] It was not until the unfair labor practice hearing itself on February 23, 2009 that Respondent was actually shown any of the Revocation Cards. [ALJ Dec. 4.]

5. Unit Employees Also Filed A Second Decertification Petition, But Ultimately Withdrew Both The First And The Second Decertification Petitions

Around the time that the Removal Petitions were presented to Respondent, Ms. Bybee, again on behalf of a group of signatory Unit employees, filed a second decertification petition, which was designated Case No. 20-RD-2468. [Tr. 22:17-24; 290:13-20.] This second decertification petition was received by the Region on November 17, 2008, three (3) days after the Removal Petitions were submitted to Respondent. [Tr. 22:17-24; 290:13-20.] On November 21, 2007, both the first and second decertification petitions were voluntarily withdrawn, presumably because Respondent had already withdrawn recognition. [Tr. 22:17-24; 23:2-12.]

6. After Withdrawing Recognition, Respondent Implemented Certain Changes To Terms And Conditions Of Employment

After November 14, 2008, Respondent no longer bargained collectively with CNA. On November 17, 2008, Respondent issued a memorandum to the nurses formerly represented by CNA. [GC Exh. 7.] The memorandum informed them of the withdrawal of recognition and also informed them of certain changes Respondent was implementing. In particular, Respondent implemented certain wage increases and benefit enhancements.³ [Tr. 19:14-25; GC Exh. 7 & 8.] These wage and benefits changes were identical to the changes contained in Respondent's January 2008 Final Offer. [R. Exh. 15 p. 3-5]

² In fact, as will be discussed in the Argument section below, once Respondent relied upon the Removal Petitions to withdraw recognition, it was too late for CNA to rely on previously undisclosed Revocation Cards.

³ Specifically, Respondent announced two (2) 5.5% wage increases, 33.3% percent matching on 403(b) contributions to a prescribed maximum contribution, a 50% reduction in employee contributions to health insurance premiums, 100% waiver of certain deductibles, and a more generous paid time off ("PTO") cash-out policy. [Tr. 19:14-25; GC Exh. 8.]

In addition to the changes outlined above, Respondent also implemented certain changes about which it had notified CNA prior to the withdrawal of recognition. These consisted of certain changes to Emergency Department procedures. [Tr. 18:18-19:11.] CNA has never contended, and it was not alleged in the Complaint, that Respondent had any obligation to bargain over the decision to implement these changes. Prior to the withdrawal, Respondent was prepared to bargain with CNA over the effects of the decisions (if any). [GC Exh. 4.] However, after the withdrawal eliminated Respondent's obligation to bargain with CNA, Respondent refused CNA's requests to engage in effects bargaining and to provide information pertaining to such effects bargaining. [GC Exh. 6.]

Prior to the withdrawal of recognition, Respondent had permitted employees of CNA to use certain areas of its property, including hospital cafeterias and a privately owned paved area on G Street in Marysville to solicit and distribute literature. In light of the fact that CNA had lost its status as bargaining representative, Respondent decided to no longer offer CNA's employees preferential treatment in these areas. Henceforth, they would be treated the same as other non-employee solicitors in these areas. [Tr. 17:11-18:14; GC Exh. 9-11.]

C. Procedural Background

On or around November 21, 2008 CNA filed an unfair labor practice charge designated Case No. 20-CA-34194. [GC Exh. 1(a).] The charge alleged that Respondent's withdrawal of recognition was unlawful because signatures on the Removal Petition were coerced and the withdrawal was tainted by unfair labor practices. [GC Exh. 1(a).] On or around December 16, 2008, CNA filed an additional charge designated Case No. 20-CA-34227 alleging that Respondent unlawfully implemented changes in terms and conditions of employment without bargaining with CNA. [GC Exh. 1(d).] On or around February 4, 2009, Region 20 of the NLRB ("Region 20") issued an "Order Consolidating Cases, Consolidated Complaint And Notice Of Hearing" in Case Nos. 20-CA-34194 and 20-CA-34228 (the "Complaint").⁴ The Complaint only alleged that Respondent withdrew recognition from CNA and thereafter implemented changes in

⁴ The Complaint was amended in some respects at the hearing.

terms and conditions of employment in violation without bargaining with CNA all in violation of Section 8(a)(1) and 8(a)(5) of the Act. [GC Exh. 1(h).] There were no allegations of coercion of employer taint. Respondent timely answered the Complaint on February 18, 2009. [GC Exh. 1(p).] A hearing was held on the Complaint before the ALJ on February 23 and 24, 2009 in Marysville, California, during which the ALJ heard testimony and received documentary evidence.

During the hearing the General Counsel conceded and stipulated that the Removal Petitions were signed by a majority of bargaining unit employees and that Respondent was not presented with any evidence, or any claim of evidence, that any of those signatures had been revoked. She was thus placed in the position of arguing that the withdrawal was unlawful notwithstanding the facially valid Removal Petitions. The theory advanced by the General Counsel was two-pronged. First, the General Counsel argued that the withdrawal was unlawful due to the eighteen (18) Revocation Cards, the existence of which was revealed to Respondent only after the withdrawal. Second, the General Counsel argued that many of the signatures on the Removal Petitions were “stale” based solely on the age of the signatures.⁵

D. The ALJ’s Decision

On April 28, 2009, the ALJ issued his decision in the cases (the “ALJ’s Decision” or the “Decision”). In the Decision, the ALJ considered the Revocation Cards and determined that they were “valid,” meaning that the signatures and dates on the cards were authentic.⁶ [ALJ Dec. p. 10.] He did not, however, consider whether those “valid” (i.e. authentic) cards qualified as *effective* revocations of the signatures on the Removal Petitions, but simply (and incorrectly) assumed that they were. Given that conclusion, the ALJ concluded that Respondent had not

⁵ Specifically, it was contended that 112 of the signatures on the Removal Petitions were stale because they predated the November 14, 2008 withdrawal of recognition by more than seven (7) months, and that, out of those 112 signatures, 72 were stale because they predated the withdrawal by more than twelve (12) months. [ALJ Dec. 12.]

⁶ Respondent presented evidence and argued in its post-hearing brief that the Revocation Cards, or some of them, were not valid because employees did not understand the content of the cards, or that they were not actually signed on the dates indicated on the cards. Although Respondent disagrees with the ALJ’s analysis and rejection of these arguments, it has not excepted to his conclusion that the signatures and dates on the cards are authentic.

demonstrated a loss of majority support for CNA and that, therefore, the withdrawal of recognition was unlawful. [ALJ Dec. p. 10-12.] Because he had concluded that the withdrawal was unlawful based upon the General Counsel's first argument, he declined to reach the General Counsel's second argument that some of the signatures on the Removal Petitions were stale based on their age alone. [ALJ Dec. p. 12.] Finally, the ALJ concluded that the post-withdrawal changes implemented by Respondent without bargaining were unlawful.⁷

III. QUESTIONS INVOLVED

The questions presented are as follows:

1. Whether the ALJ erred in concluding that Respondent's withdrawal of recognition of CNA, which was based upon the majority-signed Removal Petition, was unlawful based upon Revocation Cards that were executed prior to the withdrawal, but were neither communicated, nor otherwise made known, to Respondent until a month after the withdrawal.
2. Assuming that the ALJ erred in concluding that the Revocation Cards were effective, whether signatures on the Removal Petition were "stale" solely because they were seven (7) or twelve (12) months old when Respondent withdrew recognition of CNA.
3. Assuming that the ALJ erred in concluding that Respondent's withdrawal of recognition was unlawful, whether the ALJ's conclusion that Respondent unlawfully refused to bargain over post-withdrawal changes, or their effects, must be overturned.

⁷ In its post-hearing brief, Respondent argued that its refusal to bargain over the post-withdrawal changes was not unlawful even if it did continue to owe a general bargaining obligation to CNA. The ALJ rejected these arguments, and Respondent does not except to that aspect of the Decision. Of course, if Respondent's withdrawal of recognition was lawful, then it would have had no obligation to bargain with CNA over any matter. It is on this basis that Respondent contends that the ALJ's decision was incorrect.

IV. ARGUMENT

A. **The *Levitz* Decision And The Ineffective Revocation Doctrine**

1. **Replacement Of The Good Faith Doubt Standard With The Actual Majority Support Standard In Withdrawal And Voluntary Recognition Cases**

This case turns on the question of what evidence may be relied upon in determining whether a union has majority support at the time that an employer withdraws recognition. More specifically, the question to be answered is whether a union may rely upon employee signatures revoking support from an anti-union petition which are disclosed only after the employer has relied on the facially valid petition to withdraw recognition. The cases that have been decided in this area reveal that a union may not rely upon such revocations because they are ineffective under Board law.

The central case is the Board's decision in *Levitz Furniture Company of the Pacific*, 333 NLRB 717 (2001). In that case, the Board changed and clarified its rules regarding withdrawal of recognition ("withdrawal"), and harmonized them with the rules pertaining to voluntary extension of recognition.

In *Levitz*, the Board undertook an extensive and careful review of the historical development of its withdrawal standards. Prior to 1947, the Board applied a "good faith doubt" standard both to withdrawals and voluntary recognitions under which an employer could lawfully withdraw recognition or refuse to recognize a union seeking initial recognition "if the employer had a good faith doubt as to the union's majority support and had not engaged in illegal conduct tending to erode the union's support." *Levitz, supra*, 333 NLRB at 721. After the Act was amended in 1947 to permit employers to file election petitions ("RM petitions"), the Board initially held that such a petition was the exclusive means for an employer to challenge a union's majority status. *Id.* However, in 1951, the Board returned to its former good faith doubt standard, notwithstanding the availability of the RM petition. *Id. And see Celanese Corporation of America*, 95 NLRB 664 (1951). Thereafter, "the Board followed similar policies with regard to alleged 8(a)(5) violations in both the extension and withdrawal of recognition contexts."

Levitz, supra, 333 NLRB at 721-722. An employer could withdraw recognition from an incumbent union, or refuse to initially recognize a union, based upon a good faith doubt of its majority status, forcing the union to prove its majority status through an election. *Id* at 722.

In the following years, the standards governing withdrawal and voluntary recognition diverged. The Board abandoned the good faith doubt standard in the recognition context. *Id* at 722. In particular, in 1961, the United States Supreme Court held that an employer violates Section 8(a)(2) of the Act if it voluntarily recognizes a minority union, even if it believes in good faith that the union has majority status. *International Ladies' Garment Workers' Union v. National Labor Relations Board* ("Garment Workers"), 366 U.S. 731, 738-739 (1961). If the recognized union does not actually have majority support when recognition is granted, the employer's good faith belief in such support is not a defense to an unfair labor practice charge. At the same time, the Board continued to allow employers to withdraw recognition based only upon a good faith doubt of majority status. *Levitz, supra*, 333 NLRB at 722. Thus, the standard in the recognition context was significantly more stringent than in the withdrawal context, although the fundamental question in each case was the same: did the union have the support of a majority of the relevant employees?

In *Levitz*, the Board recognized and eliminated the illogical practice of measuring majority support in voluntary recognition cases differently than in withdrawal cases. The Board noted that

The *Celanese* rule illustrates the inconsistency between the Board's historic treatment of employers who unilaterally withdraw recognition and of those who voluntarily recognize minority unions. Under *Celanese*, an employer who withdraws recognition in the good faith but mistaken belief that the union has lost majority support does not violate Section 8(a)(5). But an employer who extends recognition in the good faith but mistaken belief that the union has majority support violates Section 8(a)(2). As the Supreme Court has explained, the employer's good faith in the 8(a)(2) context is irrelevant . . .

* * *

We believe that the same reasoning should govern withdrawals of recognition.

Levitz, supra, 333 NLRB at 724. Accordingly, the Board held that “an employer may rebut the continuing presumption of an incumbent union’s majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.” *Id.* In so doing, the Board expressly overruled *Celanese* and its progeny and abandoned the good faith doubt standard in withdrawal cases. Thus, the evolution of the Board’s doctrine in cases involving employer action based on majority status had come full circle. Initially, both withdrawal and voluntary recognition were permitted based on good faith doubt. The Board initially abandoned the good faith doubt standard in the recognition context, and required actual loss of majority support. Finally, the Board abandoned the good faith doubt standard in the withdrawal context.

2. The Effective Revocation Doctrine

As the Board explained in *Levitz*, an employer’s withdrawal of recognition of an incumbent union is lawful if, as of the date that the employer withdraws recognition, the union has actually lost the support of a majority of bargaining unit employees. The most common way for employees to express that they no longer support a union as bargaining representative is by signing a petition or other similar document signifying such. It is clear that an employer is entitled to rely on such signatures when withdrawing recognition. It is equally clear that employees are entitled to change their minds regarding union representation and to revoke their signatures in support of an anti-union petition. The issue in this case is the circumstances under which an employee’s change of heart regarding his or her support of an anti-union petition becomes effective such that the employer is no longer entitled to rely upon the signature in support of a withdrawal of recognition. The Board has never directly addressed this question in the context of withdrawal of recognition (not surprising given that the actual loss of support standard has only applied to withdrawals since 2001). However, the Board has made clear in the directly analogous context of employee signatures in support of initial union representation that

an employee's revocation of such a signature is effective only if the revocation is communicated to the employer, or to the union who obtained the signature being revoked, prior to the time that the union and/or the employer acts on the original signature (referred to hereinafter as the "effective revocation" doctrine). Given that the Board stated in *Levit* that "the same reasoning should govern withdrawals of recognition" as voluntary recognition, the effective revocation doctrine should apply in equal force in the withdrawal context as it does in the recognition context.

The effectiveness of a purported revocation of a signature in support of a petition is governed by the common law of agency, as interpreted by the NLRB. See *Davis Wholesale Company, Inc.*, 165 NLRB 271, 281 n 38 (1967). Under that body of law, revocation of an authorization is effective only when an employee, or one acting on her behalf and with her authority, communicates it to the agent to whom she granted authorization. Restatement (Third) Of Agency, §§ 1.03, 2.01, 3.01, 3.09, 3.10(1). Accordingly, in the context of a signature in support of union representation, the Board has repeatedly held that the revocation of such a signature is not effective unless the revocation is actually communicated to the union (the agent) prior to the time that the union demands recognition based upon that signature. *Davis Wholesale, supra*, 165 NLRB at 281 n. 38 ("Since these withdrawal statements were never forwarded to the Union, they bear no relevance to the question of the Union's majority status at the time it requested recognition . . . A principal's revocation of his [or her] agent's authority is ineffective until communicated to the agent.") (bracketed material supplied; internal punctuation and citations omitted); *Raley's & Independent Drug Clerk's Association*, 348 NLRB 382, 561 (2006). "[I]t is well-established that an authorization card cannot be effectively revoked in the absence of notification to the union prior to the demand for recognition." *Alpha Beta Company*, 294 NLRB 228, 230 (1989); see also *TMT Trailer Ferry, Inc.*, 152 NLRB 1495 (1965) (revocation effective if employee notifies the actual solicitor of the authorization and seeks to retrieve it from that person before its use); *Martin Theatres of Georgia, Inc., d/b/a WTVC*, 126

NLRB 1054 (1960) (revocation effective where mailed to union and oral notice given to employer).

Although the Board has not specifically considered the standard that governs the determination of whether a revocation of an employee signature from an anti-union petition is effective, it is clear that the same principles of agency law should apply. There is no meaningful difference between a signature on a representation card and a signature on an anti-union petition except for the hoped-for outcome (representation versus non-representation). In each case, the employee, acting as the principal, is authorizing an agent to take action on his or her behalf. In the case of representation cards, the agent is the union, which would be expected to request recognition based upon the signature. In the case of the anti-union petition, it is the employer who would be expected to withdraw recognition, or the petition's circulator, who would be expected to request such a withdrawal, based upon the signature. As is the case with representation cards, agency law requires that, in order to effectively revoke a signature on an anti-union petition, the employee must communicate such revocation to the employer or the petition's circulator prior to the time that the employer relies upon the signature to withdraw recognition.

This conclusion is buttressed by the *Levitz* decision itself. In *Levitz*, the Board was clearly of the view that it was illogical to treat withdrawal and voluntary recognition differently because both issues turn on the same factor – the union's majority support, or lack thereof. Indeed, the Board expressly stated that “the same reasoning should govern withdrawals of recognition” and voluntary recognition. *Levitz, supra*, 333 NLRB at 724.

Furthermore, the Board defended the fairness of its new standard for withdrawals with the following passage:

placing the burden on employers is not unfair. Employers are not without access to evidence on this issue. For example, the Respondent here was presented with the unsolicited views of employees regarding representation matters. *Indeed, had the Union not asserted that it had contrary evidence, the Respondent would have had a good case, based on the petition it received*

from a majority of the unit employees, that the Union had, in fact, lost majority support.

Id. at 725 (emphasis supplied). In *Levitz*, the union had asserted that it had contrary evidence and offered to provide it *before* the withdrawal. Thus, the above-quoted passage is consistent with the application of the effective revocation doctrine, confirming as it does that where revocations are not communicated to the employer, they have no legal effect and an employer “would have a good case” based upon reliance on an anti-union petition notwithstanding the existence of undisclosed revocations. It is equally clear that the passage is inconsistent with any rule that would give undisclosed revocations effect absent their communication to the employer prior to the withdrawal.

B. The ALJ Improperly Invalidated Respondent’s Withdrawal Of Recognition Based Upon Ineffective Revocations

Beginning his analysis of the withdrawal issue, the ALJ accurately summed up the dispositive undisputed facts thusly,

First, I note that it is clear, as set forth herein, the Hospital had before it, as of November 13, 2008, a petition reflecting 51.8 percent of the Unit employees no longer desired to have the Union as their exclusive representative. It is also clear the Hospital announced its withdrawal of recognition of the Union effective November 14, 2008, based on the anti-union petition. It is also clear the Union did not present the Hospital with the 18 reaffirmation cards prior or near in time, to the Hospital’s announced withdrawal of recognition.

[ALJ Dec. p. 10.]⁸ These facts should have ended the ALJ’s analysis. Yet, the ALJ concluded that Respondent “clearly” failed to demonstrate that it had knowledge of an actual loss of majority support for CNA based upon the very Revocation Cards that CNA admittedly failed to disclose to the Hospital prior to the withdrawal. [ALJ Dec. p. 11.] In so doing, he improperly treated the issue of whether the Revocation Cards were *authentic* as coextensive with the issue of whether they were *effective*. In fact, although the relevant authority establishing the effective

⁸ The ALJ’s reference to the “anti-union petition” is to the Removal Petitions and his reference to “reaffirmation cards” is to the Revocation Cards.

revocation doctrine was cited and extensively discussed in Respondent's post-hearing brief, he issued findings diametrically opposed to the Board's established standard.

1. Contrary To Established Board Authority, The ALJ Found Secret Revocations To Be Effective Revocations

Considering the effective revocation issue, the ALJ opined that "the Union had no burden nor was it obligated, in any way, to notify or advise the Hospital of the 18 cards in its possession which were executed prior to the withdrawal of recognition by the Hospital." [ALJ Dec. p. 12.] Thus, according to the ALJ, CNA, having obtained revocation cards from employees, was free to keep those cards secret from both Respondent and the Petition Circulators as the Removal Petition was presented to and evaluated by Respondent, only to disclose them after Respondent had relied upon the Removal Petition, and thereby retroactively invalidate signatures on the petition. In other words, although the Board's established rule in recognition cases is that revocations are not effective unless communicated prior to recognition, the opposite rule applies in withdrawal cases – revocations are effective even if disclosed for the first time after withdrawal. The sole authorities cited by the ALJ for this conclusion were *Levitz*, which stands for no such proposition, and *HQM Of Bayside, LLC*, 348 NLRB 787 (2006), which likewise does not support the ALJ anomalous conclusion.

In *HQM*, the employer received an anti-union petition signed by a majority of employees during the term of a collective bargaining agreement. *HQM*, supra, 348 NLRB at 787. The employer announced that it would withdraw recognition based upon the petition upon the expiration of the collective bargaining agreement (at that point roughly a month away). *Id.* However, prior to the date that the employer actually withdrew recognition, the union informed the employer that it had its own majority-signed petition showing its continued support, which it had submitted to the NLRB. *Id.* Notwithstanding this disclosure, and without requesting to see the pro-union petition, the employer withdrew recognition when the collective bargaining agreement expired. *Id.* The Board held that under these circumstances, the employer could not rely upon signatures on the anti-union petition by employees who had later signed the pro-union

petition. *Id.* at 788. In its analysis, the Board specifically cited the fact that “the Union had informed the [employer] prior to the withdrawal of recognition that it was in possession of evidence of continued majority support,” which, of course, would have been irrelevant if there were no need for the union to disclose revocations prior to a withdrawal. *Id.* at 789 (bracketed material supplied).

The fact pattern in *HQM* is not analogous to the instant case and does not support the ALJ’s conclusion. In fact, the case contradicts the ALJ’s conclusion. In *HQM*, the union took the critical action that CNA, for reasons known best to itself, declined to take – it disclosed to the employer, prior to the time that the employer withdrew recognition, that it had evidence that employees had revoked their signatures from the anti-union petition in question.⁹ Therefore, *HQM* does not stand for the proposition that a union may withhold evidence of revocations and reveal it only after the withdrawal takes place. It is entirely consistent with the Board’s effective revocation doctrine.

Notably, both cases cited by the Board in *HQM* also involved fact patterns in which the employer was provided with evidence of continued majority support prior to the withdrawal of recognition. In *Parkwood Development Center, Inc.*, 347 NLRB 974 (2006), the day before an existing collective bargaining agreement was set to expire, at which time the employer intended to withdraw recognition, the employer was presented with a pro-union petition signed by a majority of employees, revoking an earlier anti-union petition. The Board found the employer then unlawfully withdrew recognition after “the Union had demonstrated to the Respondent that it enjoyed majority support.”¹⁰ *Parkwood, supra*, 347 NLRB at 975. Likewise in *Highlands*

⁹ The employer in *HQM*, having been notified of the union’s evidence, declined to request to see that evidence. Member Shaumber noted that he was not deciding the issue of whether the outcome would have changed had the employer asked to see the union’s evidence, and the union had refused to provide it. *HQM, supra*, 348 NLRB at 788 n 12. Of course, in the instant case, Respondent was not even made aware of a claim of revocations because CNA chose to keep even the fact of the existence of such evidence hidden.

¹⁰ Additionally, in its decision granting enforcement of the Board’s order in *Parkwood*, the D.C. Circuit Court stated, “From December 2, 2002 until March 6, 2003, the employees’ first petition made clear their lack of support for the Union. But after March 7, 2003, the date the Union presented the counter-petition, the objective evidence showed just the opposite. The Board measured employee support at the expiration of the CBA, on March 8, 2003, because that was

Regional Medical Center, 347 NLRB 1404 (2006), the other case cited in *HQM*, the Board held that an employer was not entitled to rely upon an employee's signature in support of an anti-union petition because it was aware that, after signing the petition, the employee joined the union and executed a dues deduction authorization. *Highlands, supra*, 347 NLRB at 1407 n 16. Additionally, in *Highlands*, the Board agreed with the ALJ that employee testimony regarding their attitudes toward the union prior to the withdrawal was "irrelevant" "*because this evidence was not before the Respondent when it withdrew recognition.*" *Id.* at 1407 n 17. Thus, even if employees had actually changed their minds regarding their support for an anti-union petition, their change of heart had no legal effect unless it was communicated or otherwise made known to the employer prior to the withdrawal. Again, this is entirely consistent with the effective revocation doctrine, and completely inconsistent with the ALJ's finding that evidence or notice of revocations may be presented for the first time after withdrawal.

With regard to *Levitz* itself, no reasonable reading of that decision can support the ALJ's conclusion. As discussed in more detail above, the Board in *Levitz* undertook a detailed discussion of the development of the standards governing withdrawal, explicitly comparing them to the standards governing voluntary recognition. The Board noted with evident disapproval that the standards had been allowed to diverge and expressly stated that the same reasoning should apply to both standards. This is inconsistent with the conclusion that different standards should apply to revocations in withdrawal and voluntary recognition cases. *Levitz* certainly stands for no such proposition. Indeed, the Board in *Levitz* stated that if a union failed to notify an employer that it was in possession of revocations before the employer withdrew recognition, the employer would have a good case, strongly supporting the conclusion that the effective revocation doctrine applies in withdrawal cases.

It is true that the Board in *Levitz* held that even "an employer with objective evidence that the union has lost majority support – for example, a petition signed by a majority of the

the date on which Parkwood's announced withdrawal of recognition was to take effect." *Parkwood Development Center v. National Labor Relations Board*, 521 F.3d 404, 407-408 (D.C. Cir. 2008).

employees in the bargaining unit – withdraws recognition at its peril.” *Levitz, supra*, 333 NLRB at 724. This means nothing more than that there is no good faith defense available to an employer who withdraws recognition from a union that enjoys majority support. However, this same rule applies in the voluntary recognition context, where the Supreme Court confirmed that there is no good faith defense where an employer extends recognition to a minority union. *Garment Workers, supra*, 366 U.S. at 738-739. Yet, the Board has consistently held that a revocation of an authorization not communicated to the union or employer prior to the demand for or extension of recognition does not invalidate the recognition, notwithstanding that there is no good faith defense.

The same conclusion applies in the withdrawal context. The Board has *never* held that a revocation of a signature from an anti-union petition is effective where it is not communicated (or at the very least, known) to the employer prior to the withdrawal. As discussed above, the Board has issued many decisions consistent with the application of the effective revocation doctrine to withdrawals. There is simply no other way to read the statement in *Levitz* that the employer in that case “would have had a good case, based on the petition it received” “had the Union not asserted that it had contrary evidence.” *Levitz, supra*, 333 NLRB at 725. Obviously, the union’s failure to disclose the revocations would not have meant that they did not exist. It would have meant that they existed, but were not legally effective. There is similarly no other way to read the Board’s statement in *Highlands* that evidence that employees had changed their minds regarding their support for an anti-union petition was not relevant “because this evidence was not before the Respondent when it withdrew recognition.” *Highlands, supra*, 347 NLRB at 1407 n 17.

Although, as the cited authority indicates, the Board has never expressly stated that the effective revocation doctrine applies in withdrawal cases under the post-*Levitz* actual loss of majority support standard, it is clear that the Board has consistently applied that standard in withdrawal cases to the extent that the issue has been presented. Moreover, there are also compelling practical and policy reasons to apply the doctrine in withdrawal cases. The right of

employees to chose *not* to be represented by a union, or by any particular union, unquestionably stands on an equal footing with the right to chose to be represented. *NLRB v. Magnavox Company of Tennessee*, 415 U.S. 322, 324-325 (1974). An interpretation of the Act that would permit a union or other party seeking to invalidate a withdrawal to use previously undisclosed revocations, but deny such use to a party seeking to challenge a voluntary recognition, would favor employees supporting representation over those supporting non-representation. The Act does not countenance such a result. Indeed, the Board has found in other circumstances involving the validity of signatures on petitions calling for a withdrawal of recognition that such cases are comparable to those involving the validity of union authorizations, when it comes to the issue of determining a union's majority status, stating plainly:

We find persuasive those cases relating to the issue of the validity of union authorization cards to establish a union's majority status, by way of analogy, in determining the present issue of the validity of the petition to establish the Union's loss of majority status.

Sacramento Clinical Laboratory, Inc., 242 NLRB 944, 946 at n. 5 (1979).

Additionally, if the rule espoused by the ALJ were to prevail, an employer would have no way of evaluating whether a facially valid anti-union petition actually represented the true wishes of the employees concerned. It would have no way of knowing whether, after relying on an apparently valid petition, it would later be presented with "evidence" of the invalidity of the petition – which was not known to it, and could not reasonably have been known to it – either by the union or by pro-union employees. It could be anticipated that many, if not most, employers would not elect to take the risk of withdrawing recognition under such circumstances, leaving the RM petition as the only option as a practical matter. However, although it could have done so, the Board in *Levitz* declined to eliminate the withdrawal of recognition as a means of effectuating the desires of the majority of employees. To the contrary, the Board has recognized that the pendency of a decertification petition does not undermine the purpose of the withdrawal mechanism, and, in fact, an employer may withdraw recognition notwithstanding the pendency of such a petition. In *Shaw's Supermarkets, Inc.*, 350 NLRB 585 (2007), The Board held that,

although there was a decertification petition pending, the employer was entitled to withdraw recognition if the union did not have majority support without waiting for the results of the decertification election. *Shaw's, supra*, 350 NLRB at 588. The Board has not, and should not, adopt an evidentiary rule that would have the practical effect of eliminating withdrawals of recognition, and thereby significantly diminishing the opportunities for employees to meaningfully exercise their Section 7 rights under the Act.¹¹

Finally, it cannot be ignored that allowing unions or other parties seeking to invalidate withdrawals to present evidence of revocations that was not presented prior to the withdrawal creates an unacceptable risk of the presentation of fraudulent evidence. A union fighting to overturn a withdrawal of recognition may be unable to resist the temptation to restore its position by, for example, backdating withdrawals so that they appear to have been executed prior to withdrawal. The best way to ensure that evidence is reliable is to require, as the Board has done, that it be presented, or at least disclosed, prior to withdrawal.

2. Without Any Authority Or Justification, The ALJ Found That Respondent Was Obligated To Provide CNA With A Window In Which To Present Countervailing Evidence Before Withdrawing Recognition

In the course of analyzing Respondent's withdrawal of recognition, the ALJ stated that Respondent "learned of the number of signatures on the anti-union petition one day and the very next day announced it was withdrawing recognition of the Union" and that "the Union had no time to respond even if it had desired to do so." [ALJ Dec. p. 12.] This conclusion was factually incorrect. The union was aware that the Petition Circulators were soliciting support for the Removal Petitions for at least a month before it was submitted to Respondent, as evidenced by the fact that the first Revocation Cards were signed in September 2008. The Union thus had

¹¹ This is especially the case given that, as was evident in this case, unions have the means to delay elections for indefinite periods of time by filing blocking charges. When a union resorts to these tactics, as CNA did in this case, a majority-signed petition seeking withdrawal of recognition may be the only practical way for employees to remove an unwanted union in anything approaching a timely fashion. This was recognized in *Shaw's*, where the Board specifically noted that the pending decertification election had been delayed by the filing of blocking charges. *Shaw's, supra*, 350 NLRB at 588.

ample time to notify Respondent that employees had revoked their signatures from the Removal Petition, but chose not to do so.

More importantly, to the extent that the ALJ held that Respondent was required to provide time to CNA after receiving the Removal Petitions in order for CNA to gather and/or present evidence of its continued majority support before withdrawing recognition, he was in error. There is no authority for the proposition that a union is entitled to such time. In fact, in *Shaw's, supra.*, 350 NLRB 585, (2007), the Board upheld an employer's withdrawal of recognition, which was announced only two (2) days after the employer received evidence of a loss of majority support for the union, and without any advance notice to the union. Furthermore, in the analogous context of voluntary recognition, a union is not required to provide notice and time for anti-union employees to gather evidence before requesting that an employer voluntarily extend recognition based upon a showing of majority support. Where a majority of employees have clearly indicated their desire to no longer be represented by a union, there is no reason why their wishes should not be respected, particularly because the Union can always seek an election to be reinstated as bargaining representative if it believes that it can reestablish majority support.

C. The General Counsel's Staleness Theory Is Without Merit And Contrary To Board Precedent

1. The Board Should Reject The General Counsel's Staleness Theory, Or, In The Alternative, Remand The Issue To The ALJ

The ALJ declined to reach the General Counsel's staleness theory because he concluded that Respondent's withdrawal of recognition was unlawful based upon the Revocation Cards. As Respondent has shown, that conclusion was incorrect because the Revocation Cards were ineffective. Accordingly, the issue of the purported staleness of signatures on the Removal Petitions must be addressed. As the ALJ correctly noted, the facts relating to the staleness issue are not in dispute. Accordingly, there is no need to remand the case to the ALJ for further fact-finding. Rather, it is appropriate for the Board to consider and decide the issue at this time. In

the event that the Board declines to consider the issue at this time, the case should be remanded to the ALJ for a decision on the issue.

2. There Is No Authority For The Proposition That Signatures In Support Of Anti-Union Petitions "Expire" After A Particular Period Of Time Has Passed

It is established that a signature in support of an anti-union petition may, under some circumstances, become "stale," such that it may no longer be relied upon as an indication of an employee's desires with respect to union representation. As will be explained in more detail below, in the cases where the Board has held signatures to be stale, it has done so where the factual circumstances under which the signatures were executed have sufficiently changed during the passage of time, such that the signatures can no longer be deemed reliable. The Board considers the amount of time that has passed between the date of the signature's execution and the date when the signature is to be relied upon, but only as a factor in conjunction with circumstances that changed during that time period. The Board has never held that the passage of time alone can invalidate a signature in the absence of other changed circumstances. *See McDonald Partners, Inc. v. National Labor Relations Board*, 331 F.3d 1002, 1008 (D.C. Cir. 2003) ("The Board has never dismissed evidence as stale based solely on its age; it has required changed circumstances or new evidence calling the reliability of the old evidence into doubt.").

Despite a complete dearth of supporting authority, the General Counsel has advanced a theory that, if accepted, would represent an unprecedented application of Board law; that an employee's expression of his or her desire to no longer be represented by a union becomes stale based *solely* on the passage of time, even where there are no other changed circumstances. Notably, the General Counsel has never been able to articulate the amount of time that purportedly causes an employee's signature to become stale. Instead, she has speculated that it might be seven (7) months, or it might be twelve (12) months. The General Counsel's inability to identify the amount of time that causes a signature to become stale demonstrates that time alone does not invalidate signatures. Because the progression of time is an unvarying constant, if time alone invalidated signatures, then, by definition, there must be a bright-line time limit

beyond which all signatures are invalid. If seven (7) month old signatures are ever made invalid by time alone, then seven (7) month old signatures must *always* be invalid. Otherwise, their invalidity would not depend only on time, but would depend on time plus some other factor or factors. (This, in fact, is the Board's rule.)

In arguing its case before the ALJ, the General Counsel principally relied upon two (2) Board decisions, *Metro Health, Inc.*, 334 NLRB 555 (2001) and *Ferri Supermarkets, Inc.*, 330 NLRB 1119 (2000) for the proposition that signatures become stale with the passage of time. Neither case stands for that proposition.

The General Counsel has claimed, and can be expected to claim before the Board, that *Metro Health* stands for the proposition that signatures that are more than seven (7) months old are stale and may not be relied upon to establish a loss of majority support. The case stands for no such proposition, and, in fact, confirms that the Board requires a showing of changed circumstances over time – not time alone. In *Metro Health*, the employer was bargaining with the union over an initial contract. The union's chief negotiator was a certain Mr. Quinones. It was found that, in or around April 1998, a group of unit employees became dissatisfied with Mr. Quinones (but not with the union itself) and on April 21, 2008 signed a petition (the Quinones Petition) that stated,

The undersigned below, all of the employees of Hospital Metropolitano, disallow Mr. Radames Quinones Aponte to represent us or to bargain any employment condition in our name. In addition, we will not authorize dues check-off dues [sic] in favor of [the Union] as an employment condition.

Metro Health, supra, 334 NLRB at 555 (bracketed material in original). In July 2008, the union removed Mr. Quinones as the unit's negotiating representative and replaced him with someone else. *Id.* at 556. On August 20, 1998, the Quinones Petition was used to support a decertification petition, which was also presented to the employer. The employer withdrew recognition on December 3, 1998, relying in part on the Quinones Petition.

The Board held that the withdrawal of recognition was unlawful because, among other things, the signatures on the Quinones Petition were stale. In explaining its conclusion, the Board stated that the Quinones Petition “indicated that the signers were displeased with Quinones as their representative at the bargaining table, not with the Union itself.” *Id.* at 556. “Moreover,” the Board stated “the petition was executed some 7 months before the December 3 withdrawal of recognition.” “Such stale evidence” was not a reliable indicator of employee sentiments when recognition was withdrawn.¹² This was “especially true” because “there were significant changed circumstances,” namely the removal of Mr. Quinones.

The General Counsel would read the Board’s language, particularly its reference to “such stale evidence” as indicating that the Board viewed the age of the signatures, standing alone, to cause them to be stale. That is clearly a distortion of the Board’s holding. The age of the signatures was cited in conjunction with the fact that they expressed dissatisfaction with a union official who had already been removed. The use of “moreover” reveals the age of the signatures to be a factor contributing to their staleness, not an independent and sufficient reason for their staleness. This is confirmed in the Board’s concluding passage in which the Board stated, that “[w]hether considered individually or cumulatively,” the factors relied upon by the employer did not support the withdrawal. *Id.* at 557. While the General Counsel can be expected to cite this as supporting the claim that the age of the petition alone was sufficient, it does not, in fact, support that claim. The one and only individual factor cited by the Board that involved the age of the petition was the employer’s reliance on “7-month-old statements of dissatisfaction with a union

¹² The case cited for this proposition was the Board’s 1994 decision in *Rock-Tenn Company*, 315 NLRB 670, 672 (1994). That case only serves to confirm that it is changed circumstances over time, not time alone that causes signatures to be stale. In finding the signatures in that case to be stale, the Board stated “we rely not only on the passage of time between the circulation of the petition and the Respondent’s withdrawal of recognition, but also on the fact that unit employees showed their support for the Union in the intervening time by rallying in support of the Union . . . before overwhelming rejecting the Respondent’s 4-month contract offer . . . and that a majority signed union membership cards prior to the December 6 negotiating session.” Given this clear language, the Board could not have been citing *Rock-Tenn* for the proposition that time alone invalidates petition signatures.

official who had long since been replaced as the Union's negotiator." *Id.*¹³ Thus, the signatures were not stale because seven (7) months had passed. They were stale because during the seven (7) months the circumstances that had motivated the employees to sign the petition had completely changed.

In *Ferri Supermarket*, 330 NLRB 1119 (2000), the employer who actually received the antiunion petition was not the employer who used it to withdraw recognition and against whom the case was brought. The named employer acquired the business months after the petition was given to its predecessor. In the year that passed between the petition's original presentation and its use by the new employer, the predecessor had settled unfair labor practice charges challenging its own earlier withdrawal based upon that very petition by agreeing to re-recognize the union. The petition in *Ferri* was stale and unreliable, but if the Board's decision turned only on a rule concerning the petition's age, there was no reason to recount carefully the many intervening events before stating that it was stale.

On the other hand, in its decision in *Poray, Inc.*, 160 NLRB 697 (1966) the Board long ago affirmed and adopted a Trial Examiner's finding that signatures on an anti-union petition over two (2) years old were not "stale" because "[n]o evidence was produced which gave a more recent indication of the signers' intentions with regard to the Union." *Poray, supra*, 160 NLRB at 707. Thus, contrary to the General Counsel's theory, the Board has held that anti-union signatures that were more than one (1) year old remained valid in the absence of changed circumstances.

Even if it were true – which the Board has never held – that signatures on an anti-union petition become stale due to the passage of time, the Board has held in the initial representation context that when an organizational campaign is "interrupted by the filing and processing of unfair labor practice charges," as the Unit employees' original decertification campaign was here by CNA's filing of "blocking" charges, signatures collected during the otherwise ongoing

¹³ Other factors included an employee demonstration, the union's asserted lack of interest in representing the unit, and the filing of a decertification petition. *Metro Health, supra*, 334 NLRB at 557.

campaign are presumed to remain valid throughout the course of the delay. *Blade-Tribune Publishing Company*, 161 NLRB 1512 (1966). Accordingly, in *Blade Tribune*, the Board has found that an employee signature on a union authorization card remained valid after the passage of eighteen (18) months. *Blade Tribune, supra*, 161 NLRB. at 1513. In another case involving “many” union authorization cards that had been “signed more than 1 year prior to the Union’s bargaining requests,” the cards were counted where the signatures on them “were obtained during an organizing campaign interrupted by the filing and processing of unfair labor practice charges.” *Hickman Garment Company*, 184 NLRB 864, 877 at n. 3 (1970). Likewise, in *Aircap Manufacturers, a Division of Sunbeam Corporation (“Sunbeam”)*, 287 NLRB 996, 1038 (1988), “authorization cards that were properly authenticated” were found to be valid regardless of the age of the signatures upon them, where the cards were “solicited and received ... during the same overall campaign, but under circumstances when their continuous campaign was constantly interrupted by the filing and processing of unfair labor practice charges.”

In each of the above-cited cases, the Board found that the employer had in fact committed serious, coercive unfair labor practices. *Blade-Tribune, supra*, 161 NLRB at 1515-1516; *Hickman, supra*, 184 NLRB at 864; *Sunbeam Corp., supra*, 287 NLRB at 996. However, the unions in those cases were not “punished” for the delay caused by the respective employers’ actual and egregious unfair labor practices. Likewise, there is no justifiable reason to penalize the employees who signed and supported the Removal Petition for the fact that the First RD Petition failed to reach an election after a delay of more than a year as a result of CNA’s decision to file “numerous unfair labor practice charges.” [Tr. 26:20-22.] This is particularly the case because the Region found that only “some” of the many charges filed by CNA had any merit (Tr. 26:20-22) and of those, the ALJ in Case JD-SF-0509 found that only a few of the charges could have merit. The allegations in the earlier case did not in any manner rise to the level of egregious, “flagrant” violations of the Act as found in the cases cited above. Upon seeing that a decertification election could be indefinitely delayed by CNA in this way, even absent any serious or pervasive evidence to substantiate the allegations in the charges being filed, it is hardly

surprising that Unit employees ultimately elected to vindicate their Section 7 rights by requesting that Respondent immediately withdraw recognition from CNA.

The General Counsel may argue that CNA's sole motivation for the filing of the blocking charges was to remedy the alleged unfair labor practices committed by Respondent. However, as the U.S. Supreme Court has observed with regard to the Section 7 right of employees to be *unrepresented*, the Act protects equally the employees' decision "to have no bargaining representative, or to retain the present one, or to obtain a new one. When the right to such a choice is at issue, it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative." *Magnavox Company, supra*, 415 U.S. 322 at 325. Certainly, CNA's motivation in filing unfair labor practice charges, and thereafter declining to file a request to proceed to a decertification election on the First RD Petition, was to delay if not prevent the holding of that election. The Board recently acknowledged, in a withdrawal of recognition case, that although the parties

could have awaited the outcome of the decertification election, the ready availability of blocking charges – which, indeed, were filed here – and the delay attendant upon their resolution render this course of action problematic where a union has actually lost majority support. Continuing to recognize and deal with such a union is as deleterious to employee rights as failing to recognize a union that enjoys majority support.

Shaw's, supra, 350 NLRB at 588.

The General Counsel also advanced an argument before the ALJ that attempted to distinguish petition signatures used for the purpose of withdrawing recognition from petition or card signatures used to support a representation petition or decertification petition filed with the Board. According to this argument, when the signatures are filed in support of a decertification petition that becomes the subject of "blocking charges," the signatures become "old" but not "stale," while those on petitions presented to an employer, even when the earlier-filed decertification petition is repeatedly blocked, are to be invalidated as stale, presumably after the passage of seven (7) or twelve (12) months. There is no rational basis for this distinction, and its

application produces not only an unfair, but an absurd result in this case. The 2007 signatures which the General Counsel claims should be considered "stale" because they were presented in support of the withdrawal Petitions are the very same petition signatures that were used to support the First RD Petition (which the General Counsel would contend were old, but not stale), and which the above cited Board cases say remain valid. [Compare R. Exh. 3 & 4 with GC Exh. 3a.] The General Counsel cannot have it both ways. If on the very day they were presented to the Employer the signatures were considered old but not stale (i.e., valid) by the Board in connection with the blocked decertification petition, the use of those same signatures (without any other intervening change in circumstances) in connection with the presentation of the November, 2008 Petitions to the Employer cannot logically be treated differently. If one were to accept the General Counsel's position, the signature of Joyce Bybee, the employee who acted as the petitioner for both the First RD Petition and the Second RD Petition, would be rendered stale. The principles of employee choice underlying the Act hardly support such a rule.

In conclusion, the Board has never held that signatures in support of an anti-union petition become stale merely due to the passage of time. Instead, the Board has consistently required evidence of changed circumstances that would undermine the reliability of the signatures as indicators of majority status. In this case, the General Counsel was unable to introduce any evidence of changed circumstances, much less the kind of changed circumstances that would in any way tend to undermine the signatures on the Removal Petitions as evidence of CNA's loss of majority support. Any attempt by the General Counsel's to fall back on a nonexistent rule of automatic staleness based on the passage of time alone should be rejected.

D. The ALJ's Conclusion That Respondent Improperly Refused To Bargain Over Post-Withdrawal Changes Was Incorrect

As Respondent has shown, the ALJ's conclusion that Respondent was not entitled to withdraw recognition from CNA was erroneous. The ALJ also concluded that Respondent failed to bargain with CNA over various post-withdrawal changes to the terms and conditions of employment of the nurses formerly represented by CNA. [Complaint ¶ 8.] Each of the changes

alleged to be unlawful was specifically alleged to have occurred after the withdrawal of recognition, which occurred on November 14, 2008. Specifically, the allegations of unilateral changes to wages and benefits set forth in Complaint Paragraph 8(a) were alleged to have occurred "From about November 17, 2008 to January 2009," the changes in Paragraph 8(b) relating to Emergency Department policies were alleged to have occurred in December through January 2008, and the change to Respondent's practice regarding union access was alleged to have occurred on "November 18, 2008." [Complaint ¶ 8.] Obviously, if the Board finds, as it should, that Respondent's withdrawal of recognition was lawful, then its refusal to bargain with CNA over these post-withdrawal matters could not have been unlawful. In fact, Respondent was prohibited from bargaining with CNA. Accordingly, if the Board grants Respondent's exceptions with respect to the withdrawal of recognition, then it should also reverse the ALJ's conclusion with regard to the unilateral change allegations.

V. CONCLUSION

The Board has consistently applied its effective revocation doctrine in the voluntary recognition context to hold that an employee's revocation of his or her signature on a pro-union petition only becomes effective if the revocation is communicated to the union or the employer before the union requests, or the employer extends, recognition based upon the petition. In *Levitz*, the Board clearly indicated that withdrawals would be subject to the same standards for measuring majority support that apply in the voluntary recognition context. Furthermore, despite having never specifically ruled on the issue, the Board has clearly applied the effective revocation doctrine in the withdrawal context by, for example, refusing to even consider evidence of revocations where that evidence was not presented to the employer prior to the withdrawal.

Accordingly, the authority is overwhelming that, in order for the Revocation Cards in this case to be effective such that they could be considered evidence of CNA's majority status, CNA needed to present the cards, or at least disclose their existence, to Respondent or the Petition Circulators. Yet, although the burden placed on it was minimal, CNA chose not to do this,

calling to mind the well-known maxim that the law aids the vigilant, not those who slumber on their rights. Having chosen to keep its evidence to itself during the critical time period, CNA must now abide by the legal consequences of its decision. The Revocation Cards on which it might have relied are not effective and have no relevance to the evaluation of Respondent's withdrawal of recognition.

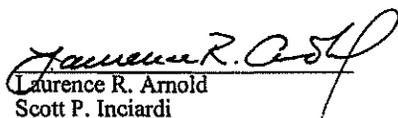
The General Counsel's attempt to invoke a nonexistent rule that signatures on anti-union petitions become stale merely due to the passage of time even where there are no changed circumstances must also fail. The Board has never adopted such a rule, but has consistently held that signatures become stale only when the passage of time is accompanied by changed circumstances. The General Counsel offered no evidence to show, and cannot claim that there were changed circumstances in this case. Accordingly, her staleness argument has no merit and should be rejected.

Finally, given that Respondent's withdrawal of recognition from CNA was lawful, it could not have violated the Act by refusing to bargain with CNA over post-withdrawal changes to terms and conditions of employment.

Accordingly, for the foregoing reasons, Respondent Fremont Rideout Health Group respectfully submits that the Board should grant its exceptions, and dismiss the Complaint in its entirety.

Respectfully submitted this 26th day of May, 2009

Foley & Lardner LLP


Laurence R. Arnold
Scott P. Inciardi
Jean C. Kosela
Counsel for Fremont Rideout Health Group

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

THE FREMONT-RIDEOUT
HEALTH GROUP d/b/a FREMONT
MEDICAL CENTER AND RIDEOUT
MEMORIAL HOSPITAL

and

Cases 20-CA-34194
20-CA-34227

CALIFORNIA NURSES
ASSOCIATION, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS

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I. INTRODUCTION

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Counsel for the General Counsel files this brief opposing Fremont-Rideout Health Group's (Respondent) Exceptions. As demonstrated below, Respondent's exceptions and the arguments in its brief are without merit. As correctly found by Administrative Law Judge William N. Cates¹ on April 28, 2009, Respondent violated Sections 8(a)(1) and (5) of the Act by withdrawing recognition from the California Nurses Association (the Union) without proof that the Union actually lost majority support and by making unilateral changes to employees' terms and conditions of employment.

In reaching those findings, the ALJ credited the testimony of General Counsel's witnesses. (ALJD, p.2, 4-10). Consequently, the ALJ's Decision should be upheld as to the General Counsel's allegations that the ALJ found meritorious.

II. FACTS

The ALJ determined that on November 14, 2008,² without advance notice to the Union, Respondent withdrew recognition from the Union on the basis of petitions containing 234 signatures in a unit of 452 employees.³ (ALJD, p. 4). However, 18 employees revoked their signatures on the anti-Union petition by signing Union reaffirmation cards before Respondent withdrew recognition. (ALJD, p. 4). The ALJ

¹ Hereinafter, the Judge or ALJ.

² All dates hereafter are in 2008, unless otherwise noted.

³ Unless noted by transcript reference or exhibit, the statement of facts is based on facts found by the ALJ. References to exhibits received into the record before the ALJ shall be made as follows: GC Exh. ____ (or R Exh. ____ or U Exh. ____). References to the transcript shall be Tr.____.

found that without these 18 employees, the anti-Union petitions did not establish loss of majority support for the Union because the remaining 216 unrevoked signatures accounted for only 47.8% of the bargaining unit. (ALJD, p. 11). Respondent does not except to the Judge's credibility findings and, specifically, does not contest the ALJ's determination that all 18 of the revocation cards are valid. (R's Exceptions Brief, p. 8, fn. 6). It is undisputed that on the day Respondent withdrew recognition, the Union had not lost its majority status. The ALJ further determined, and Respondent admits, that Respondent was aware, prior to the withdrawal of recognition, that the Union was attempting to gather the revocation cards, but did not ask for proof of the revocations. (ALJD, p. 4-5; R's Exceptions Brief, p. 5).

Of the 234 anti-Union petition signatures, 112 were seven months old or older, and of those 112 signatures, 72 were over a year old. (ALJD, p. 4). The older signatures (those from 2007) were submitted as the showing of interest to support a decertification petition filed in October 2007. (R. Exh. 4). Without these older, stale signatures, the percentage of unit employees supporting the anti-Union petition declined to either 27% (seven months and older) or 35.8% (one year and older).

After Respondent withdrew recognition, the Judge determined that it made unilateral changes to bargaining unit employees' terms and conditions of employment by implementing two 5.5% wage increases; a 403(b) plan providing for matching of 33 1/3 cents on the dollar up to the first 3% of the employee's contributions; a 50% reduction in employee contributions for health insurance premiums; a 100% waiver of deductibles for employees and dependents covered by Respondent's employee medical program; and a paid time off cash out policy, up to 80 hours per calendar year after the withdrawal of

recognition, in violation of Section 8(a)(5). (ALJD, p. 13). Following the withdrawal of recognition, the Judge determined that Respondent also unilaterally changed its past practice of granting facility access to Union representatives to leaflet on the sidewalks at Respondent's front entrance and inside the cafeteria. (ALJD, p. 18). Respondent changed this policy without notifying and bargaining with the Union. *Id.* Finally, the ALJ determined that Respondent made changes to the Emergency Department without first bargaining with the Union over the effects of their implementation. (ALJD, p. 15-17). Respondent's failure to bargain over the effects of changes to the process for initiating patient care in the Emergency Department by implementing a protocol-based patient care system, a rapid medical evaluation process, and creating a new intake nurse assignment violated Section 8(a)(5) of the Act. *Id.*

III. ARGUMENTS IN RESPONSE TO RESPONDENT'S ENUMERATED EXCEPTIONS

A. Response to Respondent's Enumerated Exceptions 1, 3, 4, 5, and 6

The ALJ determined that Respondent did not have knowledge of an actual loss of majority status for the Union at the time that it withdrew recognition from the Union on November 14. (ALJD, p. 11). The Union did not lose majority status due to the existence, prior to November 14, of 18 cards revoking employees' signatures on the anti-Union petition. *Id.*

Levitz Furniture Company of the Pacific makes clear that an employer who withdraws recognition based on a good-faith, but mistaken belief that the union has actually lost support, violates the Act. 333 NLRB 717, 725 (2001). Because a union enjoys the presumption of continued majority support, an employer withdraws recognition at its peril. *Id.* Under *Levitz*, a union can rebut the employer's proof of

actual loss, if that evidence existed at the time of the withdrawal. *Id.* Respondent distorts both the legal principle of *Levitz* and the facts of this case by claiming that the “principal issue in this case is whether a union, faced with a majority-signed petition by employees it represents seeking to remove it as bargaining representative, may withhold evidence in its possession regarding whether employees continue to support the petition...” (R’s Exceptions Brief, pg.1). The Union was never presented with the anti-Union petition and in fact, did not even see it until it was introduced into evidence at the hearing before the ALJ. Respondent’s attempt to shift the burden to the Union to prove that it had majority status is premature and contrary to the discussion of burdens in *Levitz*. The Board in *Levitz* held, “[i]f the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition.” *Id.* The Union’s contest of the withdrawal of recognition was presented, in the form of the 18 revocation cards, at the hearing. This timing was appropriate because the withdrawal of recognition was a *fait accompli* and because Respondent never provided the Union with the petition.

Anti-Union signatures that are revoked prior to the withdrawal of recognition cannot be counted as evidence of actual loss of support. *HQM of Bayside*, 348 NLRB 787, 788-90 (2006), *enfd.* 518 F.3d 256 (4th Cir. 2008); *Parkwood Development Center*, 347 NLRB 974, 974-976 (2006), *enfd.* 521 F.3d 404 (DC Cir. 2008). The Judge correctly found that because the burden is with the employer to show actual loss of majority support, and Respondent could not rebut the presumption of majority status, its withdrawal of recognition violated Section 8(a)(5). (ALJD, p. 12).

Respondent excepts to the ALJ's finding that the Union did not have time to advise Respondent of the existence of the revocation cards. (ALJD, p. 12) Again, Respondent inappropriately, and contrary to the holding of *Levitz*, attempts to place the burden of proof of majority status on the Union. The Union enjoys a presumption of continued majority support. Therefore, Respondent acted at its peril when it announced its withdrawal of recognition as a *fait accompli*, did not provide the Union with the anti-Union petition, or give the Union an opportunity to present its counter-evidence prior to November 14. Thus, unlike cases involving anticipatory withdrawals that are announced by the employer to be effective only at a specified future time, here, the Union had no opportunity to prove its majority status before the withdrawal became effective. See *HQM of Bayside*, 348 NLRB at 787; *Parkwood Development Center*, 347 NLRB at 974. As such, the ALJ correctly found that the Union had no time to respond to the withdrawal of recognition until after it was announced. (ALJD, p. 12). Respondent's claim that it was the Union's responsibility to present its evidence prior to the withdrawal of recognition is wrong: "[T]he union does not have to demonstrate conclusively to the employer prior to the withdrawal of recognition that it still has majority status. Rather it is the employer's burden to show an actual loss of the union's majority support at the time of the withdrawal of recognition." *HQM of Bayside*, 348 NLRB at 788.

If Respondent had wanted to avoid the inherent risk of a withdrawal of recognition, it could have provided the Union with time to present its evidence of continued majority support prior to its announcement. However, it is simply irrelevant that the Union did not notify the Employer of the revocation cards at the time the Union obtained them. The *Levitz* "actual loss" test is an objective one. It is not dependent on

the employer's knowledge or access to the rebuttal evidence. Respondent may not have been required to give this advance notice, but its failure to do so resulted in a withdrawal of recognition without proof of actual loss of majority support.

B. Response to Respondent's Enumerated Exception 2

In its Brief in Support of Exceptions, Respondent desperately argues a novel theory in a withdrawal of recognition context, claiming that because the revocation card signers did not seek out the anti-Union petition solicitors to ask that their names be removed from the petitions, their revocations are ineffective. Contrary to well-established Board law, and counter to the explicit holding of *Levitz*, Respondent's argument fails.

Respondent claims that as in a voluntary recognition context, employees must communicate the revocation of their signature to the "agent" who originally solicited their signature. (R's Exceptions Brief, p. 13). As admitted by Respondent, there is no such precedent requiring that an employee who seeks to revoke his signature on an anti-union petition must notify the employer or its agents. (R's Exceptions Brief, p. 12).

Respondent's analogy of the revocation of authorization cards to revocation of antiunion signatures ignores the inherent practical and legal differences between a withdrawal of recognition and voluntary recognition. Unlike the voluntary recognition context, where a union authorization card clearly authorizes the named union to act as employees' representative signature, an anti-union petition does not purport to authorize anyone to act as an agent of the employee. An employee's signature on an anti-union petition is simply an expression of the employee's position regarding union

representation. The anti-union solicitors are merely collecting proof of support from their coworkers; there is no “agent” to be notified.

That is evidenced by the language in the anti-Union petitions in this case, which state that “the undersigned” do not wish to be represented by the Union, that they wish to petition the Board for an election, or in the alternative, request that Respondent withdraw recognition from the Union. (GC Exh. 3a). The petitions do not identify any individual employee as the petition organizer or purport to authorize anyone to act as an agent on others’ behalf. Further, employees who sign anti-union petitions and later change their minds may be understandably reluctant to inform their employer or their coworkers of their change of heart in support for the union. As the anti-Union petitions here do not identify an “agent” or even a principal solicitor, employees may not even have known who to inform of their revocation, a problem that does not arise with union authorization cards.

Given the clear contrary language in *Levitz*, and given the significant differences between withdrawal of recognition contexts and voluntary recognition situations, Respondent’s reliance on voluntary recognition cases is wholly unsupported and should be rejected by the Board.

C. Response to Respondent’s Enumerated Exception 7

Because he found that the withdrawal of recognition was unlawful based on the validity of the 18 reaffirmation cards, the Judge declined to address Counsel for the General Counsel’s staleness argument. (ALJD, p. 12). Counsel for the General Counsel has not taken exception to the Judge’s failure to address the staleness argument, however, Respondent seeks to have the Board rule on this theory. Counsel for the General Counsel

agrees with Respondent (R's Exceptions Brief, p. 22-23) that all of the facts are in the record, and there is no need for the case to be remanded to the ALJ.

As argued previously, Board law precludes an employer from relying on stale signatures on an anti-union petition. Here, 112 signatures were at least seven months old. (ALJD, p. 4). Discounting these signatures from the 234 signatures leaves only 122 non-stale signatures, an insufficient number to establish loss of majority support, as does discounting the 72 signatures that were over a year old. Signatures that were at least seven months old were considered "stale" and not valid indicators of loss of majority. See *Hospital Metropolitano*, 334 NLRB 555, 556 (2001); *Ferri Supermarkets, Inc. d/b/a Murrysville Shop 'N Save*, 330 NLRB 1119, 1120 (2000).

Respondent's claim that these cases fail to establish that passage of time alone can invalidate an old signature is based on an unduly restrictive reading of these cases. In *Ferri Supermarkets*, the Board noted that an anti-union petition "was more than a year old when the Respondent refused to recognize the Union and *for that reason* could not reasonably be relied on" as a reflection of employee sentiments on the date of the refusal to recognize. 330 NLRB at 1120 (emphasis added). The Board relied on no additional factors to invalidate that petition. In *Hospital Metropolitano*, although the Board noted that changed circumstances made the old signatures even less reliable, the Board found them "stale" based on the passage of approximately seven months. 334 NLRB at 556 ("the petition was executed some seven months" before the withdrawal of recognition; "[s]uch stale evidence is not a reliable indicator" of employee sentiments at the time of the withdrawal). The changed circumstances cited by the Board in that case were merely further support for the finding of staleness based on age.

In any event, in this case, there are circumstances that support a finding of staleness in addition to the bare passage of time. Most of the contested signatures date back to around October 2007, when a decertification petition was first filed. (GC Exh. 3a). Between October 2007 and Respondent's withdrawal of recognition, the parties bargained for months, the Union conducted a strike, and 18 petition signers executed Union reaffirmation cards. (ALJD, p. 3, 10). These circumstances point to an active Union with revitalized post-petition support. In light of these intervening events, those old signatures "could not reasonably be relied on" as accurate indicators of employees' sentiments at the time of the withdrawal. *Ferri Supermarket*, 330 NLRB at 1120.

Respondent's erroneous claim that Counsel for the General Counsel is proposing two distinct staleness standards does not advance its position. Simply, signatures that are remote in time from the withdrawal of recognition are too stale to be a reliable indicator of loss of support for the Union at the time of the withdrawal of recognition. That is the standard set forth in *Hospital Metropolitan* and *Ferri Supermarkets*, which happened to involve signatures that were about seven months old and over a year old, respectively. Under this standard, there is no need to specify a bright-line rule, since the Board has made clear that signatures that are too remote in time are unreliable evidence of loss of majority support.

D. Response to Respondent's Enumerated Exceptions 8, 9, and 10

Because the ALJ determined that Respondent unlawfully withdrew recognition from the Union, he correctly found that the unilateral changes made after November 14, were also unlawful. (ALJD, p. 13-18). Respondent's exceptions rest entirely on the argument that the withdrawal of recognition was lawful, thus the changes were lawful,

and Respondent does not except to the ALJ's ruling that impasse did not privilege the implementation of the changes. (R's Exceptions Brief, p. 9, fn. 7). As such, the Board should adopt the simple conclusion made by the ALJ that the unilateral changes are unlawful because the withdrawal of recognition violated Section 8(a)(5).

E. Response to Respondent's Enumerated Exception 11

Respondent argues that the remedy in this case, a bargaining order and rescission of the unilateral changes, should be voided because the withdrawal of recognition and unilateral changes were lawful. Respondent does not argue for a lesser remedy.

Basing his decision on the clear language and instruction from *Levitz*, the ALJ properly found that Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union and subsequently made unilateral changes to terms and conditions of employment. For such a violation of the Act, a bargaining order is appropriate. As the ALJ determined, an alternative remedy would be inadequate. (ALJD, p. 17-19). Accordingly, Counsel for the General Counsel urges the Board to adopt the ALJ's remedy.

IV. CONCLUSION

Counsel for the General Counsel respectfully submits that the exceptions urged by Respondent are without merit and should be denied and that the Judge's findings and conclusions be adopted by the Board.

DATED at San Francisco, California, this 9th day of June, 2009.

/s/ Cecily A. Vix
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

THE FREMONT-RIDEOUT HEALTH
GROUP d/b/a FREMONT MEDICAL
CENTER AND RIDEOUT MEMORIAL
HOSPITAL

Employer,

and

CALIFORNIA NURSES
ASSOCIATION, AFL-CIO

Charging Party.

Case Nos. 20-CA-34194
20-CA-34227

**CHARGING PARTY'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS**

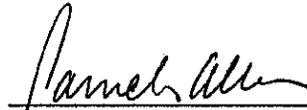
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Charging Party California Nurses Association, AFL-CIO, has determined not to file a separate answering brief to the Exceptions filed by the Employer in the above-captioned matter and, instead, hereby adopts the post-hearing brief of Counsel for the General Counsel.

DATED: June 9, 2009

Respectfully submitted,

CALIFORNIA NURSES ASSOCIATION
LEGAL DEPARTMENT

A handwritten signature in cursive script that reads "Pamela Allen". The signature is written in black ink and is positioned above a horizontal line.

Pamela Allen
Attorneys for
CALIFORNIA NURSES ASSOCIATION

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 2000 Franklin Street, Suite 300, Oakland, California 94612.

On the date below, I served a true copy of the following documents:

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: June 9, 2009



Pamela Allen

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

THE FREMONT-RIDEOUT HEALTH GROUP d/b/a
FREMONT MEDICAL CENTER AND RIDEOUT MEMORIAL HOSPITAL

And

Case No. 20-CA-34194
20-CA-34227

CALIFORNIA NURSES ASSOCIATION, AFL-CIO,

RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Respondent Fremont Rideout Health Group (“Respondent”) files its reply brief to the answering brief filed by the General Counsel (“GC”), in which Charging Party California Nurses Association (“CNA”) has joined.

II. GC MAY NOT RELY UPON THE REVOCATION CARDS BECAUSE THEY WERE INEFFECTIVE

The Parties do not disagree that it was Respondent’s burden to demonstrate an actual loss of majority support as of the time that it withdrew recognition. Likewise, all parties agree that Respondent could not count employees who effectively withdrew their support from the Removal Petition prior to the withdrawal. The issue is the circumstances under which an employee’s purported revocation of a signature on an anti-union petition becomes legally effective such that the signature may no longer be relied upon as evidence of loss of majority support. More specifically, the issue is whether the eighteen (18) Revocation Cards purportedly executed prior to the withdrawal, but not presented or even disclosed to Respondent (or the Petition Circulators) until well after the withdrawal were effective to invalidate signatures on the Removal Petitions.

GC (in a decision that speaks volumes about the strength of its argument) largely chose to ignore the arguments and authority presented in Respondent’s brief. GC states that

Anti-Union signatures that are revoked prior to the withdrawal of recognition cannot be counted as evidence of actual loss of support. *HQM of Bayside*, 348 NLRB 787, 788-90 (2006), enfd. 518 F.3d 256 (4th Cir. 2008); *Parkwood Development Center*, 347 NLRB 974, 974-976 (2006), enfd. 521 F.3d 404 (DC Cir. 2008).

[GC Br. 5.] This statement does not even purport to address the question of what makes a revocation effective. In its brief in support of exceptions, Respondent explained in detail, and cited to relevant authority establishing, that under the Board’s long-standing effective revocation doctrine, the revocation of a signature is not effective unless it is communicated either to the party who would utilize, or to the party who would rely upon, the signature (in this case, the

Petition Circulators or Respondent). [R. Br. 12-15.] GC does not dispute that the effective revocation doctrine applies in the context of a voluntary extension of recognition, and Respondent demonstrated that in *Levitz Furniture Company Of The Pacific*, 333 NLRB 717, 724 (2001), the Board held that “the same reasoning should govern withdrawals of recognition.” Neither *HQM* nor *Parkwood* hold otherwise.

Both *HQM* and *Parkwood* were “anticipatory withdrawal” cases where an employer announced in advance that it intended to withdraw recognition at the expiration of an existing collective bargaining agreement. In *HQM*, the union informed the employer *prior to the withdrawal of recognition* that it had its own majority-signed petition demonstrating continued support for the union. *HQM*, supra, 348 NLRB at 787. Likewise, in *Parkwood*, the union actually presented the employer with a pro-union petition revoking signatures on an earlier anti-union petition *before the employer withdrew recognition* based upon the earlier petition. *Parkwood*, supra, 347 NLRB at 975. Respondent discussed both *HQM* and *Parkwood* in its opening brief and explained that those decisions did not conflict with the effective revocation doctrine, and did not support the conclusion that the undisclosed Revocation Cards were effective. [R. Br. 16-18.] Yet, GC chose not to explain why cases stating that revocations that were communicated prior to withdrawal were effective stand for the proposition that revocations that were *not* communicated prior to withdrawal should be treated as effective, contrary to the Board’s established doctrines. In fact, GC chose not to discuss the cases at all, instead baldly citing them in support of a proposition for which they do not stand.

GC also chose to ignore the Board’s decision in *Highlands Regional Medical Center*, 347 NLRB 1404 (2006), which was cited in *HQM* and which was discussed and quoted in Respondent’s brief. In that case, an attempt was made to prove that the union had the support of a majority of unit employees when the employer withdrew recognition, by calling individual employees to testify that they supported the union prior to the withdrawal. The Board agreed that such testimony was “irrelevant” “because this evidence was not before the Respondent when it withdrew recognition.” *Highlands*, supra, 347 NLRB at 1407 n 17. *Highlands* directly

contradicts GC's theory that revocations are effective when kept secret and disclosed only after withdrawal – otherwise the testimony would clearly have been relevant.¹ Indeed, *Highlands* provides an example of the Board's observation in *Levitz* that where the union does not assert that it has contrary evidence prior to the withdrawal, the employer has "a good case" for withdrawal based upon a majority-signed petition. *Levitz, supra*, 333 NLRB at 725. Yet GC made no attempt to explain or distinguish this authority, apparently choosing to pretend that it does not exist.

GC argues that the "timing" of CNA's disclosure of the Revocation Cards "was appropriate because the withdrawal of recognition was a *fait accompli* and because Respondent never provided [CNA] with the [Removal Petitions]." [GC Br. 5 (bracketed material supplied).] GC cites no authority (because there is none) for the proposition that an employer, having received a majority-signed anti-union petition, is required to extend to the union some undefined period of time in which it may gather and/or present evidence countering the petition before the employer withdraws recognition.² Furthermore, the fact that CNA and its supporters were soliciting employees to sign Revocation Cards as early as September 2008 demonstrates that CNA was well aware of the movement afoot to remove it as the representative and that support for such a removal was strong enough that it needed to take some action to counter it. In order to make the revocations it was gathering effective, it could have sent copies of them to Respondent or to the Petition Circulators as they were gathered, or at least advised Respondent that it actually possessed eighteen (18) signed revocations. Instead, perhaps mistakenly perceiving some tactical advantage to doing so, it kept them and their very existence secret, rendering them ineffective. Thus, GC's suggestion that CNA was blindsided by the withdrawal and had no

¹ Indeed, *Highlands* helps illustrate the practical and policy reasons underlying the Board's effective revocation doctrine. Were it not for that doctrine, every hearing challenging a withdrawal of recognition could devolve into a swearing contest in which each side gathers as many individual employees as it can to testify as to their states of mind weeks or even months prior to the hearing. The Board has sensibly refused to consider such evidence.

² Anticipatory withdrawal cases (such as *HQM* and *Parkwood*) certainly do not stand for that proposition. In those cases, the employers had no choice but to delay their withdrawals because they could not withdraw recognition during the term of a collective bargaining agreement.

opportunity to present the Revocation Cards prior to that time is not only legally irrelevant, it is factually incorrect.

GC attempts to cite the Board's statement in *HQM* that a union "does not have to demonstrate conclusively to the employer prior to the withdrawal of recognition that it still has majority status" as standing for the proposition that employees could decide to revoke their signatures on a petition, but decline to communicate those revocations until after the original signatures were relied upon, and then use the "revocations" to retroactively invalidate their signatures. [GC Br. 6.] Of course, *HQM*, where the union did inform the employer of pro-union signatures in its possession, stands for no such proposition. CNA was not entitled to rely upon the untimely revocations, not because the burden had shifted to it to prove its majority status prior to the withdrawal, but because the untimely revocations were legally void. In other words, the reason CNA needed to communicate the revocations to Respondent was not to "prove" that it retained majority support; it was an action that was necessary to make the revocations legally effective.

The futility of GC's reliance on *HQM* is demonstrated by the fact that *HQM* itself cited the Board's decision in *Highlands*. As noted previously, in *Highlands*, the Board refused to consider testimony regarding employees' support for the union prior to withdrawal because the evidence "was not before the Respondent when it withdrew recognition." *Highlands, supra*, 347 NLRB at 1407 n 17. There is no meaningful difference between the evidence of employee support for the union in *Highlands* and the uncommunicated revocations in the instant case. In both cases, the evidence to be relied upon existed prior to the withdrawal, but was not disclosed to the employer in a timely manner, making it ineffective and irrelevant.³ The fact that the Board

³ Obviously, the evidence that was to be relied upon in *Highlands* had not been reduced to writing prior to the withdrawal, but it existed nonetheless. If it were true that the employees in *Highlands* had changed their minds after signing the anti-union petition, they could have gone to the employer and orally communicated their withdrawal of support for the petition (or the union could have done so on their behalf), in which case (it may be assumed) the employer would not have been entitled to rely upon their previous signatures. However, the fact that they remained silent meant that their previous signatures on the anti-union petition remained effective, and could not be rendered ineffective through evidence of the employees' "true" feelings disclosed only after the withdrawal. The same conclusion pertains in the instant case.

in *HQM* not only declined to overrule *Highlands*, but actually relied upon it, negates GC's argument that *HQM* supports its position.

Grasping at straws, GC claims (citing to no authority) that "the inherent practical and legal differences between a withdrawal of recognition and voluntary recognition" lead to the conclusion that the effective revocation doctrine does not apply in withdrawal cases. [GC Br. 7.] GC, however, identifies only one such purported "difference." It claims that unlike a signature on a union authorization card, an employee's signature on a removal petition "does not purport to authorize anyone to act as an agent of the employee." Rather, according to GC, such a signature is merely "an expression of the employee's position regarding union representation." This proposition cannot withstand even the slightest scrutiny. The Removal Petitions clearly state that they are "To be filed with the appropriate National Labor Relations Board Office," and that, depending on the amount of signatory employees, they would represent either a request to the Board for a decertification election, or a request to Respondent to withdraw recognition. [GC Exh. 3a.] There is no reasonable reading of the purpose of the Removal Petitions other than that they represented a request by the signatory employees for others (the circulators) to act on their behalf, either by filing an election petition with the Board, or by presenting the petitions to the employer. The claim that in signing the petitions the employees were engaging in an idle exercise and not authorizing others to act is simply beyond the pale.

GC also muses that perhaps employees may not have known the identity of the Petition Circulators. [GC Br. 8.] Certainly no evidence to support this conjecture was introduced. It should be noted that the name, address, and telephone number of Joyce Bybee, one of the Petition Circulators was on the decertification petition that were filed with the NLRB and served on CNA in October 2007, long before the withdrawal of recognition. [R. Exh. 3-4.] In any event, it was CNA that was collecting and holding the Revocation Cards, and it surely knew how to communicate the revocations had it chosen to do so.

GC claims that "[i]f Respondent had wanted to avoid the inherent risk of a withdrawal of recognition, it could have provided [CNA] with time to present its evidence of continued

majority support prior to its announcement.” [GC Br. 6 (bracketed material supplied).] However, under GC’s theory CNA was free to keep its evidence to itself until such time as it felt it was tactically advantageous to reveal it, and was under no obligation to disclose it, even if Respondent requested that it do so. Therefore, if GC’s theory were to be accepted, no employer could ever safely rely upon any majority-signed anti-union petition from its employees because there would always be the risk that the union would present “revocations” after the fact, or, as in *Highlands*, would ask employees to testify that their facially valid signatures did not represent their “true” feelings at the time. The Board, however, has prevented such a state of affairs by developing the effective revocation doctrine and applying it to withdrawal of recognition cases.

In sum, the Board has long applied the effective revocation doctrine in the context of voluntary recognition, and in *Levitz*, it stated that the same reasoning should apply in the context of withdrawal of recognition. GC could not cite to a single case where the Board declined to apply the effective revocation doctrine in a withdrawal case, and, in *Highlands*, it is clear that the Board did apply that doctrine. GC’s decision to respond to adverse authority by ignoring it does no service to its case, and simply underlines the weakness of its arguments. Under the effective revocation doctrine, once employees signed the Removal Petitions, their signatures remained legally effective until they, or CNA, communicated a revocation to Respondent or the Petition Circulators. CNA, despite having gathered eighteen (18) purported revocations, chose not to communicate them, but instead to keep them secret, presumably because it believed it to be somehow advantageous to itself. CNA must now abide by the legal consequences of its decision. The revocations were ineffective, and may not now be relied upon. Accordingly, Respondent’s withdrawal of recognition was lawful.

III. GC FAILED TO ESTABLISH THAT ANY OF THE SIGNATURES ON THE REMOVAL PETITIONS WERE “STALE”

A. GC Failed To Convincingly Support Its Theory That Time Alone Invalidates Signatures On An Anti-Union Petition

GC argues, unconvincingly, in favor of a proposition that the Board has never adopted: that employee signatures on an anti-union petition become “stale” due solely to the passage of time. GC cites two (2) cases in support of this proposition, *Metro Health, Inc. d/b/a Hospital Metropolitan* (“*Metro Health*”), 334 NLRB 555 (2001) and *Ferri Supermarkets, Inc., d/b/a Murrysville Shop ‘N Save* (“*Ferri Supermarkets*”), 330 NLRB 1119 (2000). GC, however, mischaracterizes the Board’s analysis of the staleness issues in these cases.

As described in greater detail in Respondent’s opening brief, in *Metro Health*, a group of employees signed a petition seeking to “disallow” a particular union negotiator (one Mr. Quinones) from representing them in negotiations. *Metro Health, supra*, 334 NLRB at 555. Thereafter, Mr. Quinones was removed and replaced with another negotiator. *Id.* at 556. After that occurred, the Quinones Petition was used to support a decertification petition and the employer withdrew recognition based upon it. At the time the employer withdrew recognition, the signatures on the Quinones Petition were roughly seven (7) months old.

The Board concluded that the signatures were stale. It stated, stated that the Quinones Petition “indicated that the signers were displeased with Quinones as their representative at the bargaining table, not with the Union itself” and that “Moreover” (i.e. in addition) “the petition was executed some 7 months before the December 3 withdrawal of recognition.” “Such stale evidence” was not a reliable indicator of employee sentiments when recognition was withdrawn. *Id.* at 556. This was “especially true” because “there were significant changed circumstances,” namely the removal of Mr. Quinones. GC takes the Board’s reference to the age of the signatures out of context. In fact, the Board’s concluding statement on the issue referred not to signatures that were stale only due to their age, but to “7-month-old statements of dissatisfaction with a union official who had long since been replaced as the Union’s negotiator.” *Id.* at 557.

In *Ferri Supermarket*, the employer was never presented with an anti-union petition. It withdrew recognition in October 1997 when a representative of its predecessor informed it that the employees no longer wished to be represented by the union. *Ferri Supermarket, supra*, 330 NLRB at 1120. The employer attempted to rely on a letter stating that, in August 1996 and again in April 1997 a majority of the predecessor's employees signed anti-union petitions and submitted them to the predecessor. The Board held that the employer could not rely on the events recounted in the letter because it was not aware of them when it withdrew recognition. The Board went on to state, in dicta, that, even if the employer were aware of the events recounted in the letter, it would not provide a basis for withdrawing recognition, because, among other things, the August 1996 petition referred to in the letter was more than a year old when the employer withdrew recognition. However, it is clear that there were also significant changed circumstances since the submission of the August 1996 petition. The predecessor withdrew recognition based upon that petition, but later reached a settlement with the union, which claimed that the withdrawal was unlawful, in which the predecessor agreed to recognize and bargain with the union. There was, of course, no reason for the Board to carefully set forth these facts if the petition's age alone made it stale.⁴

GC asserts that it is not proposing two (2) alternative staleness rules (seven (7) months and twelve (12) months), although it has, once again, failed to delineate which of these time periods purportedly marks the boundary between valid and stale signatures. Instead, it asserts that signatures that are "remote in time" from the withdrawal are stale. This formulation merely begs the question: what does "remote in time" mean, and why, if this is the standard, has the Board never defined the term? If the standard were twelve (12) months, then GC's assertion that *Metro Health* holds that seven (7) month old signatures are stale cannot be correct. If the

⁴ Indeed if there were a rule that signatures become stale due to their age, both *Metro Health* and *Ferri Supermarket* should have been very simple cases. Yet, the Board never referred to the supposed time-based staleness doctrine in either of those cases. Instead, in both cases, the Board carefully examined the factual circumstances surrounding the signatures even though the age of the signatures was not in dispute. This would have been completely unnecessary if the undisputed age of the signatures, on its own, acted as a bar to their use.

standard is seven (7) months, then why did the Board not cite this standard with respect to the year-old signatures in *Ferri Supermarket*? The answer is that there is no rule that signatures become stale based upon time alone in the absence of other changed circumstances. Indeed, in *Poray, Inc.*, 160 NLRB 697 (1966), a decision that was cited by Respondent, but which GC conspicuously ignores, the Board affirmed and adopted a Trial Examiner's finding that signatures on an anti-union petition *over two (2) years old* were not "stale" because "[n]o evidence was produced which gave a more recent indication of the signers' intentions with regard to the Union." *Poray, supra*, 160 NLRB at 707.

B. GC's Attempt To Advance A New Staleness Theory For The First Time Before The Board Should Be Rejected

GC, perhaps realizing that the time-based staleness theory is lacking in support, asserts in its answering brief for the first time that there are "circumstances that support a finding of staleness in addition to the bare passage of time." [GC Br. 10.] GC did not advance this theory before the ALJ. Respondent submits GC may not present this argument for the first time in its answering brief to Respondent's exceptions, particularly where GC has filed no exceptions to the ALJ's decision.

Even if it were proper for GC to advance its new theory at this time, it has failed to substantiate it. The circumstances cited by GC that purportedly demonstrate the unreliability of the signatures on the Removal Petitions are: the Parties continued to bargain collectively after October 2007; CNA conducted a strike on March 21, 2008; and eighteen (18) Revocation Cards were executed. These facts, GC claims, "point to an active Union with revitalized post-petition support."

The fact that the Parties bargained after October 2007 does nothing to show that there were any changed circumstances impacting the reliability of the Removal Petitions. The Parties had been negotiating since December 2006, and their continued negotiations were merely a continuation of the status quo, not evidence of any change in circumstances whatsoever, much less of any "revitalization."

That CNA held a strike on March 21, 2008 also proves nothing. There is no evidence in the record regarding whether any of the employees who had signed the Removal Petitions by that time participated in or supported the strike. Indeed, there is no evidence as to how many employees in general participated in or supported the strike. To the extent that there is any evidence in the record on employee support for the strike, particularly given the continued support for the Removal Petitions, it can just as readily, if not more readily, be concluded that the strike was not well supported, in which case it would not support GC's position.⁵

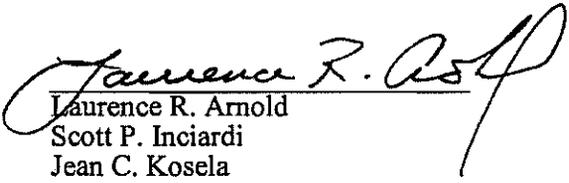
Finally, the fact that eighteen (18) employees, out of 234 total signers (7.6%), signed Revocation Cards (although they were never made effective) does not show that the overall circumstances had changed. Indeed, the fact that CNA could only muster eighteen (18) revocations suggests that it had little support indeed, and had certainly not been "revitalized."

IV. CONCLUSION

Accordingly, Respondent Fremont Rideout Health Group respectfully submits that the Board should grant its exceptions, and dismiss the Complaint in its entirety.

Respectfully submitted this 23rd day of June, 2009

Foley & Lardner LLP


Laurence R. Arnold
Scott P. Inciardi
Jean C. Kosela
Counsel for Fremont Rideout Health Group

⁵ For example, there is evidence in the record that the events cited by GC, and the strike in particular, had no impact on the ability of the Petition Circulators to gather support for the Removal Petitions. More than half of those who signed the Removal Petitions (128 out of 234) signed or re-signed after March 21, 2008, contradicting GC's claim that the strike signified or coincided with a surge in support for CNA. [GC Exh. 3(b).] Fifty-nine (59) nurses who had signed the Removal Petitions before the strike did so again after the strike. [Id.] An additional sixteen (16) employees signed or re-signed on the day of the strike itself. [Id.] In fact, 63 employees either signed or re-signed the Removal Petitions between the period beginning ten (10) days before the strike (when CNA would have given its 8(g) notice) and concluding ten (10) days after the strike (i.e. between March 11 and March 31, 2008). [Id.] These facts suggest that, rather than producing a surge of support for CNA, the strike actually prompted a surge in support for its removal.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

THE FREMONT-RIDEOUT HEALTH GROUP d/b/a
FREMONT MEDICAL CENTER AND RIDEOUT MEMORIAL HOSPITAL

And

Case No. 20-CA-34194
20-CA-34227

CALIFORNIA NURSES ASSOCIATION, AFL-CIO,

RESPONDENT'S MOTION TO STRIKE PORTIONS OF THE
GENERAL COUNSEL'S ANSWERING BRIEF TO EXCEPTIONS

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Comes now Fremont Rideout Health Group, respondent in the above-entitled matter (“Respondent”) and, pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board (the “NLRB” or “Board”) files its motion to strike portions of the Answering Brief To Respondent’s Exceptions (the “Answering Brief”) filed by the General Counsel (“GC”) on June 9, 2009.

I. Factual Background

On May 26, 2009, Respondent filed exceptions to the April 28, 2009 decision of Administrative Law Judge William N. Cates (the “ALJ”) and a brief in support thereof. One of the issues before the ALJ was whether certain signatures on anti-union petitions (the “Removal Petitions”) submitted to Respondent and relied upon by it to support its withdrawal of recognition of California Nurses Association (“CNA”) were “stale” due to the age of the signatures. During the hearing before the ALJ, the GC made clear that its position was that the signatures were stale *solely* due to their age. [Exhibit A p. 27:6-10.] The GC maintained this position in its post-hearing brief to the ALJ as well. [Exhibit B p. 15-18.] At no time did the GC take the position that there were changed circumstances (other than the passage of time) that rendered the signatures unreliable.

In his decision, the ALJ concluded that he did not need to reach the GC’s staleness argument because he found that Respondent’s withdrawal of recognition was unlawful on other grounds. In its brief in support of exceptions, Respondent argued that the ALJ’s finding that the withdrawal of recognition was unlawful was erroneous, and, therefore, that the Board should reach – and reject – the GC’s age-based staleness argument.

The GC did not file exceptions to any aspect of the ALJ decision. It did, however, file an answering brief to Respondent’s exceptions. In that brief, the GC agreed that the Board should reach the staleness issue, and argued that its time-based staleness arguments should be accepted. However, the GC also used its answering brief to advance, for the first time, an argument that the signatures in question should be considered stale because there were “intervening events” that rendered the signatures in question unreliable such that Respondent could not rely upon them in

withdrawing recognition. This argument appears as the first paragraph on page ten (10) of the General Counsel's answering brief.

II. Discussion

Section 102.46 of the Board's Rules and Regulations authorizes the filing of answering briefs to exceptions and governs their content. Specifically, Section 102.46 states that "The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof." 29 C.F.R. § 102.46(d)(2). Respondent's Exception No. 7, to which the GC's argument in question expressly related, stated, "Respondent excepts to the ALJ's failure to conclude that signatures on the Removal Petitions did not become "stale" or otherwise invalid because they were at least seven (7) or twelve (12) months old." It did not put at issue whether there were "intervening events" (other than the passage of time) making the signatures stale, and the GC had never before advanced such a theory.

Given that it had not advanced such a theory before the ALJ, it is questionable whether the GC could have properly filed an exception raising that issue before the Board. However, it was clearly improper for the GC to attempt to advance the new theory before the Board in an answering brief, particularly because the GC failed to file an exception on the issue. *See* 29 C.F.R. § 102.46(g) ("No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.").

The GC's attempt to raise this issue at this time is also improper because the GC failed to provide any notice during the hearing that the issue was being litigated. This resulted in the issue being neither fully nor fairly litigated. Any finding that Respondent acted unlawfully based on a theory that was not advanced during (or even after) the hearing, and which was not litigated at the hearing would be improper. *Facet Enterprises, Inc. v. National Labor Relations Board*, 907 F.2d 963, 972 (10th Cir. 1990) ("failure to clearly define the issues and advise an employer charged with a violation of law of the specific complaint he must meet and provide a full hearing upon the issue presented is to deny procedural due process of law."); *Rodale Press, Inc. v. Federal Trade Commission*, 407 F.2d 1252, 1256 (D.C.Cir. 1968) (holding that under the

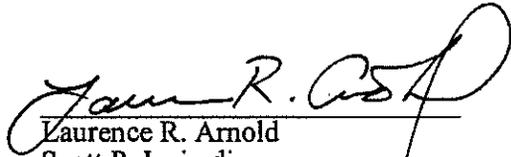
Administrative Procedure Act “it is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change.”).

III. Conclusion

Accordingly, for the foregoing reasons, Respondent Fremont Rideout Health Group respectfully requests that the Board strike the first paragraph of page ten (10) of the GC’s Answering Brief and disregard the arguments contained therein

Respectfully submitted this 23rd day of June, 2009

Foley & Lardner LLP

A handwritten signature in black ink, appearing to read "Laurence R. Arnold", is written over a horizontal line. The signature is fluid and cursive.

Laurence R. Arnold
Scott P. Inciardi
Jean C. Kosela
Counsel for Fremont Rideout Health Group

PROOF OF SERVICE

I am employed in the **County of San Francisco, State of California**. I am over the age of 18 and not a party to this action; my current business address is **One Maritime Plaza, Sixth Floor, San Francisco, CA 94111-3409**.

On **June 23, 2009**, I served the foregoing document(s) described as:

RESPONDENT'S MOTION TO STRIKE PORTIONS OF THE GENERAL COUNSEL'S ANSWERING BRIEF TO EXCEPTIONS (CASE NOS. 20-CA-34194 AND 20-CA-34227) on the interested parties in this action as follows:

(2) **BY EMAIL**: I transmitted the document via electronic mail in pdf format, to the following persons at the indicated email addresses:

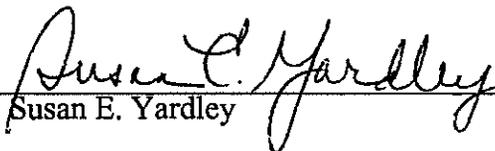
Cecily Vix
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Oakland, CA 94612
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Executed on **June 23, 2009**, at **San Francisco, California**.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Susan E. Yardley

EXHIBIT A

1 the complaints and the two answers. And also it aids me in
2 making early rulings, perhaps I m a little better informed.

3 Also, in the pretrial conference I asked the parties, and
4 I believe they agreed, that if they sum this up and put it to
5 where the rubber hits the road, that either there was a valid
6 withdrawal of recognition and there are no violations of the
7 Act or, if the withdrawal was not proper, then the changes that
8 are alleged perhaps took place. Is that a fair assessment, in
9 two sentences of the case? We ll listen to opening statements
10 and see if that s the case.

11 Government Counsel, you have my undivided attention. I
12 never take notes during opening statements, so don t view that
13 as not listening to you. Tell us what this case is about.

14 MS. VIX: Thank you, Your Honor. This is a very
15 straightforward case. In September 2006, the California Nurses
16 Association became the collective bargaining representative of
17 the unit of approximately 450 Nurses at the Fremont-Rideout
18 Memorial Hospital.

19 The parties engaged in bargaining for a little over a
20 year. In the past two years, numerous charges were filed by
21 the Union against the Employer, some of which the Region
22 determined had merit.

23 On November 14, 2008, while the meritorious charges were
24 pending before an Administrative Law Judge, the Employer
25 withdrew recognition from the Union on the basis of a petition.

1 The Employer made the withdrawal of recognition at its own
2 peril.

3 On November 14th, there were 452 Nurses in the unit, and
4 there were 234 signatures on the petition. In the Employer s
5 best case scenario, this represents only 51.8 percent of the
6 unit. However, there are two reasons why the Employer cannot
7 meet its burden to establish that the Union lost its majority.
8 One, the date of the signatures themselves made them stale, 112
9 were already between seven and 15 months old, as of the date of
10 the withdrawal and, secondly, the Union never lost its majority
11 status, because 18 of the anti Union signatories later signed
12 revocation cards, eliminating these 18 people brings the total
13 number of anti Union signatures to 47.8 percent.

14 After the Employer withdrew recognition, it made
15 unilateral changes to terms and conditions of employment. These
16 changes include denying the Union access to the facility,
17 failure to bargain over the effects of changes to the Emergency
18 Department, the implementation of certain benefits, including a
19 wage increase, 403B matching, waiver of health insurance
20 deductibles, reduction in employee contribution to health
21 insurance premiums, and paid time off cash out policy.

22 In addition to arguing that the changes were lawful
23 because the withdrawal of recognition was lawful, I anticipate
24 that the Employer will argue that the parties were at impasse
25 and thus, it was privileged to make the unilateral changes.

1 It is our position that the impasse issue is entirely
2 irrelevant. If the Employer had wanted to implement changes
3 due to impasse, it would have, back in May or whenever it was
4 that they contend impasse was reached, however, they waited
5 until after they withdrew recognition to implement the changes.
6 The impasse defense is illogical because it presupposes a
7 relationship between the parties at the time the changes were
8 made.

9 Finally, the withdrawal of recognition puts the Employer
10 in a bad faith bargaining posture, thus tainting any impasse.

11 To remedy the unlawful withdrawal of recognition and
12 unilateral changes, we are seeking the standard remedy for such
13 a case, a bargaining order and the accompanying temporary
14 decertification bar. A bargaining order is justified in this
15 case, due to the presence of past and present unfair labor
16 practices. An ALJ D recently issued in a case involving this
17 Employer, where it was determined that the Employer
18 interrogated employees, engaged in surveillance, made threats
19 to employees, made unilateral changes, dealt directly with
20 employees, and refused to furnish information to the Union,
21 amongst other findings.

22 Your Honor, I ask that you take judicial notice of this
23 case, which is JDSF0509, I have copies of this decision if you
24 wish, Your Honor.

25 Respondent s unfair labor practices, both the withdrawal

1 of recognition and the implementation of benefits, including
2 unilateral pay increase, are of a continuing nature and are
3 likely to have a continuing affect, thereby tainting employee
4 disaffection with the Union.

5 In addition, as the Board has stated in other withdrawal
6 of recognition cases, permitting a decertification petition to
7 be filed immediately, might very well allow the Respondent to
8 profit from its own unlawful conduct.

9 Finally, a bargaining order would afford the employees a
10 reasonable time to regroup and bargain through their Union in
11 an effort to reach a first contract. A bargaining order for a
12 reasonable time can remedy the ill effects of the unlawful
13 withdrawal of recognition.

14 That s it, Your Honor.

15 JUDGE CATES: Union Counsel, do you wish to be heard or
16 are you going to adopt the argument of the Government?

17 MS. ALLEN: Charging Party adopts the Government s
18 argument, Your Honor.

19 JUDGE CATES: Thank you. Hospital Counsel, what say you?

20 MR. ARNOLD: Hospital Counsel would prefer to reserve till
21 the beginning of its case, after it s heard the Government s
22 case.

23 JUDGE CATES: I will allow you to do that and I ll make my
24 standard spiel. I always believe that it is in the best
25 interest of all parties, if they wish to make an opening

EXHIBIT B

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

THE FREMONT-RIDEOUT
HEALTH GROUP d/b/a FREMONT
MEDICAL CENTER AND RIDEOUT
MEMORIAL HOSPITAL

and

Cases 20-CA-34194
20-CA-34227

CALIFORNIA NURSES
ASSOCIATION, AFL-CIO

GENERAL COUNSEL'S POST-HEARING BRIEF

Submitted by
Cecily A. Vix
Kathleen C. Schneider
Counsel for the General Counsel
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
(415) 356-5179

were contained on cards that employees were instructed to mail to an unidentified address. (General Counsel Exhibit 3a). If Respondent argues that this doctrine should apply to the withdrawal of recognition context, employees would be required to send their revocations to unidentified individuals who sponsored the anti-Union petition. Finally, it also puts employees who may have signed an anti-union petition out of fear of retaliation in the position of having to then deliver their revocation to the solicitor. This is not the law, and the fact that notice of the revocations was not provided to Respondent does not invalidate the revocations.

2. Respondent Relied on Stale Signatures

The anti-Union petition also fails to establish actual loss of support because 112 of the signatures predated the November 14 withdrawal of recognition by at least seven months. (General Counsel Exhibits 3a, 3b). Of those 112 signatures, 72 were more than a year old. (General Counsel Exhibits 3a, 3b). Under Board law, evidence of disaffection that is remote in time from the withdrawal of recognition is deemed to be too stale to constitute a reliable indicator of loss of support at the time of the actual withdrawal of recognition. *Metro Health, Incorporated*, 334 NLRB 555, 556 (2001) (seven-months old signatures were considered stale); *Ferri Supermarkets, Incorporated*, 330 NLRB 1119, 1120 (2000) (signatures that were more than a year old were stale). Respondent will likely claim that these cases considered other factors in determining that the withdrawal of recognitions were unlawful. Although the Board in *Metro Health* noted changed circumstances that further confirmed the unreliability of the stale signatures, the Board's decision cannot be read to require evidence of such changed circumstances in order to invalidate stale signatures. 334 NLRB at 555. The Board makes clear, "that the evidence, considered cumulatively or individually, did not create a good-faith reasonable doubt as to the union's majority status." *Id.* at 556. In *Ferri Supermarkets*, the Board also determined that "the petition...was more than a year old when the Respondent refused to

recognize the Union, and for that reason could not reasonably be relied on as an accurate reflection of the employees' sentiments..." 330 NLRB at 1120. Contrary to Respondent's likely plea to ignore staleness, the Board has made clear that stale signatures, alone, cannot be relied on in a withdrawal of recognition.

Respondent introduced the decertification petitions and supporting showing of interest filed in 2007 and 2008. (Respondent Exhibits 3, 4; Transcript Page 22, 23). Respondent will likely argue that because the showing of interest signatures for the decertification petition would remain valid even while blocking charges are processed, those same signatures are valid in the withdrawal of recognition context. This argument is flawed. The showing of interest signatures were not stale when presented to the Region. They could become old, but not stale, if blocking charges were filed, investigated, and potentially litigated, as was the case here. But, for the sake of any election, once the blocking charges are resolved, an election could be held months or even years after the decertification petition was filed. In this case, the Union filed blocking charges, and an administrative law judge found that, in fact, Respondent had committed violations of the Act. *Fremont-Rideout Health Group*, JD(SF)05-09. This case is currently pending before the Board on exceptions. Had Respondent settled the allegations in the blocking charges, the unfair labor practices would already be remedied and the Region would have held a decertification election in 2008. Instead, Respondent chose to litigate those allegations and the unfair labor practices remain unremedied. Eventually, once the unfair labor practices are remedied, the decertification petition would have become unblocked and the Region would have directed a decertification election. NLRB Casehandling Manual Part II, Sec. 11734. The decertification petition, however, was withdrawn after the Respondent withdrew recognition from the Union. (Transcript Page 23).

In spite of *Levitz*' clear withdrawal of recognition parameters, Respondent may argue that the old anti-Union petition signatures should be counted because in *Blade-Tribune Publishing*, 161 NLRB 1512 (1966), reversed on other grounds, 180 NLRB 432 (1969), an 18-month old union authorization card was not considered stale where the union's organizing campaign had been interrupted by the processing of unfair labor practice charges. The Board in that case, however, specifically noted that it was applying an exception to the general rule that cards signed more than one year prior to a bargaining request are too stale to be counted unless reaffirmed within one year prior to the request. 161 NLRB at 1512. Thus, the Board's general rule is that cards signed more than one year prior to a request for bargaining (or a withdrawal of recognition) are too stale to be counted. One year, or seven months, has been determined to be a "reasonable time." *Metro Health*, 334 NLRB at 556; *Ferri Supermarkets*, 330 NLRB at 1120. The Board applied an exception in *Blade-Tribune* because an employer who causes a delay by committing unfair labor practices cannot then use the delay to invalidate a card. The instant case, on the other hand, involves an employer's unilateral withdrawal of recognition, which can be lawfully accomplished only if the employer meets the bright line rule under *Levitz*; i.e., it must prove that on the date it withdraws recognition, the union in fact no longer has the majority support of the unit employees. The Board's general rule prohibiting reliance on stale cards should apply in this case. There is no exception similar to that applied in *Blade-Tribune*.

Finally, Respondent met with some of the 2007 anti-Union petition signers on December 16 through 18. (Transcript Page 253). Respondent's counsel had 30 of these employees sign template affidavits stating that they still wanted their signatures to be counted on the anti-Union petition. (Respondent Exhibit 23). Respondent's counsel asserted that after December 15, Respondent took no further action on the staleness issue. (Transcript Page 235). Clearly,

Respondent did take further action by attempting to cure the stale 2007 signatures on December 16 through 18. Under *Levitz*, when Respondent withdrew recognition, it had to rely on the evidence of actual loss of majority support as of that date. What has occurred since the withdrawal of recognition, and whether more or less employees now support the Union, is not relevant to the actions Respondent took on November 14. Though employee sentiment about the Union after November 14 is entirely irrelevant, even if these stale signatures were counted towards the total number of anti-Union signatures, they would bring the number of valid signatures to either 33.6 % or 42.5%, depending on whether staleness is counted from seven months or a year prior to the withdrawal of recognition.

In sum, under Board law, the anti-Union petition Respondent relied on to withdraw recognition fails to establish actual loss of majority support after discounting the revoked signatures, or the stale signatures, or the total of both.

b. Unilateral Changes

1. Respondent Admits It Implemented Changes After the Withdrawal of Recognition

Because Respondent could not lawfully withdraw recognition, the changes to Unit employees' terms and conditions of employment implemented since the withdrawal are unlawful. *Narricott Industries*, 353 NLRB at fn. 11. In the absence of a collective-bargaining agreement, the employer is obligated to continue past practices and is required to bargain with the union about the implementation of changes to those practices if they affect wages, hours and other terms and conditions of employment of unit employees. *Mackie Automotive System*, 336 NLRB 347 (2001). Accordingly, Respondent's implementation of changes to employees' benefits, specifically: two 5.5% wage increases; a 403(b) plan providing for matching of 33 1/3 cents on the dollar up to the first 3% of the employee's contributions; a 50% reduction in

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

THE FREMONT-RIDEOUT
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and

Cases 20-CA-34194
20-CA-34227

CALIFORNIA NURSES
ASSOCIATION, AFL-CIO

GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO STRIKE
PORTIONS OF THE GENERAL COUNSEL'S ANSWERING BRIEF TO EXCEPTIONS

Submitted by
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In support of its Motion to Strike paragraphs from Counsel for the General Counsel's Answering Brief, Respondent argues that 1) Counsel for the General Counsel used the Answering Brief to advance, for the first time, an argument that some of the anti-Union petition signatures should be considered stale because there were intervening events that made the signatures such that Respondent could not rely upon them in its withdrawal of recognition; and 2) that it was improper for Counsel for the General Counsel to make the intervening events argument because it failed to provide any notice during the hearing that the issue was being litigated.

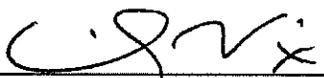
Though the Administrative Law Judge (ALJ) declined to rule on Counsel for the General Counsel's argument that Board law precludes an employer from relying on stale signatures on an anti-union petition, in its Exceptions, Respondent seeks the Board's ruling on this theory. In its Brief in Support of Exceptions, Respondent attempts to distinguish the facts of this case from the Board's holding that anti-union signatures that were seven or 12 months old were considered stale and not valid indicators of loss of majority,¹ by claiming that "the General Counsel was unable to introduce any evidence of changed circumstances, much less the kind of changed circumstances that would in any way tend to undermine the signatures on the Removal Petitions as evidence of CNA's loss of majority support." (Respondent's Brief in Support of Exceptions, p. 29).

Counsel for the General Counsel responded to this misstatement of the facts in its Answering Brief. In its Answering Brief, Counsel for the General Counsel both reasserted its argument that the Board has held that age alone renders anti-union signatures too stale to be counted in a withdrawal of recognition and responded to Respondent's claim that it was unable

¹ See *Hospital Metropolitan*, 334 NLRB 555, 556 (2001); *Ferri Supermarkets, Inc. d/b/a Murrysville Shop 'N Save*, 330 NLRB 1119, 1120 (2000).

to introduce any evidence of changed circumstances by citing three facts: continued bargaining after many of the anti-Union petition signatures were collected, a strike, and the collection of the cards revoking signatures on the anti-Union petition. In Respondent's Motion to Strike Counsel for the General Counsel's argument that there were changed circumstances, Respondent claims that these facts were not fully or fairly litigated. This assertion is disingenuous and misleading. The continued bargaining and strike facts were stipulated to by the parties (Tr. 23-25); thus, these undisputed facts required no further exploration before the ALJ. Further, the admission of the 18 revocation cards accounted for the bulk of the two day trial testimony and was certainly fully litigated. Respondent even concedes that the signatures and dates on the revocation cards are authentic. (Respondent's Brief in Support of Exceptions, p.8, fn.6). Clearly, these facts were fully and fairly litigated and Respondent's attempt to have these facts excluded from the purview of the Board should be rejected. Accordingly, Respondent's Motion to Strike should be denied.

Dated at San Francisco, California, this 25th day of June, 2009.



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UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

THE FREMONT-RIDEOUT HEALTH GROUP d/b/a
FREMONT MEDICAL CENTER AND RIDEOUT MEMORIAL HOSPITAL

And

Case No. 20-CA-34194
20-CA-34227

CALIFORNIA NURSES ASSOCIATION, AFL-CIO,

RESPONDENT'S REPLY IN SUPPORT OF MOTION
TO STRIKE PORTIONS OF THE GENERAL COUNSEL'S
ANSWERING BRIEF TO EXCEPTIONS

FOLEY & LARDNER LLP
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I. Introduction

Fremont Rideout Health Group (“Respondent”) has moved the Board to strike portions of the answering brief filed by the General Counsel (the “GC”) in which the GC advanced for the first time an theory that it had never before advanced, and which was not litigated at the hearing. Specifically, although the GC had previously argued that signatures on anti-union Removal Petitions were stale solely due to the age of the signatures, and consistently argued that it need not establish changed circumstances, the GC now attempts to argue that some of the signatures were stale due to “intervening events” that rendered them unreliable. The GC has filed a response to the motion to strike, to which Respondent now replies.

II. Respondent’s Exceptions And Brief In Support Thereof Did Not Raise The “Intervening Events” Theory The GC Now Seeks To Advance

The GC argued that, in advancing its new “intervening events” theory, that it was merely responding to arguments made by Respondent. In so doing, the GC quotes Respondent’s brief in support of exceptions out of context in an effort to create the appearance that there was a “changed circumstances” theory at issue. Specifically, the GC quotes a sentence from Respondent’s brief in which Respondent stated that “the General Counsel was unable to introduce any evidence of changed circumstances.” The full passage in which the quoted language appeared read as follows:

In conclusion, the Board has never held that signatures in support of an anti-union petition become stale merely due to the passage of time. Instead, the Board has consistently required evidence of changed circumstances that would undermine the reliability of the signatures as indicators of majority status. In this case, the General Counsel was unable to introduce any evidence of changed circumstances, much less the kind of changed circumstances that would in any way tend to undermine the signatures on the Removal Petitions as evidence of CNA’s loss of majority support. Any attempt by the General Counsel’s to fall back on a nonexistent rule of automatic staleness based on the passage of time alone should be rejected.

[R. Br. p. 29.] In other words, Respondent was arguing that the Board requires a showing of changed circumstances before it will hold signatures on an anti-union petition to be stale, but that

the GC never presented such a theory and argued instead that signatures could become stale based only on the passage of time. It was this latter theory that was litigated at the hearing, and which Respondent urged the ALJ to reject.

In fact, as Respondent showed in its motion, the GC's "intervening events" argument in its answering brief expressly related to Respondent's Exception No 7, which excepted only to the ALJ's failure to find that the signatures were not made stale by the passage of time alone. Additionally, in its statement of the issues, Respondent characterized the staleness issue as, "Assuming that the ALJ erred in concluding that the Revocation Cards were effective, whether signatures on the Removal Petition were "stale" solely because they were seven (7) or twelve (12) months old when Respondent withdrew recognition of CNA." [R. Br. at 9.]

Furthermore, Respondent's brief in support of exceptions contained the following statements that clearly indicated that its exceptions were limited to the GC's time-based staleness theory:

Respondent submits that it is appropriate at this time for the Board to reject [the GC's] argument and confirm, in accordance with the Board's past precedent, that age alone does not invalidate an employee's signature on a petition seeking the removal of a union as bargaining representative.

[R. Br. at 2 (bracketed material supplied).]

Despite a complete dearth of supporting authority, the General Counsel has advanced a theory that, if accepted, would represent an unprecedented application of Board law; that an employee's expression of his or her desire to no longer be represented by a union becomes stale based *solely* on the passage of time, even where there are no other changed circumstances.

[R. Br. at 23 (emphasis in original).] Clearly, Respondent was not itself raising an "intervening events" issue, and the GC's selective and misleading quotation of Respondent's brief is merely a *post hoc* justification for its own belated and improper attempt to raise that issue.

The GC also disingenuously asserts that the paragraph of its answering brief in question was intended to merely to respond to a “misstatement of the facts” in Respondent’s brief – again referring out of context to Respondent’s statement that “the General Counsel was unable to introduce any evidence of changed circumstances.” This “misstatement” was not quoted or even referred to in the paragraph Respondent seeks to have stricken, (or anywhere else in the answering brief). Instead, the paragraph presented the argument that “there are circumstances that support a finding of staleness *in addition to the bare passage of time.*” [GC A. Br. at 10 (emphasis supplied).] Although it is clear that this was not merely an attempt to correct a factual misstatement, to the extent that this was actually the purpose of the paragraph in question (although the paragraph makes no sense except as an attempt to raise an “intervening events” theory), it should be strictly considered only for that purpose. The Board should reject any attempt by the GC to raise an “intervening events” theory at this stage.

III. An “Intervening Events” Theory Was Not Litigated During The Hearing

Responding to Respondent’s argument that an “intervening events” theory was not litigated at the hearing, the GC retorts that “[c]learly, these facts were fully and fairly litigated and Respondent’s attempt to have these facts excluded from the purview of the Board should be rejected.”¹ The GC misconstrues Respondent’s position and the relevant legal standard. Respondent does not claim that the facts in question should be excluded – they are clearly part of the record. It is the GC’s theory that was not properly raised, and may not now be raised.²

To the extent that the GC is contending that, because some facts that could be used to support an “intervening events” theory are in the record, the issue was necessarily litigated, the contention should be rejected. That facts sufficient to support a legal theory are introduced into the record does not allow the Board to dispense with the requirement that respondents be clearly

¹ The “facts” the GC refers to are that the Parties continued to bargain, that there was a strike, and that eighteen (18) Revocation Cards were executed.

² Notably, the GC did not dispute Respondent’s assertion in its motion that the GC had never argued an “intervening events” theory until the day it filed its answering brief. In fact, Respondent’s correspondence with the GC during the pre-complaint investigation reveals that, even at that stage, the GC was not contending that there were “intervening events,” but was contending that the age of the signatures alone rendered them stale. [R. Exh. 9-10.]

and timely advised of the matters of fact and law asserted. *Conair Corporation v. National Labor Relations Board*, 721 F.2d 1355, 1372 (D.C.Cir. 1983); *National Labor Relations Board v. I.W.G., Inc.*, 144 F.3d 685, 688 (10th Cir. 1998). Further undermining the GC's contention that an "intervening events" theory was litigated is the fact that the GC never advanced the theory in its post-hearing brief, which it certainly would have done had it been a part of the GC's case.

Finally, it is significant that the ALJ himself did not believe that anything but a time-based staleness argument was being raised. In his decision, the ALJ stated,

The Government argues the anti-union petition is also further invalid and may not be relied upon by the Hospital to establish a loss of majority status because 112 of the signatures predate November 14, 2008, by at least seven months and of those 112 signatures, 72 were more than a year old. The Government argues that Board law precludes such "stale" signatures from being relied upon to support a withdrawal of recognition.

The Hospital argues the Board has never adopted a time rule of "staleness," in the absence of changed circumstances, be it seven months, a year, or more, to invalidate a disaffection petition signature.

[ALJ Dec. at 12.] The GC did not except or otherwise take issue with this accurate description of its position, nor could the GC legitimately do so.

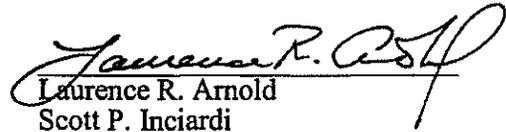
IV. Conclusion

In sum, throughout the course of this case, including during the investigation stage, at the hearing before the ALJ, and during the post-hearing briefing, the GC consistently took the position that signatures on the Withdrawal Petitions were stale due solely to their age. It never asserted that there were "intervening events" or changed circumstances other than the passage of time that rendered any signatures invalid, and, in fact, consistently argued that they were not a necessary consideration. The issue of "intervening events" was not litigated during the hearing. The GC declined to file any exceptions to the ALJ's decision, but has attempted to raise an "intervening events" theory as a counter-argument in its answering brief to Respondent's

exceptions, which themselves did not raise that issue. Accordingly, Respondent Fremont Rideout Health Group respectfully requests that the Board strike the first paragraph of page ten (10) of the GC's Answering Brief and disregard the arguments contained therein.

Respectfully submitted this 1st day of July, 2009

Foley & Lardner LLP

A handwritten signature in black ink, appearing to read "Laurence R. Arnold", is written over a horizontal line.

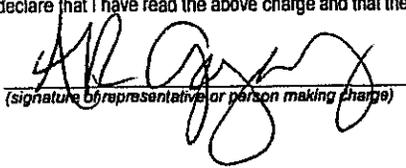
Laurence R. Arnold
Scott P. Inciardi
Jean C. Kosela
Counsel for Fremont Rideout Health Group

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 20-CA-086606	Date Filed 8/1/2012

INSTRUCTIONS:

File an original 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 Fremont-Rideout Health Group	b. Tel. No. (530) 740-1969 c. Cell No. f. Fax No. (530)740-1979 g. e-Mail ktriplett@frhg.org h. Number of workers employed 1800 total
d. Address (Street, city, state, and ZIP code) 620 J Street Marysville, CA 95901	e. Employer Representative Kimberly Triplett, PHR Employee and Labor Relations Manager
i. Type of Establishment (factory, mine, wholesaler, etc.) Hospital	j. Identify principal product or service Health Services
k. 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) (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 services 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) See attached	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) California Nurses Association	
4a. Address (Street and number, city, state, and ZIP code) 1107 9th Street Suite 900 Sacramento, CA 95814	4b. Tel. No. (916) 446-5021 4c. Cell No. 4d. Fax No. (916)446-6319 4e. e-Mail AGonzalez@calnurses.org
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) California Nurses Association	
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  (signature of representative or person making charge)	Autumn Gonzalez, Labor Representative (Print type name and title or office, if any)
Address 1107 9th St., Ste 900, Sacramento, CA 95814	7/31/12 (date)
Tel. No. (916) 446-5021 Office, if any, Cell No. (916) 296-1042 Fax No. (916)446-6319 e-Mail AGonzalez@calnurses.org	

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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 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.



CALIFORNIA
NURSES
ASSOCIATION



NATIONAL NURSES
ORGANIZING COMMITTEE

A Voice for Nurses. A Vision for Healthcare.

AFL-CIO

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Fremont Rideout Health Group has violated Sections 8(a)(1) and (5) by implementing its final offer without reaching lawful impasse with the Union.

Bargaining between the parties commenced in August, 2011. The parties met with regularity through 2011, and into April of 2012. The Union provided multiple proposals on open articles, as well as counter proposals to management proposals. Several issues reached tentative agreement during the course of these discussions. The Union also filed several information requests, in order to better shape proposals and understand management's financial position. On April 4, 2012, Management proposed a "last, best and final" offer to the union, which the membership voted down. The union requested to continue negotiations. Management informed the union that they would be implementing the last, best and final on July 5, 2012. Another session was held on July 26, 2012, at which the union presented another wage counter proposal as well as two other proposals, which were summarily rejected.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FREMONT-RIDEOUT HEALTH GROUP

Charged Party

and

CALIFORNIA NURSES ASSOCIATION

Charging Party

Case 20-CA-086606

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on August 3, 2012, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

KIMBERLY TRIPLETT, PHR Employee & Labor Relations Mgr
FREMONT-RIDEOUT HEALTH GROUP
620 J ST
MARYSVILLE, CA 95901-5413

August 3, 2012

Date

Katherine Yan, Designated Agent of
NLRB

Name



Signature

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

THE FREMONT-RIDEOUT HEALTH GROUP
d/b/a FREMONT MEDICAL CENTER AND
RIDEOUT MEMORIAL HOSPITAL

and

Case 20-CA-86606

CALIFORNIA NURSES ASSOCIATION,
AFL-CIO

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by the California Nurses Association, AFL-CIO (the Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C., Sec. 151, et seq. (the Act), and Section 102.15 of the National Labor Relations Board (the Board), and alleges that The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital (Respondent) has violated the Act as described below:

1. The original charge in this proceeding was filed by the Union on August 1, 2012, and a copy was served by regular mail on Respondent on August 3, 2012.

2. (a) At all material times, Respondent, a California non-profit corporation with offices and places of business in Yuba City and Marysville, California, herein called Respondent's facilities, has been operating hospitals providing inpatient and outpatient medical care.

(b) During the calendar year ending December 31, 2011, Respondent, in conducting its business operations described above in subparagraph 2(a), derived gross revenues in excess of \$250,000.

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

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

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

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

Kim Triplett	Employee & Labor Relations Manager
Theresa Hamilton	Chief Executive Officer
L. Wayne Mills	Chief Financial Officer

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

All full-time and regular part-time and per diem Registered Nurses in positions requiring a Registered Nurse (RN) license and who provide direct patient care and are employed by Respondent at and out of Fremont Medical Center located at 970 Plumas Street, Yuba City, CA and/or Rideout Memorial Hospital located at 726 Fourth Street, Marysville, California; excluding all non-professional employees, non-Registered Nurses, Traveler Registered Nurses, Registry Registered Nurses, Care Coordinators (discharge planning), Physician's Assistants (PAs), RN Clinical Systems Analysts, RN Focus Review Medical Records Analysts, ICU Outcome Coordinators, RN Education Coordinators, Clinical Nurse Specialists, Infection Control Nurses, RN midwives, managerial employees, confidential employees, guards and supervisors as defined in the Act.

(b) On September 20, 2006, the Union was certified in Case 20-RC-18092 as the exclusive collective-bargaining representative of the Unit.

(c) At all times since September 20, 2006, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

7. (a) About July 5, 2012, Respondent implemented what it characterized as its “last, best, and final offer” for a successor collective-bargaining agreement.

(b) Respondent’s “last, best and final offer” included changes to Unit employees’ existing terms and conditions of employment including, but not limited to, wages, pension contributions, bonuses, formation of a management/employee group to discuss breaks, leave of absence policies, use of paid time off, use of long-term sick leave, requirements for on-call/per diem work, formation of a professional practice committee, and floating assignments.

(c) The subjects set forth above in subparagraph 7(b) relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purpose of collective bargaining.

(d) Respondent engaged in the conduct described above in subparagraph 7(a) without first bargaining with the Union to a good-faith impasse.

8. By the conduct described above in paragraph 7, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(a)(1) and (5) of the Act.

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

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 complaint. The answer must be **received by this office on or before October 11, 2012, or postmarked on or before October 10, 2012.** Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office.

An answer may also be filed electronically through the Agency's website. *To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely 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. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is

filed or if an answer is filed untimely, the Board may find, pursuant to Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on the 13th day of November, 2012, at 9:00 a.m., and on consecutive days thereafter until concluded, a hearing will be conducted at a location to be designated in Marysville or Yuba City, 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 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.

DATED at San Francisco, California, this 27th day of September, 2012.

/s/ J F Frankl

Joseph F. Frankl, Regional Director
National Labor Relations Board,
Region 20
901 Market Street, Suite 400
San Francisco, California 94103

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

THE FREMONT-RIDEOUT HEALTH GROUP d/b/a
FREMONT MEDICAL CENTER AND RIDEOUT
MEMORIAL HOSPITAL

Case 20-CA-86606

and

CALIFORNIA NURSES ASSOCIATION, AFL-CIO

DATE OF MAILING September 27, 2012

AFFIDAVIT OF SERVICE OF 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 certified and regular mail upon the following persons, addressed to them at the following addresses:

VIA CERTIFIED MAIL

Kimberly Triplett
Fremont-Rideout Health Group
620 J Street
Marysville, CA 95901-5413
(Cert. No. 7007 2560 0001 5876 3775)

Autumn Gonzales
California Nurses Association
1107 9th Street, Suite 900
Sacramento, CA 95814-3688

VIA REGULAR MAIL

Richard M. Albert, Esq.
Foley & Lardner LLP
555 S Flower Street, Suite 3500
Los Angeles, CA 90071-2411

<p>Subscribed and sworn to before me on</p> <p>September 27, 2012</p>	<p>DESIGNATED AGENT</p> <p>/s/ Susie Louie NATIONAL LABOR RELATIONS BOARD</p>
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