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Solomon Health Services, LLC d/b/a Chelsea Place, Trinity Hill, and Wintonbury Health Center *and* New England Health Care Employees Union, District 1199, AFL–CIO. Case 34–CA–8982

November 26, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On November 21, 2000, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief; and the General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings[1] as explained below, and conclusions and to adopt the recommended Order as modified.[2]

The judge found, and we agree, that the Respondent was a "perfectly clear" successor within the meaning of *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), and was therefore obligated to bargain with the Union before changing preexisting terms and conditions of employment.[3] The judge further found, and again we agree, that the Respondent breached that obligation, and violated Section 8(a)(5) and (1) of the Act, when it unilaterally failed and refused to credit the unit employees with all of their unused vacation, sick, and personal leave time that accrued prior to the Respondent's April 1, 1999 commencement of operations.

In its exceptions, the Respondent contends, inter alia, that the judge mischaracterized its position as asserting that the Union waived any rights that the employees may have had to claim the benefits from the Respondent. According to the Respondent, its defense is not one of waiver, but rather that the parties bargained over the issue of accrued benefits and reached an agreement to which it adhered. For the reasons stated below, we find no merit in the Respondent's contention that the parties bargained to an agreement on the accrued benefits issue.

The facts, which are fully set forth in the judge's decision, can be summarized as follows.

The Respondent purchased the three nursing homes involved in this proceeding from a State-appointed Receiver operating those facilities. On February 23, 1999,[4] the Respondent, in order to avert a threatened strike during its negotiations with the Receiver to purchase the business, pledged, in writing, to the Union that if the court approved the purchase, the Respondent would "hire the current bargaining unit employees" and would "pay existing wages and benefits in effect immediately prior to our purchase while good faith negotiations continue." There is no dispute that paid vacation, sick, and personal leave were among the unit employees' employment conditions.

In March, employees grew concerned about a rumor that the Receiver was planning to pay (or "cash out") employees for vacation time that had accrued before the April 1 sale date. If that were to occur, employees would then have no vacation time for the remainder of the year. This matter was discussed by the Respondent and the Union in a meeting on March 16. Mark Leff, the Respondent's director of human resources, told Leslie Frane, the Union's vice president, that he "expected" that the Receiver and the Respondent would be able to agree that the Receiver would pay the Respondent an amount of money sufficient to cover the costs involved, and, if so, the Respondent would honor the vacation credit that the employees had accrued prior to April 1.

In a subsequent phone call, however, Leff advised Frane that the Receiver would not agree to this arrangement and would instead pay the employees directly. Frane was dissatisfied with this resolution because the Union's position was that, based on the Respondent's February 23 pledge, the Respondent was obligated to honor the accrued time. Frane stated that a "cash out" was not appropriate because the contract did not provide for it. Frane added, however, that if "our members got checks, . . . they would cash them. And . . . if they cashed checks equal to the amount of their accrued time, then that time wouldn't be on the books anymore. And so, we wouldn't hold [the Respondent] liable for time that the Receiver had paid out . . . but . . . we felt that it

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001).

[3] "Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294–295.

[4] All subsequent dates refer to 1999 unless specified otherwise.

was [the Respondent's] obligation to honor the time, [and] that that had been our expectation, our anticipation."

On April 1, when the Respondent assumed ownership of the three facilities, it hired virtually all of the predecessor's employees and continued, unchanged, all existing terms and conditions of employment, except for the accrued vacation, sick, and personal leave time that was "on the books" as of the change of ownership. The Respondent unilaterally eliminated all accrued paid leave balances of the bargaining unit employees.

Thereafter, the Union received certain monetary payments from the Receiver for the employees' accrued vacation leave, but far less than the Union's estimate of the value of the employees' total accrued leave (including sick and personal leave). The judge found, and we agree, that "there is a substantial difference between what the Receiver paid the Union and what the liquidated value of the employees' accrued leave was." [5]

On these facts, we cannot agree with the Respondent's argument that the Union agreed to accept a cash-out from the Receiver covering all accrued leave benefits and to proceed only against the Receiver for any possible shortfall. To the extent that any "agreement" was reached regarding accrued benefits, it was solely between the Respondent and the Union, it covered only the subject of vacation leave, and it was limited to the Union's conditional acceptance of a cash out, provided that the amounts were calculated properly. All of this was made clear by Frane when, as noted above, she told Leff in March that a "cash out" was not appropriate, but if it were to occur and if vacation "checks [were] equal to the amount of [employees'] accrued time, then that time wouldn't be on the books anymore . . . but that . . . it was [Respondent's] obligation to honor the time . . . ." The conditional requirement of full payment for vacation credits was not satisfied, however, as evidenced by the fact that the Receiver's payment of $250,000 was less than what was owed. And as for the sick and personal leave time, even assuming that these two items were included in the conditional cash-out deal,[6] the condition was similarly not satisfied as evidenced by the undisputed fact that the Receiver paid nothing to cover these accrued benefits. See footnote 4 of the judge's decision. In short, a consummated agreement was never achieved that permitted the Respondent to eliminate accrued leave credits when it commenced operations on April 1.

Accordingly, we reject the Respondent's contention, and we adopt the judge's decision finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to credit employees with all of their unused vacation, sick, and personal leave time that accrued prior to April 1.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Solomon Health Services, LLC d/b/a Chelsea Place, Trinity Hill, and Wintonbury Health Center, Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Dated, Washington, D.C. November 26, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] The Respondent contends that it did not introduce any evidence about the monetary value of the accrued leave balances or the sufficiency of the Receiver's payments to employees because the judge ruled that these matters would be resolved at the compliance stage. Therefore, according to the Respondent, the Board should not consider the judge's finding that there was a significant discrepancy between what the Receiver paid employees and the actual value of the accrued leave balances.

Contrary to the Respondent's assertion, the judge did not rule that no evidence could be introduced about the value of the accrued leave balances or the sufficiency of the Receiver's payments. Rather, the judge merely held that he would not be calculating the exact value of the leave balances or the precise difference between the Receiver's payments and the actual value of the leave balances. The judge did not, explicitly or implicitly, preclude the Respondent from attempting to establish that there was no difference between the Receiver's payments and the actual value of the leave balances.

[6] The judge found that they were not. In fact, he found that the subject of personal leave "was not even mentioned between Frane and Leff" and that Frane's demand for sick leave credit was "ignored" by Leff.

Darryl Hale, Esq., for the General Counsel.
Cherie Maxwell and *Steven M. Fleischer, Esqs.,* of Newark, New Jersey, for the Respondent.
John M. Creane, Esq., of Milford, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Hartford, Connecticut, July 27, 2000. On August 17, 1999,[1] New England Health Care Employees Union, District 1199, AFL–CIO (the Union), filed the charge in Case 34–CA–8982 alleging that Solomon Health Services, LLC, d/b/a Chelsea Place, Trinity Hill, and Wintonbury Health Center (the Respondent) had committed certain unfair labor practices under the Act. After an investigation of the charge (as later amended), the General Counsel issued a complaint alleging that the Respondent had violated Section 8(a)(5) and (1) of the Act by certain acts and conduct. The Respondent filed an answer admitting that this matter is properly before the National Labor Relations Board (the Board) but denying the commission of any unfair labor practices.

On the testimony and exhibits entered at trial, and after consideration of the briefs that have been filed, I make the following findings of fact and conclusions of law.

I. JURISDICTION AND LABOR ORGANIZATION'S STATUS

The Respondent is a corporation with its office and principal place of business located in Denver, Colorado, that provides skilled and semiskilled health care services at three facilities in Hartford, Connecticut, known as Chelsea Place, Trinity Hill, and Wintonbury Health Center (the Hartford facilities). During the 12-month period ending December 31, the Respondent, in conducting those business operations, derived gross revenues in excess of $100,000, and it purchased and received at its Hartford facilities goods valued in excess of $50,000 directly from suppliers located at points outside Connecticut. As such, the Respondent has been, and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. As the Respondent further admits, at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Leslie Frane is a vice president of the Union who has responsibility for contract administration at certain Union-represented hospital units in Connecticut. Frane reports directly to Jerry Brown, the Union's president. (Frane testified at trial; Brown did not.) For many years, the Union and American Health Foundations/Hartford, Inc. (AFH), had separate collective-bargaining agreements covering about 500 employees of the 3 Hartford facilities. The last of these agreements were negotiated in 1995; they were originally scheduled to expire on December 15, 1998, but extensions that were effective through March 31, 1999, were negotiated.

On May 8, 1997, pursuant to a request by Connecticut's Department of Health, a State court placed AFH in receivership; E. Cortright Phillips was appointed to be the receiver. Frane testified that her information was that the receivership was imposed upon AFH because it was behind in loan payments to the State and because of certain Health Department concerns about the levels of patient care at the Hartford facilities. The Receiver was charged with the duties of improving the day-to-day operations of the Hartford facilities and, ultimately, finding a purchaser for them. (Phillips testified, but he did not rebut this testimony by Frane.) After his appointment as receiver, Phillips continued to employ essentially the same unit employees, continued to operate the business in substantially unchanged form, and continued to apply the collective-bargaining agreements that covered the employees of the Hartford facilities. Each of the collective-bargaining agreements provided for vacation benefits ranging from 2 to 5 weeks depending upon completed years of service, 3 personal leave days, and sick leave benefits of up to 12 days per year.

On April 1, the Receiver sold the Hartford AFH operations to the Respondent. The complaint alleges that the Respondent is the successor of both AFH and the Receiver and that, in violation of Section 8(a)(5): "On or about April 1, 1999, Respondent failed to credit the employees in the [3 collective-bargaining units] with all unused vacation, sick and personal [leave] time." The Respondent admits that it is the successor of AFH and the Receiver, and it admits that it did not credit the employees with vacation, sick, and personal leave time that accrued before it purchased the operations, but it contends that the Union waived any rights that the employees may have had to claim those benefits from it rather than from the Receiver.

At some point in December 1998, Phillips informed the Union that he and the Respondent had reached a tentative agreement of sale for the three Hartford facilities. By letter dated December 23, 1998, Brown requested Robert Salazar, the Respondent's president and CEO, to meet and bargain with the Union. Salazar did not respond to the letter. (Salazar did not testify.)

On January 17, the Respondent and Phillips reached an asset purchase agreement that was to be effective on April 1. Shortly after being notified of the purchase agreement, Frane sent a letter (which was undated) to Salazar again asking him to join in the processes of negotiating for new collective-bargaining agreements covering the unit employees and specifically asking him to attend a previously scheduled February 17 bargaining session between the Union and the Receiver. Salazar also did not respond to this letter. After receiving no responses to its letters, the Union sent the Receiver and the Respondent notices of intent to strike the Hartford facilities on February 24. Frane testified that during the day of February 23 Brown and Salazar conducted several telephone calls between themselves. Frane was not a party to those telephone conversations and therefore could not testify about their content, but she was able to testify that, at the end of the day, the Union received a facsimile-transmission letter from Salazar to Brown. Salazar's letter stated:

[1] All dates are in 1999 unless otherwise indicated.

> If our planned purchase of the three AFH Hartford facilities is approved, we will hire the current bargaining unit employees of AFH at Wintonbury, Chelsea Place, and Trinity Hill. If for any reason we do not hire the entire work force, we will hire in order of seniority. If this is the case, employees not rehired will have certain recall rights, subject to negotiations during the month of March.
>
> Second, we will pay existing wages and benefits in effect immediately prior to our purchase while good faith negotiations continue. Permanent wages (including future wage increases), benefits, and working conditions are subject to negotiations between the Union and Solomon Health Services in accordance with applicable law.
>
> I hope that these assurances will satisfy your concerns and lead to a productive relationship between the employees and our company.

Upon receipt of this letter, the Union canceled its strike notice.

On March 16, at the Union's hall, a delegation of the Respondent's representatives met with Frane, two other union representatives (who did not testify), and about 85 unit[2] employees (none of whom testified). The Respondent's delegation was headed by Mark Leff, the Respondent's director of human resources. Frane testified that some employees who were at the meeting were prepared with questions, one of which was whether there was truth to a rumor that the Receiver was planning to pay (or "cash out") employees for vacation credit that had accrued before the April 1 sale date. The employee added that, if so, the employees would be severely disadvantaged because they would have no vacation time for the remainder of the year. (This was because, again, under the AFH agreements, vacation benefits depended on completed years of employment.) Frane testified that Leff told the meeting that he agreed that cashing out the vacation benefits "would be a very bad way to go because he didn't want to be in a situation where his employees didn't have any time to take for a year." Further according to Frane, Leff stated that he "expected" that the Respondent and the Receiver could work out an agreement pursuant to which the Respondent would be able to grant the leave time the unit employees expected to be able to take that year.

Shortly after the March 16 meeting, Leff and Frane had 2 telephone calls. Frane testified that during the first telephone call Leff told her that the Respondent and the Receiver had worked out the financial details that would allow the employees to take the leave time when they became employed by the Respondent after April 1. Frane further testified, however, that during the second telephone call Leff told her that "he was not going to be able to honor the commitment he had made in the previous phone call, to keep the time on the books" because Phillips had reneged and was going to send checks directly to the employees to cover the dollar values of their accrued leave time. According to Frane:

> I told him I was upset. I told him that the employees would be upset. I told him that I thought that was completely inappropriate, because the contract didn't have a provision for cash out. That Solomon had agreed to continue the terms and conditions based on the letter of February 23rd. And that we believed that they had an obligation to do that.
>
> I told him, however, that if our members got checks we weren't going to throw the checks out. We weren't going to return them to the Receiver. If our members got checks, that they would cash them. And that if they cashed checks equal to the amount of their accrued time, then that time wouldn't be on the books anymore. And so, we wouldn't hold Solomon liable for time that the receiver had paid out . . . but that we felt that it was Solomon's obligation to honor the time, [and] that that had been our expectation, our anticipation.

As discussed infra, Leff denied that he ever agreed that the Respondent would credit the employees with their accrued leave benefits.

On April 1, the Respondent hired essentially all of the employees who had previously been employed by AFH and, more recently, by the Receiver. When asked what terms and conditions of employment the Respondent continued after April 1, Frane summarized:

> Essentially all of them [including] wages. They continued to make contributions to the Unions, Health and Welfare, Pension and Training Fund, shift differential. They continued to process grievances. They continued to deduct Union dues and forward that dues to the Union office. They continued to notify the Union of discharges and suspensions in accordance with the contract. . . . [A]nd they continued [with] vacation, sick and holiday time [benefits], prospectively; they continued to credit employees with the amounts of time that the contract specified. The one exception had to do with the accrued sick, vacation and holiday times that were on the books as of the change of ownership.

When asked how the Respondent applied the collective-bargaining agreements' provisions for personal, sick, and vacation pay, Frane replied:

> All employees started with a zero balance. They had no vacation, sick [or] personal time available to use. They then began to earn time going forward at the rate specified in the contract. And as they earned that time, they were allowed to use it.

The Respondent did not dispute any of this testimony by Frane.

Frane testified that in April the employees received individual letters from the Respondent containing statements of the amount of vacation days (or hours) that each employee had accrued before April 1. Many of these statements were low; some contained even "negative" balances. Frane further testified that, also in April, the Receiver paid approximately $120,000 to the Union to be distributed to the employees as payment for at least part of their claims for accrued vacation benefits (but not as any payment for accrued sick or personal leave). Frane denied that this $120,000 payment was sufficient for the purpose of liquidating the vacation-leave rights of the unit employees, a point that the Respondent does not contest.

[2] The term "unit employees" in this decision refers to the employees of all three units.

On May 17, Frane filed a grievance with Leff over the Respondent's "failure to recognize the vacation, sick, and personal time accruals of our members" in the three units. Frane stated in the grievance that, "while we would rather not have the time cashed out, we would accept such a cash-out, provided that the amounts were calculated properly." Frane further stated in the May 17 grievance that the Union had filed a separate grievance against the Receiver over the failure to fully pay the employees for, or to cause them to be credited with, their accrued vacation, sick, and personal leave time; the May 17 grievance further stated that, if the grievance against the Receiver went to arbitration, the Union would have the Respondent joined in that proceeding. Frane testified that, at some point thereafter, the Union sought arbitration of both grievances, but the Respondent refused to participate and no arbitration was held. The Respondent did not contest this testimony by Frane.

Frane further testified that the State court ordered mediation of the issues among the three parties (the Union, the Receiver, and the Respondent) in an attempt to wind up the receivership. The Receiver participated in the mediation, but the Respondent refused. The (then) two-party mediation resulted in a September 7 "Settlement and Release Agreement" pursuant to which the Receiver was to pay the Union an additional $130,000 toward the remainder of what the Union claimed to be the value of the employees' accrued vacation time; the agreement left it to the Union to distribute that money among the units employees. The "Settlement and Release Agreement" further recited that payment of the $130,000 (and certain other amounts not in issue in this case) would release the Receiver from all claims of the Union; it expressly provided, however, that by entering the Agreement, the Union did not waive any of its claims against the Respondent. Frane further testified (without contradiction) that, although the Respondent refused to participate in the mediation, it appeared in State court to protest the Settlement and Release Agreement. The Respondent did not contest this testimony by Frane.

Frane testified that the Union was not satisfied with the total of $250,000 that the Receiver paid to the Union as the employees' accrued vacation leave because it was far less than the Union's estimate of the value of the employees' total accrued leave (including sick and personal leave), $1,300,000. This estimate was necessarily imprecise, but, even if it is high, the Respondent does not dispute that there is a substantial difference between what the Receiver paid the Union and what the liquidated value of the employees' accrued leave was.[3]

On August 11, the Respondent and the Union signed a single collective-bargaining agreement, effective through March 15, 2001, covering the employees of the three units. No mention of payment or credit for pre-April 1 vacation, sick, and personal leave time is contained in the agreement. Post-April 1 vacation benefits are graduated according to seniority as they were in the prior AFH contracts, and the seniority section includes the statement: "Employees' anniversary dates shall be their original hire dates and not the date that the Employer purchased the facilities." The Respondent has made no payments to the employees as compensation for vacation, sick or personal leave time that accrued before April 1; nor has the Respondent given employees credit for such leave in any other fashion. By memorandum dated June 2, Salazar informed the unit employees, inter alia, that the "obligation for your past accrued benefits" was that of the Receiver.

Receiver Phillips, whom the Respondent called as its witness, identified an instrument entitled "Employment Transition Agreement" that he and Salazar executed on March 31. The Union was not a party to the agreement. The agreement recites, inter alia: "The Receiver will pay to the employees their unused vacation pay . . . which has accrued through March 31, 1999." The agreement did not state the amount that the Receiver was to then pay the employees, but, as noted above, Frane acknowledged that the Union received $120,000 from the Receiver in April. Phillips testified that he understood that the $120,000 that he paid to the Union in April, plus the $130,000 that he paid to the Union pursuant to the September 7 "Settlement and Release Agreement," did, in fact, fully compensate the unit employees for unused vacation time. Phillips acknowledged, however, that the amounts that he paid to the Union were in no way intended to compensate employees for their accrued sick or personal leave.[4] Phillips was not asked to deny Frane's testimony that whatever formula he used to calculate employees' vacation rights yielded inaccurately low balances (including "negative" balances for some of the employees).

Leff testified that at the March 16 meeting he agreed that it would be better if things could be arranged so that the employees' accrued vacation credit would be carried over as vacation time with the Respondent. Leff testified that he told those at the meeting that such an arrangement would require the Receiver to pay the Respondent the value of the accrued vacations. Leff testified that at the meeting he promised only to discuss the matter with Salazar. Leff further testified that in the first telephone call with Frane he told her that Salazar would "pursue the issue as the Union had requested"; in the second he told Frane that Salazar had told him that the Receiver was unwilling to pay the Respondent for the costs of crediting the employees with vacation time that had accrued prior to April 1 and would, instead, pay money directly to the employees as compensation for their accrued vacation leave.[5] Leff denied telling Frane that the Receiver and the Respondent had made arrangements that would result in the Respondent's affording the employees time for accrued vacation, and he denied that Frane told him that the Union held the Respondent responsible for the vacation time or, as a less-desirable alternative, payments in lieu thereof. Leff testified that Frane made no such claim until after the Receiver

[3] The transcript, p. 70, L. 16, is corrected to change "it is not a substantial matter" to "it is not an insubstantial matter."

[4] Phillips testified that he and his attorney decided that the Receiver was not responsible for sick and personal leave benefits. The distinction that Phillips made was that the AFH collective-bargaining agreements provided for pay-out of accrued vacation pay upon an employee's termination, but they did not provide for any pay-out of sick or personal days' credit.

[5] Phillips corroborated this testimony by testifying that he reached the decision not to pay the value of the accrued vacation benefits to the Respondent out of fear that, if the Respondent for any reason failed to credit the employees, the Union might have brought an action against the Receiver.

had paid out some of the money that was due to the employees (apparently referring to the claim of the May 17 grievance). Leff further testified that there were no discussions of benefits that had accrued before April 1 during the negotiations that led to the August 11 collective-bargaining agreement.

On cross-examination Leff readily agreed that Salazar's March 23 representation that the Respondent would "pay existing wages and benefits" was made to avert a strike by the unit employees on March 24. Further on cross-examination, Leff was asked and he testified:

> Q. [By Mr. Creane:] It's your testimony that Ms. Frane said whatever the receiver wants to pay the workers, we'll accept that?
>
> A. No, that is not my testimony.
>
> Q. What did you say?
>
> A. My testimony was — is that Ms. Frane's preference was that the receiver pay Solomon for the time, and time be carried on the books. Her second choice which was acceptable, but not what she wanted and not what we wanted, was that the receiver pay out the employees, period. There was no discussion about [what would happen] if they don't pay the right amount. That was not discussed.

The Respondent, however, contends that Frane consented to accept whatever the Receiver paid the employees in lieu of accrued vacation time, if not the other accrued benefits.

Analysis and Conclusions

The Supreme Court has held that, even if a predecessor had recognized a labor organization as the collective-bargaining representative of its employees, and even if the predecessor was a party to a collective-bargaining agreement with such a labor organization, a successor employer is ordinarily free to set the initial terms upon which it will hire the employees of the predecessor since the continued majority status of the bargaining representative of the predecessor's employees is not evident until the successor has hired a full complement of employees. However, the Court has also recognized that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The Board has interpreted this caveat to be restricted to "circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer ... has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, 209 NLRB 194 (1974).

Atrium Plaza Health Care Center, 317 NLRB 606 (1995), which follows *Burns* and its progeny, is a case that is strikingly similar to this one. The respondent in *Atrium Plaza* (also a Hartford nursing home) was a successor that signed a collective-bargaining agreement with the Union.[6] That agreement provided that the terms of an expired contract between the Union and Atrium's predecessor (also a Connecticut receiver) would "remain in effect" except as thereafter modified. As in this case, the Union's contract with the predecessor had provided vacation and sick leave benefits based on seniority. (A personal leave benefit was not mentioned in *Atrium Plaza*.) Rather than abide by its contractual commitment to continue the vacation and sick leave benefits, however, the respondent unilaterally changed the seniority dates of the unit employees from their dates of hire by the predecessor to the date that the Respondent became the successor. The action had the effect of divesting the employees of vacation and sick leave credit that had accrued before the change in ownership. The administrative law judge found that the contractual provision that the predecessor's contract was to "remain in effect" was a contractual provision that "contemplates an uninterrupted continuance of the agreement's terms," including vacation and sick leave. The Board concurred, finding that, although under *Burns* the respondent in *Atrium Plaza* arguably could have unilaterally set the unit employees terms and conditions of employment,

> [T]he Respondent here consulted with the Union instead of unilaterally fixing initial terms, and it negotiated a bargaining agreement governing employees' terms and conditions of employment. It is axiomatic that, once a bargaining agreement is executed, the terms of that agreement, as well as any other established conditions of employment that may have existed, may not thereafter be altered unilaterally. The Respondent, however, did precisely that, altering unilaterally each employee's existing anniversary date.

The Board therefore agreed that the respondent had acted unilaterally, and in violation of Section 8(a)(5) and (1), by changing the employees' seniority dates and thereby eliminating their accrued vacation and sick leave benefits; as the required remedy, the Board ordered restoration of the seniority and the benefits.

Salazar's written February 23 pledge to "pay existing wages and benefits in effect immediately prior to our purchase while good faith negotiations continue" was part of the bargain that the Respondent made to avert a strike that the Union had threatened to begin on February 24. The February 23 bargain between the Union and the Respondent here was no less a contract than was the bargain between the respondent and the Union in *Atrium Plaza.* At minimum, Salazar's February 23 pledge was conduct that actively "misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment" within *Spruce Up Corp.*, supra. Although the pledge expressly stated that benefits would be maintained "while good faith negotiations continue," it did not state that all "existing" benefits (such as accrued leave rights) would be eliminated after entry of a collective-bargaining agreement such as that which the Respondent and the Union reached on August 11. The employees' statutory

[6] *Atrium Plaza* involves not only the same issues and the same Union, it involves the same union representative, Frane.

rights to receive their accrued leave benefits from the Respondent therefore vested on February 24, the day that they accepted the Respondent's promise and declined to go on strike.

The employees' rights to their vested benefits, including their vested leave benefits, could not be divested without an effective waiver by their collective-bargaining representative. As has been held repeatedly by the Board and the courts, and as recently re-articulated by the Board in *Charles S. Wilson Memorial Hospital,* 331 NLRB No. 154 (2000):

> Waivers of statutory rights "are not to be lightly inferred, but instead must be 'clear and unmistakable.'" *Georgia Power Co.*, 325 NLRB 420 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). "[E]ither the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the Union consciously yielded or clearly and unmistakably waived its interest in the matter." *Georgia Power Co.*, 325 NLRB at 420–421.

Leff acknowledged that the issue of previously accrued benefits was not even discussed during negotiations that led to the August 11 agreement. Moreover, by August 11, the Respondent had received Frane's May 17 grievance over the Respondent's "failure to recognize the vacation, sick, and personal time accruals of our members" in the three units. The Respondent, however, did not secure a withdrawal of that grievance during the negotiation of the August 11 contract, and the effect of Leff's testimony is that the Respondent did not even seek such withdrawal. Therefore, the Respondent cannot, and does not, contend that by entering the August 11 agreement the Union waived the rights of the employees to claim their accrued vacation, sick, and personal leave benefits. Instead, the Respondent argues that, even before the execution of the August 11 collective-bargaining agreement, on March 16, Frane consciously waived the employees' statutory right to claim their accrued leave benefits.

Assuming that Frane's March 16 conduct theoretically could have been a clear and unmistakable waiver of the employees' rights that had vested on February 24, I would nevertheless find that no such waiver occurred. On brief (p. 11) the Respondent argues that on March 16 "[T]he parties addressed accrued time and agreed that the employees would be cashed out by the Receiver, even though the Union preferred to have the time [carried] over. Attendant to this agreement, the Receiver did cash out the employees."[7] This statement makes two representations, both of which are false: (1) Even Leff did not testify that Frane agreed that the Receiver "would" cash out the employees. At most, Leff testified that Frane told him that a payout by the Receiver would be "acceptable." (2) The Receiver did not cash out the employees. Although the Respondent has all relevant employee records, it does not dispute Frane's testimony that the payments that the Union received from the Receiver as the employees' accrued *vacation* pay was only a small fraction of what the employees' *total* accrued leave (including sick and personal leave) was worth.

[7] Transcript citations (of only Frane's testimony) are omitted.

I do not believe Frane's testimony that in March Leff made a "commitment" (either during or after the March 16 meeting) that the Respondent would credit the employees with vacation time. I find that, at most, Leff told Frane and the employees that (as Frane testified at one point) he "expected" that the Receiver and the Respondent would be able to agree that the Receiver would pay the Respondent an amount of money sufficient to cover the costs involved, and, if so, the Respondent would honor the vacation credit that the employees had accrued prior to April 1. Also, I find that, as Leff testified, Frane and Leff did not discuss what would happen if the Receiver failed to pay the full amount due as the employees' vacation pay. The finding that partial payment was not even discussed, however, necessarily leads to the finding that both Frane and Leff thought, and spoke, only in terms of what would happen if the Receiver made full payment for the employees' vacation rights; in that regard, Frane agreed only not to attempt to "double dip" and seek leave time from the Respondent, as well. Therefore, Frane did not consciously yield any of the employees' rights to their accrued vacation benefits. Nor did Frane consciously yield on the issues of the employees' rights to sick and personal leave; Frane demanded sick leave credit for the employees, which demand Leff ignored, but personal leave was not even mentioned between Frane and Leff in March, as I find. Finally, even according to Leff's admission on cross-examination, Frane did not agree to accept whatever the Receiver might pay the employees as vacation benefits, or any other benefits, even if such payment were deficient. Therefore, it cannot be said that Frane engaged in conduct that clearly and unmistakably waived the employees' rights to their accrued leave benefits.

Accordingly, I find and conclude that, by failing to credit the unit employees with their vacation, sick and personal leave time that had accrued by April 1, the Respondent has violated Section 8(a)(5).[8]

CONCLUSIONS OF LAW

1. Respondent, Solomon Health Services, LLC, d/b/a Chelsea Place, Trinity Hill, and Wintonbury Health Center, of Hartford, Connecticut, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. New England Health Care Employees Union, District 1199, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. The employees who are employed by the Respondent at its Chelsea Place, Trinity Hill, and Wintonbury Health Center facilities in units that are described in the collective-bargaining

[8] The fact that, before entering the Settlement and Release Agreement, the Union also may have had claims against the Receiver is immaterial. See *Consolidated Coal Co.*, 307 NLRB 69, 72 (1992), wherein the Board states:

> The Respondent's contentions completely miss the thrust of this proceeding. This is a complaint by the Regional Director for the Board under the provisions of the National Labor Relations Act and it stands independent of any rights of the Charging Party to pursue other legal remedies. Respondent's plea could have some relevancy at the compliance stage in this proceeding, but it has no bearing at all on the question presented by the complaint which is directed at the issue of whether Respondent violated the Act [as alleged in the complaint].

agreement between the Respondent and the Union effective from June 8, 1999, to March 15, 2001, constitute units that are appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union has been at all material times, and is within the meaning of Section 9(a) of the Act, the exclusive bargaining representative of the employees in the above-described collective-bargaining units for the purposes of collective bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment.

5. Since April 1, 1999, and continuing to date, the Union has requested, and is requesting, the Respondent to recognize and bargain collectively with it as the exclusive representative of employees in the above-described bargaining units with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

6. Since April 1, 1999, and continuing to date, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by unilaterally, without notice to or consultation with the Union, failing and refusing to credit the unit employees with all of their unused vacation, sick and personal leave time that accrued prior to April 1, 1999.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent, in violation of Section 8(a)(5) and (1) of the Act, unilaterally failed and refused to credit the unit employees with all of their unused vacation, sick and personal leave time that accrued prior to April 1, I shall recommend that the Respondent be ordered to cease and desist from making unilateral changes in the vacation, sick and personal leave rights of the said employees, or making unilateral changes in any other terms and conditions of employment of the said employees, and I shall recommend that the Respondent make whole the said employees for any loss of pay or other benefits they may have suffered as a result of the Respondent's unfair labor practices in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). At the compliance stage, the Respondent will be entitled to credit for all payments that were made by the Receiver in partial satisfaction for the unit employees' claims for leave time that accrued prior to April 1, 1999.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Solomon Health Services, LLC, d/b/a Chelsea Place, Trinity Hill, and Wintonbury Health Center, of Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the vacation, sick, or personal leave time rights of the unit employees, or changing any other term or condition of employment of the said employees, without prior notice to and consultation with the Union.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Credit the unit employees with all of their unused vacation, sick and personal leave time that accrued prior to April 1, 1999.

(b) Immediately make the unit employees whole, with interest, for any loss of pay or other benefits that they may have suffered as a result of the Respondent's unilateral failures and refusals to credit them with all of their vacation, sick, and personal leave time that accrued prior to April 1, 1999.

(c) Within 14 days after service by the Region, post at its Hartford, Connecticut, facilities copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 Respondent 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 Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 1999, the date of the first unfair labor practice found herein.

(c) 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 that the Respondent has taken to comply.

Dated at Washington, D.C. November 21, 2000

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[9] 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.

[10] 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 Judgement Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

The National Labor Relations Board (the Board) has found that we violated the National Labor Relations Act (the Act) and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT, without prior notice to and consultation with New England Health Care Employees Union, District 1199, AFL–CIO (the Union), change your vacation, sick, or personal leave rights, or any other of your terms or conditions of employment, while you are employed in collective-bargaining units at our Chelsea Place, Trinity Hill, or Wintonbury Health Center facilities, as those units are described in our collective-bargaining agreement with the Union which is effective from June 8, 1999, to March 15, 2001.

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

WE WILL credit our employees who are employed in the above-described collective-bargaining units with all unused vacation, sick and personal leave time that accrued prior to April 1, 1999.

WE WILL make whole, with interest, our employees employed in the above-described collective-bargaining units for our failures and refusals since April 1, 1999, to credit them with all vacation, sick and personal leave time that accrued prior to that date.

SOLOMON HEALTH SERVICES, LLC D/B/A CHELSEA PLACE, TRINITY HILL, AND WINTONBURY HEALTH CENTER