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

REGENCY GRANDE NURSING &
REHABILITATION CENTER

and Case No. 22-CA-26231

SEIU 1199 NEW JERSEY HEALTH
CARE UNION

Lisa D. Pollack, Esq.,
for the General Counsel
Morris Tuchman, Esq., of New York, New York
for the Respondent
*William S. Massey, Esq., (Gladstein Reif &
Meginniss, LLP)* of New York, New York
for the Charging Party

SUPPLEMENTAL DECISION

Statement of the Case

MINDY E. LANDOW, Administrative Law Judge. This is a supplemental proceeding to determine the amounts of money due to employees of Regency Grande Nursing & Rehabilitation Center (Respondent) based upon the Board's decision and order issued on August 30, 2006 (347 NLRB 1143), subsequently enforced by the Court of Appeals on February 20, 2008.[1]

A hearing was held before me on December 17, 2008.[2] Briefs have been filed by the General Counsel and Respondent and have been carefully considered. Based upon the entire record I make the following:

I. Findings of Fact

A. The Board's Decision

The Board found that Respondent violated Section 8(a)(1)(2) and (3) of the Act by recognizing Local 300S, Production Service & Sales District Council a/w United Food and Commercial Workers International Union (Local 300S) as the exclusive collective-bargaining representative of its employees and by entering into, maintaining and enforcing a collective bargaining agreement containing union-security and dues check-off provisions with Local 300S at a time when Local 300S did not represent a majority of employees in the following unit:

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[1] 265 Fed. Appx. 74 (3rd Cir. 2008).

[2] Unless otherwise stated, all dates herein refer to 2008.

> All full time and regular part time service employees, maintenance employees and LPN's employed by Respondent at its Dover, New Jersey facility, but excluding all officers, managerial and professional employees, confidential employees, temporary employees, all other employees, guards and supervisors as defined in the National Labor Relations Act.

The Board ordered that Respondent reimburse former and present unit employees, with interest, for fees and moneys deducted pursuant to the union-security and dues-checkoff clauses of the contract, providing, however, that those employees who voluntarily joined and became members of Local 300S prior to January 8, 2004 are not entitled to reimbursement of such dues and fees. 347 NLRB 1143 fn. 4; 1144 (citing *Dairyland USA Corp*., 347 NLRB 310 (2006); *Elmhurst Care Center*, 345 NLRB 1167 (2005)).

B. The Compliance Specification and Respondent's Answers Thereto

On September 25, the Regional Director for Region 22 issued a compliance specification and notice of hearing alleging amounts of reimbursement due to approximately 218 claimants in the amount of $ 74,392.71, plus interest.[3] The reimbursement period began on January 8, 2004,[4] the date Respondent entered into the collective-bargaining agreement with Local 300S and terminated on March 31, 2008, the date Respondent ceased deducting union dues and initiation fees from the paychecks of bargaining unit members.

After an extension of time to file its answer due to service on an incorrect address, Respondent filed its answer on October 13. The answer admitted certain paragraphs of the compliance specification and contained general denials concerning others, in particular paragraphs 5 and 6.[5] The answer further raised the following affirmative defense:

> The Board's Order provides that reimbursement is not due for employees who joined Local 300S before January 4, 2004, Respondent will show that 68 employees signed membership cards for Local 300S before January 4, 2008.[6]

On October 24, Counsel for the General Counsel notified Respondent that inasmuch as the answer filed neither stated with specificity those 68 employees referred to in its affirmative defense nor provided alternate computations, its answer was insufficient. Respondent was granted additional time to file an amended answer. Respondent then submitted a letter, dated October 28, providing, in pertinent part, as follows:

> In amplification of our previously filed answer to the compliance specification, please be advised that we agree that $20,070 (or 19,980) of the specification is "due." Since the

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[3] As will be discussed below, certain individual claimants are listed more than once, under different names. The recommended order herein will consolidate the claims as is appropriate.

[4] The compliance specification sets the date as January 4, 2004. Under all the circumstances, I have concluded that this is an inadvertent typographical error.

[5] Paragraph 5 avers that each discriminatee's gross backpay calculations are reflected alphabetically on a summary worksheet attached to the specification and paragraph 6 contains a summary list of employees due reimbursements and the total amounts owed.

[6] Again, I find that Respondent's answer contains inadvertent typographical errors regarding the relevant date.

> Board provided no dues reimbursement for employees who had signed up with Local 300S before January 2004 and since a number of employees (see below) had dues deducted in 2005 and thereafter, we would agree that they likely did not sign cards for Local 300S before January 2004.
>
> However, we intend to show that as many as 68 employees signed cards for Local 300S before January 2004 and therefore do not agree that employees who had dues deducted in 2004 and thereafter should receive reimbursement. We intend to subpoena Local 300S to produce the cards signed by employees before January 2004. . . .
>
> The employees who we acknowledge are due reimbursement are: Abril, Acevedo, Antunez, Appel, Agron, Arias (Darley and Javier), Arellano, Artigas, Baker, Bell, Best (Douglas and Kathy), Bonnell, Buitrago, Caamano, Cano, Carreon, Catania, Chavis, Chavis, Cochran, Cortes, Delgado, Duque (Alberto and Andria), Dale, Escobedo, Estrada, Estudillo (Estrella), Fitzpatrick, Florez, Forrest, Garderes, Giraldo, Gomez, Grames, Guida, Gutierrez, Hernandez, Hickenbottom (Tyreese), Hunter, Jimenez, Kennedy, Laboy, Lascano, Lewis, Lopez (Carolina, Eduardo and Navih), Maidana, Mantilla, Masson, McLean, Meirelles, Molena (if she did not seek reimbursement under another name for 2004), Montoya (Ana), Moreira, Munoz (Flor de Maria and Jennifer), Navarro (Lino, Maria E. and Nino), Orbes, Orihuela, Orozco, Ouldes (Dominique), Palomino, Posse, Ritzie, Riviera, Roberts (Christine), Rodriguez, Rojas (Marianela), Ruendes, Ruiz (Morocho), Saavedra, Salazar, Sanchez (Betty), Silva, Soto (Justin and Maria), Stuber, Suarez, Taylor, Torres, Toussaint, Trujillo, Uddin, Vergera, Villegas, Wayside, Zabala, Zapata, Zorilla.

The General Counsel accepted the October 28 letter as an amended answer.

C. Relevant Testimony at the Underlying Proceeding

As is more fully set forth in Judge Davis' opinion in the underlying case, James Robinson, who in 2003 was the president of Local 300S, testified that the union had obtained a total of 68 signed authorization cards from Respondent's employees during the period from February to April 2003. During that period, only three or four signed cards were obtained in person at the facility; the remainder had been mailed to Local 300S. Robinson testified that he had been informed that there were approximately 120 employees in the unit, and on May 5, 2003, he wrote to Respondent, advising that Local 300S represented a majority of employees. On May 21, 2003, the cards were presented to an arbitrator who compared the signatures on the cards with W-4 forms supplied by Respondent. The arbitrator found that that Local 300S had demonstrated its majority status, and Respondent recognized Local 300S on the following day. Robinson further testified that, in about late-November 2003, he threw the authorization cards signed by Respondent's employees away inasmuch as a six-month period of time had elapsed and he was advised they were no longer needed. Robinson could recall the name of only one employee who had signed a card.[7]

In contrast to Robinson's testimony, evidence was received from 81 unit employees who

[7] Robinson further testified that, after he learned of the charge in the underlying case, he did not attempt to have any employees verify that they had signed cards on or before May 21, 2003. In addition he had not retained copies of the cards, a list of the card signers or their addresses, notes showing which employees were contacted who supported the union or those who may have been helpful in organizing and representing the workers.

were employed on May 22, 2003, when Respondent recognized Local 300S. In the underlying proceeding Judge Davis credited the testimony of these employees and, in particular relied upon the testimony of 74 (out of a unit of approximately 117 employees) who affirmatively stated that they did not sign a card authorizing Local 300S to represent them before it was recognized, "or indeed at any time before January 2004." [8] 347 NLRB at 1147. In addition, 38 employees testified that they were unaware of the presence of Local 300S prior to January 2004. Further, 27 employees, some of whom were the same as those who testified that they were unaware of Local 300S, stated that they did not see any union organizers outside the building soliciting membership in a union and 28 employees stated that they did not recall seeing any such people. Twenty workers heard no conversations in Respondent's facility about a union trying to organize employees at the time, and 15 could not recall any such conversations.

Judge Davis concluded that the General Counsel had made a prima facie showing that Local 300S did not represent a majority of employees at the time it was recognized by Respondent on May 22, 2003. The judge further found that the Respondent had not met its burden of proving the majority status of Local 300S. 347 NLRB at 1154. In so finding, Judge Davis noted that Robinson never inquired of the Respondent the size of the unit to that he could test whether the cards he testified to receiving constituted a majority of the unit. The judge further noted that the arbitrator who certified Local 300S as representing a majority did not identify in his award the number of cards he received, the number of employees in the unit or which categories of employees were encompassed in the unit. 347 NLRB 1153.

D. The Instant Hearing

At the inception of the instant hearing, the parties entered into a stipulation that that the employees listed and referred to in paragraphs 5 and 6 of the compliance specification were employed by Respondent during the relevant period between January 8, 2004 and March 31, 2008. In addition, Respondent stipulated that the "gross pay figures as stated in paragraphs 5 and 6 of the [compliance specification] are accurate and correctly calculated." Respondent reserved its right; however, to contest that employees named in paragraphs 5 and 6 of the compliance specification were due to receive reimbursement.

Neither the General Counsel nor the Charging Party presented witnesses at the hearing. General Counsel took the position that, based upon the stipulations which had been entered into by the parties, as described above, no witnesses were necessary. Respondent called one witness, now former Local 300S President Robinson.[9] Robinson had received a subpoena duces tecum from Respondent seeking production of authorization cards in his possession signed by employees of Respondent. Robinson asserted at the compliance hearing, as he did in the underlying case, that he did not have possession of such cards. Robinson further testified that Respondent had never had access to the cards in question. Robinson offered no testimony regarding whether any other employee, other than those whose cards had been disposed of, had joined the Union after May 22, 2003 and prior to January 8, 2004.

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[8] Two other employees stated that they could not recall signing a card for Local 300S prior to its recognition. Five employees who testified were not asked directly whether they had signed a card for Local 300S. One employee, Aida Basualto, stated that she had in fact signed a card, but the judge found it was unclear whether the card had been signed prior to the date of recognition. The General Counsel is not seeking remuneration for this employee.

[9] At the time of his testimony in this hearing, Robinson was no longer president of Local 300S. The record does not establish when he ceased serving in this capacity.

Counsel for Respondent then proffered certain testimony going to an issue, first raised at the hearing, of whether the reimbursement remedy sought by the General Counsel was unduly burdensome. I accepted Robinson's testimony, over the objections of General Counsel and the Charging Party, in the form of an offer of proof. In this regard, Robinson further testified that during the time he was president he was familiar with the finances of Local 300S, but that now his understanding of the union's finances was "minimal." He then testified that if a judgment were to be rendered against the union for approximately $100,000 it would bankrupt the union.

Respondent presented no further witnesses or evidence in support of its case. At the close of Respondent's case, Counsel for the General Counsel submitted a Motion for Summary Judgment, which I denied by order dated December 23.[10]

E. The Contentions of the Parties

Respondent contends that, inasmuch as the Board's order requires reimbursement for dues only to those employees who had not signed cards for Local 300S prior to January 2004, it is incumbent on the General Counsel to establish eligibility for reimbursement. Thus, Respondent asserts that the General Counsel bears the burden of showing that those employees that it seeks reimbursement for did not sign membership cards for Local 300S prior to January 8, 2004. Respondent asserts that the General Counsel presented no evidence that reflected on the eligibility of such employees in this proceeding, and, moreover, that the evidence adduced in the underlying case is insufficient for me to conclude that such employees are eligible for reimbursement.

Respondent now seems to have retreated from its apparent concession, as set forth in its amended answer, that certain employees, in particular, those who "had dues deducted in 2005 and thereafter" are owed reimbursement of dues and fees. Respondent argues in its brief as follows:

> The letter sent to amplify the answer in this case, dated October 28, 2008, conceded that the [General Counsel] did not have to offer evidence that employees who first came to work at [Respondent] after the '04 date did not sign with [Local 300S] *before* they came to work. It did not concede liability to pay. (It noted the amount "due" with word "due" in quotes.)

As Respondent currently asserts, there are three categories of employees at issue here: (1) employees who came to work after January 8, 2004; (2) employees who testified in the underlying proceeding that they had not signed an authorization card for Local 300S prior to the date of recognition and (3) "employees that a claim is being made for but which there is no evidence about their underlying eligibility for reimbursement at all."

Respondent further contends that due to "changed circumstances" liability as to the first two groups of employees should be extinguished on the basis that such liability would be "unduly burdensome." With regard to the third category of employees, Respondent contends

[10] In that ruling I stated that "[t]he judge considered no evidence and made no specific finding regarding whether any other employee may have voluntarily signed a card for or joined Local 300S prior to January 4, 2004. . . " In addition to the obvious typographical error, I was incorrect insofar as such a statement implies that Judge Davis made no finding regarding whether the employee witnesses had signed cards prior to January 2004. I hereby correct that error.

that there is no liability because the General Counsel has not met its burden of establishing that such employees are, in fact, eligible for reimbursement.

The General Counsel, to the contrary, argues that Respondent has the burden of establishing its affirmative defense that 68 employees were not entitled to back pay because they had voluntarily signed cards for Local 300S prior to January 8, 2004, and that Respondent has the burden to establish with specificity any amounts it claims would mitigate back pay liability.[11] General Counsel further argues that Respondent is merely attempting to relitigate issues raised in the underlying unfair labor practice proceeding. The General Counsel additionally contends that Respondent's argument that changed circumstances have rendered the remedy sought herein unduly burdensome is irrelevant.

II. Analysis and Conclusions

A. The Burden of Proof

Here, it is not disputed that the employees named in the compliance specification were, in fact, employed by Respondent during the relevant period: that is, between the dates of January 8, 2004 and March 31, 2008. Moreover, it is not disputed that the method by which the reimbursement amounts were calculated is an accurate one. The General Counsel and the Respondent each contend that the other party has the burden of proof on the issue of whether any of the employees listed in the compliance specification voluntarily joined Local 300S prior to January 8, 2004, rendering them ineligible for reimbursement.

Respondent argues that the testimony of those employees who testified in the underlying proceeding cannot be relied upon inasmuch as it is not evidence presented in the instant proceeding and, further, that there is no evidence in the record that other employees named in the compliance specification had not voluntarily joined the Union prior to January 2004. The General Counsel asserts, to the contrary, that it is well-settled that the burden of proof is upon a respondent to establish affirmative defenses that mitigate its liability. General Counsel further argues that a respondent carries the burden of establishing with specificity any amounts it claims would mitigate liability.

As an initial matter, for the purposes of this proceeding, I take administrative notice of and rely upon Judge Davis' findings as regards the testimony of those employees who testified in the underlying case about whether they had signed cards for Local 300S either prior to recognition or January 2004. [12] See e.g. *Stark Electric, Inc*., 327 NLRB 518, 518 fn. 1 (1999). Thus, I find that of a unit of approximately 117 employees, at least 74 employees did not voluntarily join Local 300S prior to January 8, 2004. In agreement with the General Counsel, I find that this was an issue, litigated in the underlying case, which may not be relitigated here. See e.g. *Convergence Communications, Inc*. 342 NLRB 918, 919 (2004); *Paolicelli*, 335 NLRB

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[11] In support of these contentions, the General Counsel relies upon *Atlantic Limousine*, 328 NLRB 257, 258 (1999); *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986) and *Ryder System, Inc*. 302 NLRB 6087 (1991). These cases involve situations where employees are owed backpay and stand generally for the proposition that once the General Counsel has shown the gross amounts of backpay due, the respondent bears the burden of establishing those facts which would mitigate its liability.

[12] Although, in making such a finding, Judge Davis did not specify the precise date the contract was entered into, i.e. January 8, I conclude that is what he intended. If there had been some variance in the proof on this issue, I find that Judge Davis, who the Third Circuit noted "assiduously laid out the evidence," would have discussed such a discrepancy.

881, 883 (2001)(citing *Arostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1617 (2001). I further find, contrary to the assertions contained in Respondent's brief, that the amended answer filed on October 28 constitutes an admission, unamended by any subsequent stipulation, that approximately 94 employees named in the compliance specification, who had dues deducted beginning in 2005 and thereafter, are due reimbursement. Nevertheless, even if I were to find this not to be the case, and were to accept Respondent's contention that its amended answer somehow reserved its right to contest reimbursement for all named employees, for the reasons discussed below, I find that reimbursement is due to those employees named in the compliance specification, as amended at the hearing.

As a general matter, the General Counsel ultimately bears the burden of proof in a compliance case. See e.g. *Triple A Fire Protection*, 353 NLRB No. 88 (2009). Here, I find that the stipulations entered into by the parties as described above, are sufficient for the General Counsel to meet its initial burden of establishing that the amounts sought for employees are accurate. Thus, the record establishes that the employees named in the compliance specification were employed by the Respondent during the relevant period for purposes of computing their reimbursement, and that the figures set forth are accurate calculations of monies which would be due to employees pursuant to the Board's Order which provides that Respondent be directed to:

> Reimburse, with interest, all of its former and present unit employees for fees and moneys deducted from their back pay pursuant to the union-security and dues-checkoff clauses of the contract dated January 8, 2004. However, reimbursement does not extend to those employees who voluntarily joined and became members of Local 300S prior to January 8, 2004.

This language echoes that which is contained in numerous cases where the Board has held that reimbursement is not available to those employees who "voluntarily" joined a union prior to the effective date of an unlawful contract. See e.g. *Control Services*, 319 NLRB 1195, 1196 (1995); *Katz's Deli*, 316 NLRB 318, 334 (1995) enfd. in pert. part 80 F.3d 755 (2d Cir. 1996); *Polyclinic Medical Center*, 315 NLRB 1257 (1995) enfd. 79 F.3d 139 (D.C. Cir 1996); *Cascade General*, 303 NLRB 656, 657 fn. 14 (1991), enfd. 9 F.3d 731 (4th Cir. 1993). [13] In my view, such language contemplates that the proof to be adduced at any subsequent compliance proceeding would be in the form of mitigation of Respondent's liability. There is no clear suggestion in such cases that the General Counsel would be obliged to prove the negative, i.e., that individual employees had *not* voluntarily joined the unlawfully recognized union, to render them eligible for a reimbursement remedy.

The issue of which party bears the burden of proof on such matters at the compliance stage was more fully explicated in *Freeman Decorating Co.*, 336 NLRB 1 (2001), enf. denied on other grounds 334 F.3d 27 (D.C. Cir. 2003). In that case, it was held that the respondent employers had unlawfully withdrawn recognition from a union following the expiration of their

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[13] In *Local 60 Carpenters v. NLRB*, 365 U.S. 651 (1961), the Court reversed the Board's award of reimbursement of dues and fees where the union and the company enforced and maintained an illegal closed-shop clause. The Court noted that there was no evidence that any employee was coerced to join or to remain a member of the union and that; in fact, all affected employees were already union members. In such circumstances, the Court concluded that the Boards' order was punitive. Based upon this decision, and its reasoning, the Board began to except from its reimbursement remedy those employees who were not coerced into joining a union, e.g. those who "voluntarily" joined or supported an unlawfully assisted union, prior to the effective date of an unlawful contract.

collective-bargaining agreement because the union had previously obtained 9(a) status prior to the expiration of the contract. The Board majority found that the employers and another union had violated Section 8(a)(2) and 8(b)(1)(A) of the Act by entering into a collective bargaining agreement. Part of the remedy sought by the General Counsel involved the disgorgement of monies paid by employees and the Board agreed, as follows:

> We find merit in the General Counsel's exceptions seeking disgorgement of dues, fees and contributions made by or on behalf of employees [performing work for respondent employers falling within the respondent union's jurisdiction] to the extent that such payments are not shown by the Respondent Employers to have been noncoercive. We defer this issue to the compliance stage. [14]

336 NLRB at 14 (citing *Polyclinic Medical Center*, supra at 1257).

Thus, in that instance the Board stated that, at the compliance stage, it would be the Respondent's burden to adduce evidence of noncoercion. Similarly, here, I find it appropriate to assign the burden of proof on the issue of voluntariness to the Respondent.

Respondent claims a particular disability in this regard inasmuch as the cards which were allegedly obtained by Local 300S were disposed of and unavailable at the hearing. It is also the case that the record here establishes that Respondent did not have access to the authorization cards in question. Nevertheless, it is a basic tenet of Board law that an employer extends voluntary recognition to a union at its own peril. *International Ladies' Garment Workers' Union, AFL-CIO (Bernhard-Altman Texas Corp.) v. NLRB,* 366 U.S. 731 (1961). In particular, an employer who relies upon authorization cards to support a claim of majority status bears the risk that such cards may have a disability which would preclude a finding that a valid majority existed. In such situations an employer is not exonerated from its conduct in recognizing a minority union.[15] In a similar vein, it stands to follow that such a party would not be relieved from its subsequent liability in a compliance proceeding based upon an inability to come forward with valid cards or other evidence to support a claim of mitigation. Moreover, it is well-established that when ambiguities or uncertainties exist in compliance proceedings, doubts should be resolved in favor of the wronged party rather than the wrongdoer, see e.g. *Paper Moon Milano*, 318 NLRB 962, 963 (1995), *United Aircraft Corp*., 204 NLRB 1068 (1973).

I additionally note that while Respondent has argued that the General Counsel failed to call witnesses to confirm that they had not signed cards, the converse is also true: Respondent could have availed itself of an opportunity at the hearing to establish mitigation through testimonial evidence. In this regard, Respondent was in a position to readily identify those employees who were employed during the relevant period, and has presented no evidence that it unsuccessfully attempted to do so or that Respondent would have been unable to contact them to testify in this proceeding. Nor did Respondent seek to adduce testimony from Robinson about whether any employee, other than those whose cards had been disposed of, had voluntarily joined the Union prior to January 8, 2004. Thus, Respondent failed to avail itself of the opportunity to present relevant evidence going to the issue of whether employees had voluntarily joined the Union prior to the effective date of the contract.

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[14] The Board's Order reiterated this burden allocation and required the respondents to: "[j]ointly and severally disgorge all dues, fees and benefit contributions made by or on behalf of employees . . . to the extent that such payments are not shown by the Respondent to have been noncoercive." 336 NLRB at 16.

[15] See generally *Le Marquis Hotel*, 340 NLRB 485, 492 (2003) and cases cited therein.

Based upon the foregoing, I find that Respondent has failed to meet its burden of establishing that any employee named in the compliance specification voluntarily joined and became a member of Local 300S prior to January 8, 2004.

B. The Claim that an Order Requiring Reimbursement of Employees is "Unduly Burdensome"

At the hearing, and in its post-hearing brief, Respondent claimed that it would be unduly burdensome to assess responsibility for the dues reimbursement to Respondent alone. In support of this contention, Respondent argues that there was never any finding in the underlying case that Respondent coerced employees to sign cards for Local 300S, nor was there any dispute that the arbitrator had concluded that that union represented a majority of employees. Respondent further argues that it was Local 300S who received the benefit of the dues, and that Respondent derived no benefit from them. Such arguments raise matters which have been previously considered by the Board and the Third Circuit and will be discussed in further detail below. With regard to the evidence developed in the instant case, Respondent relies upon Robinson's testimony that any attempt to seek subrogation from Local 300S by Respondent would bankrupt that union.

As an initial matter, Respondent failed to raise the claim that the Board's remedy is unduly burdensome, tantamount to an affirmative defense, in its answer to the compliance specification.[16] At the hearing, however, Respondent entered into stipulations with the General Counsel and the Charging Party which, in essence, amended its answer with regard to paragraphs 5 and 6 of the compliance specification and in the course of doing so specifically stated that it was reserving its right to contest that the amounts set forth in the compliance specification were due to employees named therein. Although a fair argument can be made that Respondent's amended answer, as again amended at hearing, does not meet the Board's requirements for specificity,[17] affording the Respondent the benefit of the doubt on this issue, I will consider the evidence proffered by the Respondent in support of its argument that "changed circumstances" have rendered the Board's remedy "unduly burdensome."

The only evidence adduced in support of this defense is Respondent's claimed inability to seek contribution from Local 300S. As an initial matter, there is no finding as against Local 300S, so the issue of that union's liability is not properly before me. Further, any purported right of subrogation held by Respondent is irrelevant to any issue in this case, where a Board Order, enforced by the Third Circuit, has found that Respondent is liable for the reimbursement of the employees involved herein.[18]

Moreover, there is no evidence to support the general claim of "changed circumstances"

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[16] Section 102.56(c) of the Board's Rules and Regulations sets forth the effect of a respondent's failure to answer or plead specifically and in detail to allegations in a compliance specification.

[17] In this regard I note that Respondent did not seek to amend that paragraph of its amended answer where it was acknowledged that certain employees were due reimbursement.

[18] Moreover, as to the asserted financial circumstances of Local 300S, as noted above, I note that Respondent has not supported its factual assertions with competent evidence. Robinson is no longer president of that union and there is no evidence to suggest that he is currently familiar with the state of its finances. In fact, he admitted that his current knowledge was "minimal." Parenthetically, I note that even if the Respondent and Local 300S had been held jointly and severally liable for the reimbursement remedy ordered herein, any purported inability of one respondent to pay its share does not relieve the obligation of any other party. See e.g. *Regional Import and Export Trucking Co., Inc.*, 323 NLRB 1206, 1207 (1997).

advanced by the Respondent. No evidence has been adduced to support the assertion that an order requiring reimbursement of employees for unlawfully withheld dues and fees would be "unduly burdensome" as that standard has been applied by the Board. In particular, Respondent has presented no evidence in this compliance proceeding regarding any limitation on its financial resources, threat to its continued viability, negative impact on employees or consumers or any other purported hardship which would be caused by compliance with the Board's order.

In this regard, as a matter of law, the authority relied upon by Respondent in support of its contentions is unpersuasive. In *United Association of Journeymen, etc. (Lummus Corp.),* 125 NLRB 1161 (1959), the respondent union contended by way of defense in an unfair labor practice proceeding that the application of the *Brown-Olds* remedy[19] sought by the General Counsel would be punitive. In support of this contention, the respondent, among other things, sought to make an offer of proof that because of the respondent union's limited financial resources, enforcement of a reimbursement order against it would jeopardize its existence and deprive its members of vested rights to certain benefits. The Board held that proof respecting the respondent's financial inability to comply with a reimbursement order should be reserved for consideration in the compliance stage of the proceeding.

Lummus Corp. appears to have been last cited in a published decision by Justice Harlan in his concurrence in *Local 60 Carpenters v. NLRB*, supra, and not for the point of law urged by the Respondent here.[20] Nevertheless, Respondent has drawn my attention to a January 31, 2007 unpublished Board order in *Elmhurst Care Center*, Case Nos. 20-CA-22674, 2-CB-10843. In the underlying case the Board had ordered the respondent employer and union to reimburse employees for union dues and initiation fees. In response to the respondents motions for reconsideration and rehearing, the Board, relying in part on *Lummus Corp*., stated that, consistent with the Board's policy on remedial matters, it would permit the parties to introduce, at the compliance stage of the proceeding, evidence relevant to whether the remedy ordered was unduly burdensome. Although I do not find that the Board's unpublished order has precedential value with respect to the instant case, I note that the issues involved there are similar to ones under consideration here. Thus, it appears from the order in *Elmhurst Care Cente*r that the Board remains amenable to allowing respondents to assert and litigate through relevant evidence claims that a reimbursement remedy would be unduly burdensome. In any event, however, I find *Lummus Corp*. does not compel the result sought by the Respondent inasmuch as I have concluded, as discussed above, that the evidence adduced by Respondent on this issue is irrelevant to any matter properly before me and that Respondent has otherwise failed to support its claims herein.

Lear Siegler, Inc., 295 NLRB 857, 861 (1989), also relied upon by Respondent, dealt with an order to restore a manufacturing operation that had been moved to another location

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[19] Prior to the Court's decision in *Carpenters Local 60*, discussed above, the Board required unions to reimburse employees for all dues and assessments received under unlawful union-security agreements. *Plumbers & Pipe Fitters Local 231 (Brown-Olds Plumbing & Heating Corp.)*, 115 NLRB 594 (1956). In *Carpenters Local 60*, the Court invalidated such a remedy as "punitive" and found that the Board erred in compelling the respondent union, under the so-called *Brown-Olds* rule to refund dues, assessments and work permit fees collected from employees who had been members of that union at the time they had been employed on the job in question.

[20] *Lummus Corp*. was cited by Justice Harlan as standing for the proposition that, at that time, Board law found an illegal closed shop or discriminatory hiring practices to create an irrebutable presumption of coercion. In the context of this case, I note that Justice Harlan characterized evidence that employees had voluntarily made dues or assessment payments as "defensive." 365 U.S. at 657.

because the employer did not want to deal with the Union. The administrative law judge ordered the respondent to reestablish and resume production of its operations as they had been prior to the unfair labor practices and to reinstate all discriminatorily laid-off unit employees. As a result of the respondent's exceptions to the judge's order, the Board directed that the employer be permitted to introduce evidence at the compliance hearing that the restoration remedy was unduly burdensome. In that case, the Board additionally announced that it would henceforth apply the "unduly burdensome" standard to any respondent challenging the appropriateness of such a restoration remedy. Notwithstanding the foregoing, I am mindful that this case was also cited by the Board in its unpublished January 31, 2007 order as has been described above. However, in my view this case is inapposite to the present circumstances where the sole remedy sought by the General Counsel is monetary, and, as noted above, there is no evidence to prove that such a remedy would be unduly burdensome, in any event.[21]

III. Conclusion

On these finding of fact and conclusions of law and on the entire record, I issue the following recommended[22]

SUPPLEMENTAL ORDER

It is hereby ordered that Respondent Regency Grande Nursing & Rehabilitation Center, and its officers, agents, successors and assigns, shall make whole those individuals named in the compliance specification, as amended herein and set forth below[23] plus interest as

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[21] As noted above, in its post-hearing brief Respondent has also argued that the remedy sought herein is unduly burdensome because there was never any finding in the underlying case that Respondent coerced employees to sign cards for Local 300S, that the arbitrator had concluded that that union represented a majority of employees, that Local 300S received the benefit of the dues, and that Respondent derived no benefit from them. Respondent has cited no case which stands for the proposition that such circumstances constitute an undue burden which would obviate the imposition of the Board's remedy, and I find that they do not. I additionally note that Respondent's contentions as set forth above echo arguments raised before the Board and the Third Circuit which have been duly considered and rejected. For example, Judge Davis, affirmed by the Board, found Respondent's defense that it honored the arbitrator's award in good faith to be unwarranted based upon the facts of the case as well as applicable Board law. Respondent then argued before the court that the Board erred in not deferring to the arbitrator's award. The court rejected that argument, finding that based upon the evidence adduced in the record, the Board did not abuse its discretion in declining to follow the arbitrator's decision. Respondent additionally argued to the Third Circuit that requiring it, but not Local 300S, to refund dues was tantamount to a penalty and not a proper make-whole relief. Although the Board had previously rejected this argument on the ground that it had not been timely raised in exceptions, the Third Circuit found that the Respondent's statement of exceptions was "minimally sufficient" to warrant its consideration of the remedy. The court found that the remedy ordered by the Board was proper inasmuch as it restored the status quo ante and did not exceed the Board's discretion. Thus, even if I were to find Respondent's arguments to be compelling, which I do not, such matters have been previously litigated in the underlying unfair labor practice proceeding. *Scepter Ingot Castings, Inc*., 341 NLRB 997 (2004) (citing *Fire Protection Systems Co*., 337 NLRB 141, 142 (2001)); *Triple A Fire Protection*, 353 NLRB No. 88, slip op. at 3 (citing *Convergence Communications, Inc*., 342 NLRB 918, 191 (2004)).

[22] 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.

[23] As noted above, pursuant to stipulation of the parties the compliance specification was amended

Continued

prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Employee Name	Grand Total
Abril, Jamie	190.00
Acevedo, Maria	290.00
Antunez, Isabel	30.00
Agrinsoni, Claudia	20.00
Aguado, Nora	140.00
Angel, Jaime	100.00
Appel, Ricardo	590.00
Agron, Lilibeth A.	20.00
Arias, Angie	120.00
Arias, Darley	50.00
Arias, Javier	170.00
Arellano, Elizabeth	100.00
Armstrong, Kelly	940.00
Artigas, Lucrecia	280.00
Artigas, Pablo	750.00
Atehortua, Diego	10.00
Augustine, Elma	280.00
Ayala, Nilsa	940.00
Baker, Dorothy	130.00
Balbuena, Carlos	940.00
Basulato, Aida	0.00
Bell, Kelly	170.00
Best, Jr., Douglas	170.00
Best, Kathy	0.00
Betancourth, Sylvia	200.00
Bojkovic, Hajrije	940.00
Bojkovic, Ilira	401.00
Bonnell, Janet	560.00
Buitrago, Diana	180.00
Caamano, Aida	60.00
Camacho, Ana	940.00
Canepa, Andrea	120.00
Cano, Victoria	140.00
Carmona, Maria	940.00
Carreon, Maria E	780.00
Castro, Francisco	940.00
Castro-Richards, Rosa	950.00
Catania, Noemi	140.00
Celentano, Ashley	100.00

as follows: claimant Maria Carrion (also listed as Maria Oulds) is owed a total sum of $780; claimant Lino Navarro (also listed as Nino Navarro) is owed a total sum of $510; claimant Rosita Fitzpatrick (also listed as Rosita Romero) is owed $940. In addition, General Counsel has made the uncontested claim that Fanny Maria Zapata (also listed as Fanny Marie Ruendes) is owed $750.

	Chavis, Fabiola	50.00
	Chavis, Cornell	670.00
	Cochran, Krystle L.	270.00
	Conklin, Minnie	100.00
5	Cornier, Inocencio	940.00
	Correa, Gricelda	100.00
	Cortes, Debora	100.00
	Crosby, Gwendolyn	940.00
	Cuellar, Jeison	160.00
10	Culleny, Marion	60.00
	Delgado, Roman J.	50.00
	Duque, Alberto	270.00
	Duque, Andrea	70.00
	Dale, Patti	100.00
15	Easton, Warren	940.00
	Enriquez, Brenda	950.00
	Escobedo Pro, Rames	50.00
	Estrada, Rosana E	240.00
	Estudillo, Cristal	920.00
20	Estudillo, Estrella	380.00
	Fauste, Jose Omar	800.00
	Ferreira, Ana Maria	940.00
	Ferreira, Mariela	0.00
	Figueroa, Elizabeth	20.00
25	Figueroa, Manuela Erika	920.00
	Finlayson, Alnora	100.00
	Fitzpatrick, Rosita	940.00
	Florez, Diana M.	170.00
	Forrest, Doreth	510.00
30	Foster, Katrina	30.00
	Francis, Dorie	60.00
	Franco, Alba	940.00
	Fudriai, Claudia	340.00
	Garcia, Elvira	940.00
35	Garcia, Raul	120.00
	Garderes, Virginia	170.00
	Garnder, Carole	940.00
	Gatling, Leatha	900.00
	Gibbons, Michael	940.00
40	Giraldo, Leidy	50.00
	Gomez, Natalia P	20.00
	Gonzalez, Jose A	120.00
	Gonzalez, Mauricio	200.00
	Grames, Charles	10.00
45	Groman, Nancy	60.00
	Guida, Silvia	630.00
	Gutierrez, Jennifer	310.00
	Hall, Jahmad	291.31
	Harvey, Norma	920.00
50	Hernandez, Leidi	90.00
	Hickenbottom, Kerry Ann	600.00

	Hickenbottom, Tyreese	170.00
	Hidalgo, Miguel	940.00
	Hunter, Barbara	510.00
	Hunter, Desmond	150.00
5	Jackson, Melouise	340.00
	Jasso, Cristina	160.00
	Jiminez, Dulce	170.00
	Kaur, Amarjeet	210.00
	Kaur, Kulwinder	180.00
10	Kennedy, Shannon	670.00
	Laboy, Alex Leoner	90.00
	Lasaga, Matias	340.00
	Lascano, Filomena	80.00
	Lewis, Sylvia	310.00
15	Lopez, Carolina	230.00
	Lopez, Eduardo	510.00
	Lopez, Navih	50.00
	Maidana, Valeria	80.00
	Mantilla, Arlyn	50.00
20	Martinez, Nubia	110.00
	Masini, Ana	40.00
	Massari, Anthony	40.00
	Masson, Jorge	510.00
	McClanahan, Grethel	260.00
25	McLean, Velma	20.00
	McCord, Robin	340.00
	Meikle, Michele	940.00
	Meirelles, Marcelo	70.00
	Mella, Paola	940.00
30	Mendez, Ruth	120.00
	Mendez, Sol M.	470.00
	Miraflores, Gelia	10.00
	Modafferi, Michelle	-60.00
	Mohamed, Swalaha	940.00
35	Molena Oyola, Isela* (Same)	90.00
	Moncaleano, Adela	850.00
	Montanez, Carmen	260.00
	Montenegro, Victoria	940.00
	Moraga, Juan	510.00
40	Muneton, Eliana	30.00
	Montoya, Ana	130.00
	Montoya, Claudia	40.00
	Moreira, Julio Cesar	90.00
	Munoz, Claudia	460.00
45	Munoz, Flor de Maria	30.00
	Munoz, Jennifer	130.00
	Myers, Amy	0.40
	Navarro, Lino	510.00
	Navarro, Maria E.	310.00
50	Newell, Joan	600.00
	Noel, Rita	940.00

	Orbes, Diana	270.00
	Orihuela, Ana M.	80.00
	Orozco, Diana	190.00
	Ortiz, Jasmin	80.00
5	Ospina, Ofelia	950.00
	Oulds, Dominique N.	230.00
	Palomba, Frieda	40.00
	Palomino, Greyssi	230.00
	Parks, Laureen Anne	600.00
10	Pasion, Juanito	180.00
	Pafez, Nestor E.	780.00
	Pedraza-Rodrigu, Samaris	100.00
	Phelan, Helen	860.00
	Pizano, Monserrat	50.00
15	Portilla, Gloria	40.00
	Posse, Cindy	120.00
	Richards, Joyce	940.00
	Ritzie, Omar Antony	150.00
	Riveria, Elvira	40.00
20	Roberts, Christine M.	80.00
	Roberts, Marion	160.00
	Rodriquez, Miquel Hernand	310.00
	Rohde, Kathy Patricia	920.00
	Rojas, Ivonne	360.00
25	Rojas, Marianela	490.00
	Rosario, Kimberly	90.00
	Ruiz Morocho, Yessica	160.00
	Ruiz, William	80.00
	Saavedra, Veronica	550.00
30	Sadick, Zahira	940.00
	Salazar, Melida	290.00
	Saldarriaga, Nathalia	40.00
	Sanchez, Betty	330.00
	Sanchez, Jose	940.00
35	Sanchez, Tecza	480.00
	Secola, Patricia	140.00
	Shann, Steven	360.00
	Siepierski, Karina	240.00
	Silva, Nancy B.	550.00
40	Silveira, Nestor	180.00
	Smith, Harry	940.00
	Soto, Justin	310.00
	Soto, Maria Lenor	310.00
	Stuber, Miriam	70.00
45	Studivant, Alnora	40.00
	Suarez, Gabiela	0.00
	Tavera, Elvira	900.00
	Taylor, Donna	70.00
	Terry, Mary	940.00
50	Thomas, Mattie	300.00
	Torres, Stephanie	190.00

Toussaint, Edythe M.	170.00
Toxqui, Jose	40.00
Trujillo, Wilfer	490.00
Tuballes, Amado Bart B	600.00
Uddin, Katijha	50.00
Valentin, Francisco	440.00
Vergara, Brenda	80.00
Villegas, Viviana	120.00
Walker, Mary Delores	940.00
Walling, Belinda	130.00
Wayside, Jessica	230.00
Waysome, Vivienne	940.00
Witto, Paola	760.00
Zabala, Liberato	50.00
Zapata, Fanny Marie	750.00
Zaretskie, Angela	40.00
Zelada, Flores R	370.00
Zorilla, Nancy	80.00
Total	**74,792.71**

Dated: May 28, 2009.

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Mindy E. Landow
Administrative Law Judge