

**Santa Cruz Convalescent Hospital, Inc., d/b/a Live Oak Skilled Care & Manor and Hospital and Health Care Workers Union, Local 250, Service Employees International Union, AFL-CIO.**  
Case 32-CA-9933

December 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

On August 9, 1989, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Acting General Counsel and Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's findings,<sup>1</sup> and conclusions and to adopt the recommended Order, as modified.

AMENDED REMEDY

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to timely notify the Union of its decision to transfer its Santa Cruz convalescent hospital to Live Oak Care Center, Inc. (LOCC), by failing to provide the Union with requested information, and by refusing the Union's requests to bargain over the effects of its transfer decision. To remedy these violations, the judge ordered the Respondent to cease and desist from engaging in its unlawful conduct, provide the Union with requested information, and engage in effects bargaining. Contrary to the Acting General Counsel's and Charging Party's requests, however, the judge did not additionally require the Respondent to provide unit employees with backpay as provided in *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968).<sup>2</sup> The judge found this backpay remedy unwarranted because he concluded that the unit employees had suffered no palpable loss as a result of the Respondent's unfair labor practices and that the Union would not have secured additional benefits had timely effects bargaining occurred.

The Acting General Counsel and Charging Party except, arguing that the judge erroneously found that em-

ployees did not suffer loss and that the Union would not have obtained benefits for employees through timely bargaining. Additionally, they contend that the *Transmarine* remedy should be imposed, regardless of loss, because otherwise the Board's order will be totally devoid of economic consequences for the Respondent.

For purposes of this case we need not decide whether the remedy providing for a minimum of 2 weeks' backpay in *Transmarine* is warranted for all effects bargaining violations, regardless of loss. We do, however, agree with the General Counsel and the Charging Party that backpay is appropriate here, because we find that the Union might have secured additional benefits for employees had the Respondent engaged in timely effects bargaining. Thus, the contract required the Respondent to provide the Union with advance notice of any decision to transfer the Santa Cruz facility,<sup>3</sup> and the Union demonstrated that it promptly would have sought effects bargaining over specific issues had this contractual requirement been met. Furthermore, as explained below, we do not agree with the judge's affirmative finding that the employees suffered no financial losses as a result of the transfer of ownership that might have been compensated for through timely bargaining with the Respondent.

The underlying facts are fully set forth in the judge's decision. Briefly, the 1987-1988 collective-bargaining agreement between the Respondent and the Union included a "successor clause" explicitly requiring the Respondent to (1) provide at least 30 days' advance, written notice of any decision to sell, lease, transfer, or assign the Santa Cruz facility; and (2) bargain over the effects of its decision. Under this provision, the Union was contractually ensured an opportunity to present its effects bargaining demands at a time when the Respondent was still in need of the unit employees' services, and before the "collective strength of the employees' bargaining unit had been dissipated." *Transmarine*, supra. Moreover, the contractual notice requirement afforded the Union the opportunity to engage in meaningful effects bargaining and, indeed, secure employee benefits, while some measure of balanced bargaining power remained.

On the record before us, it is clear that the Union would have expeditiously sought effects bargaining had the contractual notice requirement been satisfied. From the first rumors of a sale, the Union demonstrated a keen interest in, and quick response to, any indication that the Santa Cruz facility would be sold.

<sup>1</sup>No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) or that these unfair labor practice charges should not be deferred to the parties' contractual grievance-arbitration procedure.

<sup>2</sup>In *Transmarine*, the Board ordered an employer that had unlawfully refused to bargain over the effects of its plant closure decision to, inter alia, pay unit employees at their normal rate of pay beginning 5 days after the Board's decision until the first of four events: (1) an effects bargaining agreement was reached; (2) a bona fide bargaining impasse was reached; (3) the union failed to timely request or commence bargaining; or (4) the union failed to bargain in good faith. Id. The Board further specified that "in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ." Id.

<sup>3</sup>Because the Union had a contractual entitlement to this degree of advance notice, and because no exceptions have been taken to the finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to give notice in advance of the decision to transfer, we are not presented with the issue decided in *Los Angeles Soap Co.*, 300 NLRB 289 (1990), and *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990), concerning notice requirements for the purposes of bargaining over the effects of a sale.

When the Respondent encouraged it to settle a grievance in August 1988,<sup>4</sup> saying that “there may possibly be a prospective buyer for the facility,” the Union immediately pressed for more information. When the Respondent replied that no details were available, and that the Union would be notified when and if a sale occurred, the Union nonetheless asked the Respondent’s administrator if the sale rumors were true. Even after the administrator denied that any sale was planned, the Union made additional inquiries in late August or September. The Respondent refused to discuss the inquiries, stating that the Union would be notified of any transaction, as provided in the collective-bargaining agreement.<sup>5</sup> Finally, on October 3, when the Union belatedly learned of the transfer from LOCC, it immediately wrote the Respondent requesting detailed information and proposing prompt effects bargaining on a number of specific issues.

One issue which the Union promptly pursued was employee accrued leave benefits.<sup>6</sup> When the Union learned that LOCC had taken over the convalescent hospital, it immediately asked the Respondent whether employees had been paid for accumulated vacation leave, and requested bargaining over the “cash pay out and/or transfer of sick leave accrued.” Neither request was heeded. Nor was it clear that employees retained accrued leave benefits after the sale. Thus, when the Union asked the Respondent during the week of October 3 whether accrued vacation pay would be included in employees’ final paychecks, it was told it would not. Although the Respondent informed the Union that LOCC had agreed to assume its accrued leave liability, it did so on the basis of the September 30, “Management Agreement” which the Union knew made no mention of LOCC responsibility for accrued vacation pay. And, although LOCC assured the Union and employees that terms and conditions of employment would remain unchanged, except for a wage increase, it admittedly would not commit itself to assuming the Respondent’s accrued leave obligations. LOCC merely told employees that it would “recognize seniority and . . . pay vacation and sick pay to the extent that we would do it.” Likewise, LOCC informed the Union

that it was willing to make some accrued payments but would not assume the Respondent’s obligation because it did not know the extent of the liability.

The judge acknowledged that there was confusion over the accrued pay issue, but concluded that employees had suffered no loss because LOCC had entered into a “gentlemen’s agreement” to assume the Respondent’s accrued pay liability and because LOCC had honored all claims for accrued leave. We do not agree that these facts establish that no loss occurred.

First, the “gentlemen’s agreement,” which was never disclosed to the Union, was expressly premised on the Respondent’s assurances to LOCC that its accrued leave liability did not exceed a specific dollar figure. The Respondent’s actual obligation has not been established, however, and, for that reason, LOCC will not commit itself to the liability.<sup>7</sup> And, although the judge correctly noted that LOCC has honored accrued leave claims, approximately 9 months remained after the hearing for accrued leave requests to be made.<sup>8</sup> Therefore, it is not certain that employees’ accrued leave benefits remained the same under LOCC. Even assuming that they were unchanged, given the confusion over the accrued leave issue, and the Union’s demonstrated interest and diligence in pursuing this subject, it is likely that the Union would have pressed for bargaining over this issue. Moreover, armed with employee support and the bargaining strength available only in timely, effects bargaining, the Union indeed might have negotiated additional benefits for employees.

In addition to requesting bargaining on accrued leave on October 3, the Union made similar requests concerning, inter alia, severance pay,<sup>9</sup> pending griev-

<sup>7</sup> Repeated efforts to pinpoint the Respondent’s accrued leave liability have been unsuccessful. When the Union visited the Santa Cruz facility in November or December to review payroll records for accrued vacation and sick leave information, it abandoned its search after it was unable to locate the relevant information. When the Union later questioned LOCC about accrued leave in December and January 1989, LOCC said it did not know the extent of the Respondent’s liability. At the hearing, LOCC Owner Anderson testified that he has the Respondent’s leave records but, that they do not include accrued vacation and sick leave information. Finally, the individual who recorded leave information for the Respondent is not in LOCC’s employ.

<sup>8</sup> Under the contract, employees’ leave accumulated from their anniversary dates. Because, at the time of the hearing, only 3 months had elapsed since LOCC’s October 1 takeover of the Santa Cruz facility, a considerable portion of the year remained during which accrued leave claims potentially could be made.

<sup>9</sup> The judge found that the Union would not have pressed for severance pay in effects bargaining because no employee was terminated, no benefit was lost, and because the Union had not pursued a severance pay demand in a comparable bargaining situation. We cannot agree that this issue can be decided with any certainty. First, as discussed, supra, it is not clear that employees suffered no loss. In addition, the Union’s previous posture in bargaining is not determinative of what it would have sought in effects bargaining with the Respondent. For example, if the Union had believed it commanded sufficient leverage, in timely, effects bargaining with the Respondent it might have pressed for cash payments for employees. Indeed, the likelihood of that demand, and its possible success, had some foundation in this case. The Respondent had long operated the Santa Cruz facility at a loss and admittedly was very interested in transferring the facility. Rather than jeopardize a transaction to LOCC,

*Continued*

<sup>4</sup> All dates are in 1988 unless noted.

<sup>5</sup> Despite the Union’s repeated inquiries, the Respondent engaged in protracted negotiations to transfer the Santa Cruz facility to LOCC without notifying the Union of a prospective sale. It also affirmatively misled the Union, and attempted to prevent further inquiries, by representing that it would comply with the contractual notice requirements if a transaction occurred. Instead, the Respondent transferred the Santa Cruz facility to LOCC without affording the Union any notice or opportunity for meaningful bargaining. In these circumstances, it was the Respondent’s deception and lack of timely notice that prevented negotiations precisely at the time when they most likely would have resulted in an agreement on effects bargaining. *Royal Plating & Polishing Co.*, 160 NLRB 990, 997 (1966).

<sup>6</sup> Under the 1987–1988 contract, employees earned vacation and sick leave and could accrue leave within certain limits. Employees could maintain 20 days of earned sick leave at any time and use accumulated vacation pay in the year after it was earned. Employees who stopped working for the Respondent were entitled to cash payments for accrued vacation pay.

ances, and payment of “all wages and benefits due.” On the issue of grievances, the record establishes that the Union and the Respondent previously settled a grievance involving employee Jane Johnson. The settlement provided that disciplinary references would be removed from Johnson’s file and that Johnson would receive a cash payment. On November 8, in apparent response to the Union’s information request, the Respondent informed the Union that it had instructed LOCC to purge Johnson’s file. It is not clear whether LOCC did purge the file. Moreover, the Union asserts that Johnson has not been paid and the Respondent cannot establish otherwise. Under timely effects bargaining, the Johnson grievance, and any other outstanding grievances, might well have been satisfactorily resolved.

Finally, the Union claims that after it demanded information and effects bargaining, it learned that the Respondent may have required kitchen employees to work more than 40 hours a week without receiving overtime pay. The Union said it did not inform the Respondent of this claim because it needed the timecards and payroll records it requested on October 3 to evaluate the situation. Had the contractual notice requirement been satisfied, and the requested information timely provided, this situation likewise might have been resolved in effects bargaining.<sup>10</sup>

In sum, based on the particular facts in this case, including the contractual advance-notice requirement and the Union’s demonstrated diligence in promptly requesting information and bargaining on specific, unresolved issues, we find that the Union, indeed, might have secured employee benefits had timely, effects bargaining occurred. It is clear that the Respondent affirmatively misled the Union and withheld information concerning its decision to transfer its facility, thereby deterring the Union from bargaining over the effects of the transfer on the employees. *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 940 (9th Cir. 1967). Now, 2 years after the Respondent’s cessation of business, “the Union can hardly hope to obtain the same benefits from bargaining that might have helped ease

the Respondent might have granted employees severance pay or some other requested benefit.

<sup>10</sup> Although the judge acknowledged that the Union might want to bargain with the Respondent over the issues of grievance resolution and overtime claims, he stated that these issues were “unrelated to the takeover,” and “only loosely termable as ‘effects bargaining’ issues.” The judge said that because these issues turned on the underlying legal merits of the claims, and not on the give-and-take of negotiations, the *Transmarine* backpay remedy is not warranted. We disagree.

Unions reasonably may view effects bargaining as the forum for resolving any outstanding claims against employers. Particularly where, as here, the contract mandates notice well in advance of any transaction, unions logically might attempt to resolve remaining issues while some semblance of balanced bargaining power exists. They would also seek such resolutions in cases in which they would cease to be unit representatives after the transfer of ownership. That these issues, if unresolved in effects bargaining, may proceed through the contractual grievance procedure or another legal forum, and be resolved on their merits, does not warrant a different result.

the unit employees’ transition into their employment with their new employer had ‘effects’ bargaining taken place at the time required by law.” *Signal Communications*, 284 NLRB 423, 428 (1987). Under these circumstances, it is reasonable to require that “the employees whose statutory rights were invaded by reason of the Respondent’s unlawful . . . action, and who may have suffered losses in consequence thereof, be reimbursed for such losses until such time as the Respondent remedies its violation by doing what it should have done in the first place.” *Royal Plating & Polishing Co.*, 160 NLRB 990, 999 (1966), quoting *Winn-Dixie Stores*, 147 NLRB 788, 792 (1964), enfd. in relevant part 361 F.2d 512 (5th Cir. 1966). Accordingly, we find that the *Transmarine* backpay remedy is warranted in this case.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Santa Cruz Convalescent Hospital, Inc., d/b/a Live Oak Skilled Care & Manor, Santa Cruz, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following for paragraph 1.

“1. Cease and desist from

“(a) Failing or refusing to give timely notice to and bargaining with Hospital and Health Care Workers Union, Local 250, Service Employees International Union, AFL–CIO, as the exclusive representative of its employees in the appropriate unit set forth below, with respect to the effects on its unit employees of its decision to sell or otherwise transfer its interest in Live Oak Skilled Care & Manor. The appropriate unit is:

All full-time and regular part-time certified nursing assistants, cooks, nurses aides, housekeepers, janitors, laundry employees, kitchen helpers, activity aides, and maintenance employees employed by the Respondent at its Santa Cruz, California facility; excluding registered nurses, licensed vocational nurses, volunteer coordinators, training coordinators, clerical employees, administrative employees, watchmen, guards, and supervisors as defined in the Act.

“(b) Failing or refusing, on request, to furnish the Union with information relevant and necessary to the Union’s fulfillment of its functions as your exclusive collective-bargaining representative.

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

“(c) Pay limited backpay to the unit employees in the manner set forth in the amended remedy section of this decision.”

3. Substitute the attached notice for that of the administrative law judge.

#### APPENDIX

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

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

WE WILL NOT fail or refuse to give timely notice to and bargain with Hospital and Health Care Workers Union, Local 250, Service Employees International Union, AFL-CIO, as the exclusive representative of our employees in the appropriate unit set forth below, with respect to the effects on our unit employees of our decision to sell or otherwise transfer our interest in Live Oak Skilled Care & Manor. The appropriate unit is:

All full-time and regular part-time certified nursing assistants, cooks, nurses aides, housekeepers, janitors, laundry employees, kitchen helpers, activity aides, and maintenance employees employed at our Santa Cruz, California facility; excluding registered nurses, licensed vocational nurses, volunteer coordinators, training coordinators, clerical employees, administrative employees, watchmen, guards, and supervisors as defined in the Act.

WE WILL NOT fail or refuse, on request, to furnish the Union with information relevant and necessary to the Union's fulfillment of its function as your exclusive collective-bargaining representative.

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

WE WILL, on request, furnish the Union with information relevant and necessary to the Union's function as your exclusive collective-bargaining representative.

WE WILL, on request, meet and bargain collectively in good faith with the Union concerning the effects on unit employees of our decision to sell or otherwise transfer our interest in Live Oak Skilled Care & Manor and, if any understanding is reached, WE WILL embody it in a signed agreement.

WE WILL pay employees in the appropriate bargaining unit who were employed by us limited back-

pay, plus interest, as required by the National Labor Relations Board.

SANTA CRUZ CONVALESCENT HOSPITAL,  
INC., D/B/A LIVE OAK SKILLED CARE &  
MANOR

*Valerie Hardy-Mahoney, Esq.*, for the General Counsel.  
*Thomas Gosselin, Esq.* (trial) and *Stephen D. Pahl, Esq.* (brief) (*Tarkington, O'Connor & O'Neill*), of San Jose, California, for the Respondent.

*Paul D. Supton, Esq.* (brief only) (*Van Bourg, Weinberg, Roger & Rosenfeld*), of San Francisco, California, for the Charging Party Union.

#### DECISION

##### STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard this 8(a)(5) case in trial at Santa Cruz, California, on January 27, 1989. It arose when the above-named Union filed unfair labor practice charges against the above-named Respondent on October 13, 1988 (all dates are in 1988 unless I specify otherwise). After investigating those charges, the Regional Director for Region 32 issued a complaint and notice of hearing against Respondent on November 25.

The complaint alleges in substance that Respondent unlawfully failed and refused to bargain in good faith with the Union when, on September 30 Respondent “ceased operations and terminated employees” without giving “advance notice” to the Union, when Respondent later refused the Union's October 3 mailed request “to engage in negotiations concerning the effects” of that September 30 action, and also “refuse[d] . . . to furnish” the Union with information, also demanded in its October 3 letter, which was “relevant and necessary” to the Union's representative role.

Respondent's answer admits jurisdictional facts and that the Union, a statutory labor organization, was the exclusive collective-bargaining representative of a certain unit of employees as defined in the parties' labor agreement, but denies all wrongdoing.

##### Ruling on Motion for Deferral

At trial, Respondent for the first time moved for deferral of this case to the grievance-arbitration system provided in the labor agreement. The parties were not prepared to argue the issue. I withheld ruling and directed that litigation proceed on the merits, subject to reconsideration of the motion in the light of a more complete factual record and the parties' more careful briefing of the deferral issue.

As is more fully set forth in findings, below, this case does not involve the “termination” or shutting-down of an employing enterprise; rather, it involves Respondent's sale and transfer of its leasehold and management rights in an on-going business enterprise to a new business entity, i.e., a form of “successorship.” In this context, Respondent notes that its labor agreement with the Union contains at Section 25 a “SUCCESSOR CLAUSE” which states:

In the event this facility is to be sold, assigned, leased, or transferred, the facility will notify the Union, in writing, at least 30 calendar days prior to such action. Such notice shall include the name and address of the prospective new owner, assignee, lessee, or transferee. The employer agrees thereafter to bargain over the effects of the transaction.

Respondent's motion implicates the general policies expressed by Board majorities in such leading cases as *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984), as further elaborated in *United Technologies Corp.*, 274 NLRB 504 (1985) (*United Technologies II*).<sup>1</sup> These much-debated policies clearly rest on a judgment that the public interest is normally best served by encouraging parties to labor disputes—even those involving violations of Federal law—to resolve those disputes by resort to arbitration mechanisms provided in their collective-bargaining agreements. Applying these policies in a given case is often a challenging task, however, because of the variety of pronouncements by the Board on the subject and the uniqueness of each new case in which deferral contentions are raised. And, as I discuss below, when deferral motions are raised for the first time at trial, it becomes doubly difficult to address them.

Here, I would deny the deferral motion on two independent grounds. First, although I am aware of no clearly supportive precedent, I would find Respondent's deferral motion untimely.<sup>2</sup> While, as noted, *United Technologies II* seemingly finds deferral motions timely if raised in an answer to the complaint, but untimely if raised for the first time on posttrial briefs, the Board has not squarely decided whether deferral motions are timely if raised at trial. I think the general subject of timeliness of deferral motions deserves renewed consideration by the Board, and I thus suggest below some reasons for holding respondents to a duty to raise deferral at an earlier point even than the Board currently permits, and certainly at some point before the parties and the judge arrive for a trial on the merits.

As already noted, Respondent did not indicate an intention to plead for deferral until the trial opened. By this time, the Charging Party and the General Counsel (and Respondent) had already fully prepared to litigate the case on its statutory merits and the Government had gone to considerable expense to furnish a judge and court reporter for a trial on the merits. And it is hard to see why it would be necessary to vindicate the policies underlying the Board's deferral doctrine to permit a respondent to wait that long to raise the issue for the first time. It would impose no obvious burden on a respondent to require it to invoke deferral at some earlier point—no later than by the time its answer to the complaint is due, and arguably, such earlier still, for example, shortly after the filing of the original charge. Seemingly, too, the expense to the taxpayers inherent in processing these cases would be reduced to the extent deferral motions were re-

quired to be filed at some point earlier than the date the parties arrive on site for a merits trial.

As a practical matter, it is easiest to inquire into the "merits" of a deferral request during the investigative stage, at some point before a full-blown investigation and determination by the Office of the General Counsel of the substantive merit of the charge itself. At that preliminary stage, first of all, it is relatively easy informally to determine the overall factual contours of the case, to examine the relevant collective-bargaining agreement, and, if necessary, to do the exacting legal research often necessary to sort out from the confusing array of Board law the worthiness for deferral of any given case. Cases determined to be deferrable would not require the typically more detailed investigation required into the merits of the alleged violation. By contrast, when such contentions are raised for the first time at a trial, judgments about the deferrability of a case require improvisation, usually an informal and potentially lengthy "bench inquiry" into the underlying facts and the contentions of the parties. This necessarily eats into trial time, often imperiling the schedule which the judge and counsel had relied on to conclude a trial on the merits without the need for a return trip. And, especially, where, as here, trials are conducted at a site which does not provide ready access to a labor law library, and where the party opposing deferral and the judge have no prior notice that the contention will be raised, it is often inevitable that the judge hearing the motion will be forced to "defer" ruling on the deferral motion and to direct that the merits litigation go forward, even if, after more leisurely consideration of the facts and review of the relevant precedents, the judge might determine that the case is properly deferrable (just as the General Counsel, through the Regional Director, might have done, with far less intervening expense and diversion of resources, had the matter been raised in a more timely fashion, i.e., before embarking on a detailed investigation into the statutory merits and before issuing a complaint and summoning a judge to hear those merits).

Thus it is at least arguable that once the General Counsel's office has invested money and staff resources in a "full" merits investigation and has then prepared for full litigation before a judge, the current policy which generally encourages the "private" resolution of labor disputes should yield to another compelling public interest—that these merits be determined promptly and with finality in the Board forum which Congress has provided, rather than being belatedly shunted aside to a private disputes-resolution system which may or may not dispose of the statutory issue with finality. In any case, the problems of waste of resources, procedural confusion, and delay are compounded by permitting respondents to wait until a merits trial has opened (or perhaps has been underway for some considerable length of time) to raise an issue which could just as easily have been raised well before trial.

Second, I find in any case that deferral is inappropriate where it is alleged that, as part of its overall refusal to bargain, Respondent refused to furnish the Union with information relevant to its collective-bargaining function. It is arguable, in the light of the above-quoted "Successor Clause" in the parties' contract, that Respondent's alleged refusal to give timely notice and to engage in timely and meaningful effects-bargaining is susceptible of resolution in an arbitral forum and is thus presumptively deferrable. But this case

<sup>1</sup> See also *Olin Corp.*, 268 NLRB 573 (1984).

<sup>2</sup> Cf. *United Technologies II*, supra. In that case (274 NLRB at 504), the Board found the respondent's deferral request timely, noting that the respondent had raised deferral in its answer, and contrasted that case with other cases in which deferral requests were treated as untimely because they had been raised for the first time in posthearing briefs or in exceptions to the Board from the judge's decision.

also involves an alleged refusal on Respondent's part to furnish the Union with information associated with Respondent's transfer of the enterprise to the new owner, and the Board generally will not defer alleged refusals to furnish information to arbitration because of the inherent delays, procedural confusions, and the prospect for "two-tiered arbitration," involved in deferral of such "information" cases.<sup>3</sup> And especially where, as here, the refusal-to-furnish information question is "intertwined" with, or has an "intricate relationship" with the alleged refusals to engage in timely or meaningful effects-bargaining, partial deferral of the latter issues, while litigating the merits of only the information issues of this dispute would clearly seem inappropriate.<sup>4</sup>

Accordingly, I deny Respondent's motion to defer.

On the entire record,<sup>5</sup> my observations of the witnesses as they testified, and my assessments of the inherent probabilities, I make the following

#### FINDINGS OF FACT<sup>6</sup>

##### *A. The Transfer of the Operation and its Impact on Employees*

Respondent is a corporation which, under a sublease of the premises, formerly operated a 240-bed convalescent hospital in Santa Cruz, California, under the business name "Live Oak Skilled Care & Manor." It typically employed 80 to 90 unlicensed care-support, janitorial, and food-service employees who were represented by the Union under a labor agreement effective from October 16, 1987, through November 1, 1988. The agreement contains, inter alia, the "Successor Clause" quoted earlier.

Starting in late February or early March, Respondent's agents and Kenneth Anderson began what proved to be protracted negotiations for the takeover of the Santa Cruz facility by a corporation set up by Anderson for that purpose, Live Oak Care Center, Inc.<sup>7</sup> From the start, the negotiations contemplated that Anderson's corporation would assume Re-

spondent's sublease and operate under Respondent's State of California license until it could become licensed in its own name. The negotiations became attenuated largely because the holder of the master lease (or "master sublease"—the record is contradictory), Hillhaven Corp., of Tacoma, Washington, imposed many obstacles to its approving Anderson's corporation as an assignee of the sublease—its principal concern, according to Anderson, being protection of its interest in collecting on certain amounts it believed were owing from Respondent.

On September 30, after a round of concluding meetings and conferences by telephone with Hillhaven which had begun on September 20, Respondent and Anderson's corporation finally signed two documents, a "Management Agreement," and an "Assignment of Lease." Counterparts of those agreements were signed the same day by Hillhaven.

Pursuant to those instruments, Anderson's corporation began operating the hospital on October 1. Under the terms of the management agreement, however, Respondent was depicted as the "Owner," and Anderson's corporation was designated as the "Manager," "employ[ed] . . . to manage the Facility for the Owner's account" under certain specified terms and conditions. The witnesses to the transaction who testified (Robert Stotts, for Respondent, and Anderson, for the takeover corporation) explain that the device of a "Management Agreement" was used, consistent with industry practice, as an "interim" arrangement until Anderson's corporation could obtain its own hospital operating license from the State of California.<sup>8</sup>

As all parties agree, regardless of the device, or its acceptability under state licensing laws, Anderson's corporation assumed full control on October 1. In the process, it retained all of the former bargaining unit employees, without hiatus in their employment, and with assurances that their former terms and conditions of employment would not change, except that employees would all get a 10-cent hourly raise.<sup>9</sup> In the circumstances, Anderson's corporation plainly became the "successor employer," as that term is understood in labor relations law, and I shall hereafter refer to it as the "successor."

This was a status the successor recognized during the negotiations leading to the October 1 takeover. Thus Anderson testified that he had agreed with Respondent that the successor would retain the bargaining unit intact, and had further acknowledged the obligation to recognize the Union upon takeover (indeed, Pahl, as the successor's attorney in that instance, had told Anderson that, upon taking over, it was his responsibility to notify the Union, and the employees, that the new corporation had taken over).<sup>10</sup>

<sup>3</sup> See generally *United Technologies II*, supra, 274 NLRB at 505, where the Board stated that "[the original *United Technologies* case] did not vary the law concerning 8(a)(5) allegations involving an employer's refusal to furnish information requested by an exclusive collective-bargaining representative,]" citing *General Dynamics Corp.*, 270 NLRB 839 (1984), which in turn relies on *General Dynamics Corp.*, 268 NLRB 1432 fn. 2 (1984), and authorities cited. See also, *International Harvester Co.*, 241 NLRB 600 (1979).

<sup>4</sup> E.g., *American Commercial Lines*, 291 NLRB 1066, 1068 (1988), and cases cited.

<sup>5</sup> The exhibit file containing Respondent's exhibits erroneously includes R. Exh. 1, which I rejected at trial, directing that it be placed in a "rejected exhibit file." This is a purported "Declaration of [Respondent's attorney] Stephen D. Pahl Related to Notice Provided to Local 250." The exhibit is plainly hearsay; it does not qualify under any of the hearsay exception provided in Rule 804, Federal Rules of Evidence. The representation of Respondent's trial counsel that attorney Pahl was "unavailable" due to "other business commitments" was not enough to show that he was "unavailable" within the meaning of Rule 804(a); neither was his declaration receivable under the "catch-all" provisions of Rule 804(b)(5), particularly where Respondent failed to provide opposing parties with a "Fair opportunity to prepare to meet it," by failing to give notice of an intention to offer the declaration until the trial started. Accordingly, I have given that exhibit no consideration.

<sup>6</sup> The material facts are not in dispute. The testimony of each witness is harmonious with that of all others on common points and is further harmonious with the documentary record. Accordingly, in quoting or paraphrasing the testimony of any witness named below, I intend to adopt that testimony as my own finding on the point.

<sup>7</sup> From all accounts, Respondent had been operating the facility at a loss for some time and was anxious to locate a buyer.

<sup>8</sup> At trial, counsel for Respondent stated that, "the management agreement is simply an artifice to comply with the State regulatory bodies on operation of a health care facility until Mr. Anderson, the new owner, could get a license."

<sup>9</sup> Contrary to the complaint, there is no direct evidence that Respondent ever took any formal steps to "terminate" employees prior to the takeover, nor even told the before the fact that they would be going on to a new company's payroll. The most the record shows is that, on the evening of September 30, one or more employees somehow knew (and so informed the Union's agent, Lasky), that the hospital had been "sold," and that the employees could all stay on, with a 10-cent raise.

<sup>10</sup> Anderson was represented in the takeover negotiations by Attorney Stephen Pahl, who previously had represented Respondent in certain labor relations and grievance-handling matters with the Union Attorney Pahl also rep-

*Continued*

Anderson also told the Union's agent, Patty Lasky, when she approached him on or about October 7 that he would recognize the Union as the employees' bargaining agent and that no prior terms or conditions had been changed, except for the 10-cent raise. Those parties then entered into negotiations. On November 7, they signed an agreement in which the successor agreed to "adopt" Respondent's "current [sic] Collective Bargaining Agreement," and to extend its term "until February 1, 1989," with further provision that any agreement thereafter reached would be retroactive to November 1, the scheduled (and already elapsed) terminal date of Respondent's agreement with the Union.

If there were any potential ambiguity of understanding about the effects of the takeover on unit employees between Respondent and the successor (or between both employers and the Union, in later, inconclusive, discussions on the point) it related to the successor's willingness to credit employees with unused vacation and sick leave accrued while in Respondent's employ. On or about September 20, Anderson had admittedly made a "gentlemen's agreement" with Stotts—after receiving assurances about prior practices and likely amounts in question—that the successor would "assume responsibility" for vacation and sick leave time "accrued" by employees while in Respondent's service.<sup>11</sup>

There is no evidence, since the takeover, that the successor has refused any employees' leave request requiring credit for prior unused leave under Respondent's operation; the Union's agent, Lasky, states the Union is not aware of any such instances Anderson asserts without contradiction that, in fact, the successor has honored all leave requests submitted to date, including leave requests which credit employees for unused leave under Respondent. Indeed, as Lasky now admits, evidence that the successor was honoring previously accrued and unused leave time was implicit in at least one employee's pay and leave records reviewed by Lasky during visits to the facility in November and December. As a practical matter, the issue now appears to be moot because leave requests, in fact, have been "spread out," and because the labor agreement requires employees to "use or lose" accumulated leave within a year.

The evidence detailed elsewhere below shows that, until October 3, when it received a letter dated September 29 from the successor advising of the "change of ownership," the Union had received only inconclusive and contradictory information from Respondent's agents about the possibility of a takeover, and nothing about its potential timing, nor the

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resented Respondent in the conference calls immediately preceding this trial, and he signed Respondent's posttrial brief.

<sup>11</sup> Stotts says that Anderson saw the issues of "accrued" vacation and sick leave entitlement as "no problem," once Stotts assured Anderson that the "liability," liquidated to a dollar amount, would be less than \$14,000. It is not clear from Anderson's testimony whether Anderson ever voiced any specific reservations about this during the pretakeover negotiations, but he testified that, subjectively, he was not prepared to be confronted with mass demands for immediate vacation time off which would leave him with a staffing problem, and that this concern made him reluctant to make a blanket commitment on the subject. He further testified, however, that as long as employees' requests for accrued leave were "spread out over a period of time," he was prepared to accept their "accrued" rights in this respect. It also appears from Anderson's testimony that when pressed on this point by various employees, including during a group meeting after the takeover, Anderson tried to avoid making any blanket commitment while simultaneously seeking to assure the employees in general terms that their prior "seniority" would be "recognize[d]" and that the successor would "pay vacation and sick pay to the extent that we would do it."

identity of the putative new "owner," nor the potential impact on employees of any such transaction.

B. "Notice" to the Union; the Union's Efforts to Bargain and to Obtain Information

I here detail the evidence bearing on "notice" to the Union, what the Union did once it received clear notice on October 3, and what Respondent did and did not do in response to the Union's subsequent efforts to gain information and bargain about the "effects" of the transition.

According to the Union's agent, Timothy McCormick, the first hint of a possible takeover came around the "beginning of August," when McCormick called Respondent's labor relations attorney, Pahl, to discuss a certain outstanding grievance scheduled for arbitration. (By that point McCormick had been replaced, or was about to be replaced, by Lasky, as the agent to service the Union's relationship with Respondent, but McCormick was apparently trying himself to dispose of "old" business in calling Pahl). In the course of attempting to settle the grievance, Pahl told McCormick that "it was probably in the interest of the Union to settle this because there may possibly be a prospective buyer for the facility." Apparently during this conversation also, as McCormick later elaborated, McCormick asked Pahl for the "identity" of the "buyer," but Pahl demurred, saying he could not provide any "details" and that "when and if it became effective that [the Union] would be notified." McCormick told Pahl that in such event McCormick would not be the person to notify, because of his changed responsibilities.

At some point shortly thereafter, McCormick told Lasky what Pahl had told him, and, as Lasky recalled it, "Sometimes toward the late summer months or so," Lasky went to the hospital and asked Respondent's administrator, Charlene Henion, whether there was "any truth to the rumor that the facility is being sold?" Henion replied, "Not that I know of," but agreed to make inquiries and report back to Lasky on the subject. A few days later, Henion called Lasky back and said that the facility was not being sold, adding, however, that businesses are "always on the market for a price."

McCormick recalls that in late August or early September, he called Pahl to report that Henion had denied to Lasky that the facility was being "sold." Pahl replied that McCormick's disclosure to Lasky and Lasky's conversations with Henion had created a "major flap." McCormick did not press Pahl for any clearer statement of the status of or details surrounding any sale negotiations but only repeated that he was not the agent to deal with if any sale "became formal or actually pending" and that he had "every expectation" that Pahl would notify Lasky, in writing, "as called for in the contract." Pahl said he would "comply with that," and that he was "aware of both the statute and the contract provisions." At some later point (Lasky states it was in mid-September), Lasky herself called Pahl, and asked him if "the facility was being sold." He replied that he "was not going to discuss it" with her. He made some reference to problems she had created when she "had been asking about it at the facility," but stated that, "in the event of the transaction, they will notify [the Union] per the . . . collective bargaining agreement."

McCormick had one additional telephone contact with Pahl in late September, devoted exclusively to concluding a grievance settlement. McCormick did not raise the subject of

the pending "sale"; neither did Pahl. As found earlier, the Union's next notice on the subject came when Lasky went to the facility on the night of September 30 and learned from an employee that the new company would be taking over the next day, and would be giving a 10-cent raise. And, learning nothing more during the intervening weekend, the Union's next notice came when Lasky received the successor's own "notice" letter on October 3.

When Lasky received the successor's notice letter, she was admittedly "nervous" over the Union's lack of information about the transition, but also admittedly lacked at that time any specific basis for believing that any employee had suffered actual injury in the process. As a consequence, she drafted a broad set of demands—what she termed the Union's "standard letter" in such circumstances—and mailed it certified to Conrad Petermann, who, apparently through his own service company, Sun Pacific, acted in some agency capacity for Respondent in the management and accounting associated with the hospital, including in maintaining payroll records and issuing pay checks.<sup>12</sup> She also mailed a copy to Attorney Pahl on the same date. This is the material text of Lasky's October 3 letter:

In order to bargain over the effects that the sale of Live Oak Skilled Care and Manor have on the employees at this facility, please prepare the following information for the Union as soon as possible:

- (1) An up to date list of employees (as of the effective date of the transfer) with the following information:
  - (a) Date of hire (and seniority date reflecting full seniority with the hospital)
  - (b) Sick leave accrual
  - (c) Vacation accrual and amount paid for vacation if applicable
  - (d) Address
  - (e) Classification.
- (2) Name and address of the Workers' Compensation carrier and the names of any employees who have filed a Workers' Compensation claim during Sun Pacific's operation of the facility.
- (3) Copies of all sale agreements and/or interim Management Agreements pertaining to the sale and/or transfer of the facility.
- (4) To the extent necessary to assure that all wages and benefits have been paid, please have copies of all payroll records available for review.

The following issues need to be discussed and resolved at our meetings:

- (1) Severance pay.
- (2) Continuation and/or transfer of Health Insurance coverage.
- (3) Transfer rights to other facilities.
- (4) Payment of all wages and benefits due.
- (5) Cash payout and/or transfer of sick leave accrued.

<sup>12</sup>Lasky states that Respondent had previously told the Union that Petermann was its agent for labor relations matters, and Respondent affirmed at trial that he was so acting in the period in question.

(6) Agreement as to the disposition of employee personnel and health records.

(7) Disposition of all pending grievances.

(8) Compliance with applicable minimum wage regulations.

The Union reserves the right to make proposals with regard to these and any other appropriate issues throughout these negotiations. We are also open to discussing other pertinent issues which you might suggest.

We would like to meet on Monday, October 10, 1988 at a mutually agreeable location. Call me at 408/287-3030 to confirm.

Also on October 3, Lasky telephoned Petermann directly, complaining that Respondent had not given the prescribed 30-day notice nor engaged in the "effects" bargaining contemplated in section 25 of the labor agreement, the "Successor Clause" quoted earlier. Lasky asked for a meeting to bargain over those effects, and the two then agreed to meet on October 17.

Within a day or two, Lasky reviewed public records maintained by the state licensing agency for the hospital, where she found an unsigned copy of the September 30 management agreement. Later that week, concerned by "rumors that there could be some problems with the paychecks that were due to arrive from Sun Pacific," Lasky telephoned Petermann and raised the subject. She took the opportunity to ask if Respondent planned to include "accrued vacation" on employees' "final" paycheck Petermann said, "No," later elaborating that the "new people would assume that liability." Petermann said that this was covered by the management agreement and Lasky replied that she had reviewed a copy in the state records and saw no such reference, whereupon Petermann said that it "might be covered under some other document." Lasky then said that the Union would "be needing to have that document, also"

On October 11 or 12 Petermann called Lasky, saying that he didn't feel it necessary to meet with the Union on October 17, and asking whether they couldn't instead "deal with these issues over the telephone" Lasky said, "No," that she "felt we needed to sit down and deal with these things, plus we had information we had requested from him that we needed to receive." On October 12, Lasky wrote a followup letter to Petermann, with copies to Pahl and Stotts. In substance, her letter protested Petermann's unwillingness to meet on October 17, reminded him that Respondent had failed to honor the contract's 30-day notice requirement and that the contract required Respondent to engage in "effects" bargaining, and offered to meet for that purpose on October 17, 19, or 20. Her letter stated also that Petermann's currently expressed refusal to meet on October 17 was "posing undue hardship on our members," and that it was "the Union's position that there are several critical issues that need to be resolved in a timely manner."<sup>13</sup>

<sup>13</sup>Again I note that the Union's concerns were still (quite understandably) generalized—even at this point—and traceable more to the fact that its agents had not to date received detailed information from Respondent about the specific terms of the transition than to any particular evidence that employees had suffered specific losses or harm to their accustomed terms and conditions of employment. Indeed, by then, Lasky had already met with Anderson for the successor and had received generalized assurances from him that the successor

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On November 8, Petermann wrote to Lasky, apparently in partial response to her October 3 demands for information, stating,

The Workman's Compensation carrier through October 1, 1988 was State Fund Policy Number 1014235-87 2

The accrued vacation and sick pay through October 1, 1988 [he apparently meant the records associated with those items] is maintained at the facility. Ms. Shirley Lacey is in charge.

We are sending a copy of this letter to Ms. Lacey and asking her to make sure that Jane Johnston's personnel file is expunged of the citation.<sup>14</sup>

On November 11 Lasky wrote to Petermann, copy to Stotts, stating, "The Union is hereby reiterating its demand to bargain over the impact of the transition . . ." And, referring to "information" the Union had requested in "previous correspondence," Lasky "insist[ed]" that this information be provided and that [Respondent] meet no later than November 23, 1988."

Receiving no further answer from Respondent, Lasky visited the facility in "November" or "December" and, assisted by an agent of the successor, attempted to review the locally-maintained "payroll records," including pay and leave statements. These were "raw" records, i.e., locally completed forms and sheets which had been used to generate all the information required by Respondent's computerized payroll and accounting service (Sun Pacific). These had been retained intact in the facility, pursuant to state regulations, but they had been stored in cartons and boxes, apparently somewhat haphazardly, and (as Anderson admits), the ones that Lasky tried to review had been incompletely prepared by Respondent's former local payroll clerk. It is not clear how much time or effort was invested by Lasky, assisted by the successor's agent, who was unfamiliar with the records or their current organizational scheme, before Lasky finally abandoned her review. Respondent's agent Stotts admits that much or all of the same information would have been available from Respondent's (i.e., Sun Pacific's) payroll and ac-

would recognize and bargain with the Union and would maintain all established terms and conditions, excepting the 10-cent hourly wage increase. In fact, it was not until a "few weeks" after the takeover—Lasky admits it was after October 12—that Lasky had a discussion with at least one employee which caused her to wonder whether (unrelated to the transition) Respondent had not violated the union contract or wage and hour laws by paying only straight-time pay for as long as a year previously to kitchen employees who may have worked more than 40 hours within a calendar week. The Union has never subsequently raised this specific question with Respondent.

<sup>14</sup> As all parties agree, the Union's former agent, McCormick, and Respondent's attorney, Pahl, had previously settled a grievance (unrelated to the transition) over a citation and related discipline issued by Respondent against Johnston; the settlement included purging the citation from her file and paying her an undisputed sum certain reflecting "backpay" due to Johnston. It appears from Petermann's letter (although Lasky did not affirmatively recall this) that Lasky had somehow previously brought the general question of Respondent's compliance with the Johnston grievance settlement to Petermann's attention. Lasky herself later came to believe that Respondent had not yet paid Johnston the agreed backpay sum. Respondent has never taken the position that it does not owe Johnston the amount in question. (At trial, when the question arose, no one representing Respondent could state with certainty whether the payment had been made. Nor is it evident from the record that the Union had ever asked Respondent, prior to this trial, whether it had paid Johnston, or intends to pay her). Whether or not Johnston has, in fact, been paid, is irrelevant to the complaint and to the General Counsel's requested remedy.

counting data base, maintained on floppy computer disks at Sun Pacific's Los Angeles area headquarters.

Absent any evidence to the contrary, I presume—and therefore find—that Respondent could itself have furnished information responsive to the "payroll records" and other related requests contained in Lasky's October 3 letter to Petermann, and could have done so with relatively little expenditure of time or expense. Similarly, I will presume that the records which could have been printed out from Sun Pacific's data base would have been a far more manageable, comprehensive, and authoritative source of the information requested by the Union than the raw records which the successor had acquired but were still packed in cartons.

#### ANALYSIS; SUPPLEMENTAL FINDINGS, CONCLUSIONS OF LAW

For reasons set forth next, I find that Respondent has committed unfair labor practices substantially as alleged in the complaint.

The Union was presumptively entitled to notice—before the fact—that Respondent intended to transfer the employing operation to a new operator. *Fast Food Merchandisers*, 291 NLRB 897 (1988). ("The failure to provide *advance* notice and an opportunity to bargain clearly violated Section 8(a)(5) and (1) of the Act.") See also *Metropolitan Teletronics Corp.*, 279 NLRB 957-959 (1986), *enfd.* 819 F.2d 1130 (2d Cir. 1987). Respondent has shown no good reason why it could not have given the Union enough advance notice to permit "meaningful" effects bargaining prior to the successor's takeover.

Respondent makes much on brief of the fact that the deal was in doubt at any given time up to and including the September 30 date it was concluded. There is some evidence to support Respondent's point, but I believe Respondent has exaggerated the extent of Respondent's actual "doubt" about the prospects for a successful conclusion, particularly in the roughly 2-week period immediately preceding the transition. Thus, as early as September 20, if not earlier, Respondent and the successor had believed that they had an agreement, subject to its being approved and signed by Hillhaven. On that date, they had each signed off on an "agreement in principle," which Hillhaven itself had drafted and presented for their approval. This instrument was "almost identical" (testimony of Respondent's agent, Robert Stotts) to the September 30 "Management Agreement." Because there is no specific contrary evidence, I will presume that the management agreement signed on September 30 did not reflect any material changes from the September 20 "agreement in principle." More specifically, I will presume that the provision in the management agreement calling for the successor's assumption of the operation on October 1 had been part of the September 20 "agreement in principle."<sup>15</sup> Thus, Respondent

<sup>15</sup> Stotts could not recall in what particulars the "agreement in principle" varied from the ultimate management agreement signed on September 30. Anderson, after having his memory prodded by a pretrial affidavit, could only recall that Hillhaven continued, after September 20, to hold out in some unclear way for assurances that, by assigning the sublease to the successor, it was not forfeiting any claims it might have against Respondent (or Stotts, personally) for any outstanding moneys it believed it was owed. It is not obvious from the instruments signed on September 30 that this concern was specifically addressed even in those final writings. Exactly what happened between September 20 and 30 to assuage Hillhaven's concern—or whether it simply

was not excused from its duty to notify the Union in advance simply because the transaction did not become “final” until the eve of actual takeover. It was enough that, for months prior to the takeover, Respondent had been giving “active consideration” to an “imminent” transfer of the business.<sup>16</sup> Moreover, at least 10 days prior to the takeover, Respondent had reached an “agreement in principle” substantially embodying all the terms for the takeover, including the takeover date. Respondent has offered no reason why it could not have notified the Union on September 20, at which time there were no apparent further obstacles to a conclusion of the deal, since Respondent and the successor had signed off on the very terms that Hillhaven had tendered and was implicitly prepared to approve.

Respondent at one time appeared to take the position that the Union did, in fact, receive advance notice through Pahl and thereby waived any rights to conduct effects bargaining prior to the takeover. I detect no such present claim in its brief. In any case I find otherwise. Pahl’s statement at the “beginning of August” to McCormick about a “possibl[e] buyer” was too vague to put the Union on notice of the reality—that serious negotiations with a specific “buyer” had been going on for months between and among Respondent, Anderson, and Hillhaven. And Pahl’s simultaneous refusal, on McCormick’s request, to disclose these details, of which he was fully aware, made it a near futility for the Union formally to demand “effects” bargaining at that early stage. So, too, Pahl’s similar refusal, in the face of Lasky’s followup inquiries to him, after Henion had “checked” the matter and had represented that the facility was not being “sold.” Moreover, by denying, through Henion, that there was a “buyer” in the wings, Respondent gave false or misleading information clearly intended to discourage any further inquiries from the Union and to “conceal its decision” from the Union.<sup>17</sup> Finally, Pahl’s repeated promises to comply with Respondent’s contractual and statutory duties to notify and bargain with the Union would further tend to mislead the Union into believing that a takeover of the facility was still remote, speculative, and not presently worth seeking to bargain about. In all the circumstances, it was wholly excusable that the Union did not demand effects bargaining until it received formal notice on October 3 that the transaction was a fait accompli. Respondent’s prior behavior, whenever the subject was raised or pressed by the Union made it futile to make such a demand.

I thus conclude that by failing and refusing to provide the Union with advance notice of the contemplated takeover transaction, indeed by concealing those plans, Respondent denied the Union a meaningful opportunity to bargain over the effects of that transaction on unit employees and thereby failed and refused to bargain collectively in good faith within the meaning of Section 8(a)(5) and (1).

Once the Union received (belated) notice of the fait accompli and demanded such bargaining, Respondent plainly failed to honor the Union’s persistent requests to meet for that purpose.<sup>18</sup> In so refusing to meet, Respondent independ-

ently failed and refused to bargain in good faith within the meaning of Section 8(a)(5) and (1).

The information sought by the Union in its October 3 request, although potentially extensive, was either “presumptively relevant” to its representative function,<sup>19</sup> or was shown to be necessary for the Union to determine whether or not Respondent was in compliance with its agreement, or was otherwise specifically relevant to potential concerns relating to the “effects” on unit employees of the successorship.<sup>20</sup> Respondent has not specifically contested the relevancy or the Union’s need for any of the requested information; neither has it argued that it would have been unduly burdensome to produce it. And it is no defense that the Union may have been able by alternative means to discover some of the information sought in its generalized “standard” request of October 3.<sup>21</sup> Where the same information was under Respondent’s control, and was in more manageable, authoritative, and easily retrievable form, it was Respondent’s obligation promptly to furnish those records, and not simply to direct the Union to another, more awkward, or less reliable, potential source.<sup>22</sup>

By substantially defaulting on its duty to furnish information, Respondent independently failed and refused to bargain in good faith with the Union and thereby violated Section 8(a)(5) and (1).

telephone, and Lasky refused, insisting on a face-to-face session, aided by the information the Union had sought. Petermann’s implied offer to bargain over the telephone did not discharge Respondent’s obligation, particularly where the Union needed information in order to prepare for bargaining and where Respondent had failed to furnish payroll records and other information responsive to the Union’s October 3 request. Collective bargaining is best accomplished in face-to-face meetings (e.g., *Alle Arcibo Corp.*, 264 NLRB 1267, 1273 (1982)), and would have been impossible to conduct by telephone in the absence of the information which Respondent persistently refused to disclose to the Union. Moreover, Respondent has offered no reason why a face-to-face meeting in Santa Cruz—“at the plant where the controversy is in progress”—would have been impossible or unduly burdensome. *Tower Books*, 273 NLRB 671, 672 citing *NLRB v. P. Lorillard Co.*, 117 F.2d 921, 924 (6th Cir. 1941).

<sup>19</sup>I refer here to the basic unit employment data requested in items 1(a) through (e), and 4 of the Union’s October 3 request. See generally, *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). As to names and addresses of unit employees, see, e.g., *Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978) (“well settled that names and addresses . . . like wage data, are presumptively relevant either during contract negotiations or during the term of the agreement. Hence no showing of particularized need . . . necessary”). See also *Harco Laboratories*, 271 NLRB 1397, 1398 (1984) (“trend of Board law to place less and less emphasis on a showing of alternate means of communication and more on the duty to furnish relevant information”). Cf. *Leland Stanford Junior University*, 262 NLRB 136 fn. 1 (1982). (Union has burden of establishing “relevance” of demand for temporary employees’ addresses.)

<sup>20</sup>I refer here to all other items requested by the Union in the October 3 letter. Especially as to item 4, seeking copies of “sales agreements and/or interim Management Agreements,” I note that a successor violates Sec. 8(a)(5) by refusing to furnish the union with documents and other data relevant to the successorship transaction *Fremont Ford Sales*, 289 NLRB 1296, (1988). Similarly, the Board holds a predecessor to a duty to furnish the union with details relating to a proposed or completed sale. E.g., *Westwood Import Co.*, 251 NLRB 1213, 1226–1227 (1980). See also, e.g., *Washington Star Co.*, 273 NLRB 391, 396 (1984); *RBH Dispersions*, 286 NLRB 1185 (1987).

<sup>21</sup>I refer here to the (unsigned) purported copy of the September 30 management agreement which Lasky found in the records of the state licensing authorities in the first week of October, and to the “raw” records under the successor’s control which Lasky made an effort to inspect at the facility in November or December.

<sup>22</sup>And see *Harco Laboratories*, supra, emphasizing “trend” favoring disclosure by employer possessing presumptively relevant information without regard to “alternative means” of gaining same.

took an additional 10 days for Hillhaven’s executive to sign the already presented paperwork—are matters which remain unclear on this record.

<sup>16</sup> *Walter Pape, Inc.*, 205 NLRB 719, 720 (1973).

<sup>17</sup> *Metropolitan Teletronics*, supra, 279 NLRB at 959.

<sup>18</sup>In canceling the previously scheduled October 17 meeting, Petermann asked Lasky about the possibility of merely discussing the matters over the

## THE REMEDY

The record repeatedly shows that this case was not settled, but went to trial, because the General Counsel and Charging Party insisted that the remedy for the alleged violations must include, in addition to Respondent's furnishing of the requested information and bargaining over the effects of the successorship, a minimum 2-weeks' "backpay" payment to each unit employee. It is this feature of the complaint proceedings which Respondent most vigorously resists. The prosecuting parties (I shall hereafter refer solely to the General Counsel, whose position on the point is indistinguishable from that of the Charging Party) justify this latter demand as a "standard" remedy, authorized by the "*Transmarine*" line of cases,<sup>23</sup> as a means of restoring to the Union some measure of the "bargaining strength" it would have held if Respondent had given it appropriate advance notice and a meaningful opportunity to bargain over effects prior to the transfer of operations to the successor.

At various points throughout this proceeding, I questioned the appropriateness of such a remedy where, from all appearances, and despite Respondent's alleged failure to comply with its statutory obligations, employees in the unit did not, in fact, suffer any palpable "loss" which might have been avoided had Respondent complied with its notice and bargaining obligations. Put another way, I questioned whether, as a practical matter, an order directing Respondent to cease and desist and to furnish the requested information and to bargain with the Union over any lingering questions would not adequately remedy the alleged violations. With these doubts in mind, I invited the General Counsel not only to address these questions in trial colloquy, but also to litigate any facts bearing on the question of actual losses to unit employees occasioned by Respondent's unilaterally acted-upon decision to transfer the operation to a new "owner." I similarly requested the General Counsel to speak to these questions on brief.

At trial, counsel for the General Counsel averred that such actual "loss" had occurred, and made some effort to prove this. On brief, however, without conceding that employees sustained no actual losses, she has not attempted to address the point further, except so indirectly and inconclusively that the claim of actual "loss" has lost much of its steam. Suffice it to state that the General Counsel no longer directly argues that Respondent's unlawful practices caused harm to employees' pocketbooks, to their eligibility for benefits, or to their accustomed working conditions—facts which, if shown, would more obviously trigger a duty on the wrongdoer's part to "make them whole" by paying them "backpay." The General Counsel's failure to link the requested "backpay" remedy to any showing of actual "loss" is not surprising, given the absence of any such specific evidence in the record and the presence of evidence generally indicating that no such actual "losses" were incurred by anyone. But, in fairness to counsel for the General Counsel, her principal prosecutorial contention throughout these proceedings, and especially at the briefing stage, appears to be that a showing of actual loss is not necessary for a *Transmarine* remedy, that the remedy must be imposed without regard to the actual in-

jury suffered by unit employees in any particular transaction, and must be imposed simply because to do otherwise would allow Respondent to "reap the benefits of its unlawful conduct" and would "deprive" the Union of the "bargaining strength" it might have possessed if Respondent had entered into effects bargaining before the successorship transaction was a *fait accompli*.

For reasons more fully explicated elsewhere below, I remain unpersuaded by any of the General Counsel's inconclusive efforts to demonstrate that Respondent's unfair practices caused employees to "lose" anything tangible, as distinguished from the more abstract "harm" which Respondent's actions worked on their right to bargain collectively with their employer, which latter harm could be presumably cured by directing that such bargaining now take place. But, as I further acknowledge, the General Counsel's claim that a showing of actual "loss" to employees' pocketbooks is not necessary to a *Transmarine* "backpay" remedy is not patently frivolous; it finds some indirect support in the standard formulation of the *Transmarine* remedy, which, in its ultimate proviso (see below), does not appear to allow for any deduction of "interim earnings" from the "minimum two-weeks' backpay" contemplated by such orders. Ultimately, however, I do not read the cases as going so far as to say that actual "loss" is *irrelevant* to the imposition of such a remedy. And, ultimately, I shall judge that to impose a "backpay" remedy in these unique circumstances is neither required by the precedents nor would it bear any reasonable relationship to the actual damage to employees' rights occasioned by Respondent's misconduct. Rather, as I shall conclude, the General Counsel's remedial demands for a minimum of 2-weeks' "backpay" reflect, in my opinion, an unreasoning, rigid, and mechanical application of *Transmarine* and progeny, one not obviously contemplated by those authorities, and one which, if applied in these circumstances, would be merely punitive.

I start by identifying what a *Transmarine* remedy contemplates, the ordinary fact context in which it is granted, and the express and implicit assumptions made by the Board in granting it.

As usually formulated, the *Transmarine* remedy is so complex that it does not admit of ready understanding. Thus, it typically provides that a respondent shall (my emphasis),

bargain with the Union about the effects on its employees of the shutdown, and to pay these employees amounts at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; *but in no event* shall the sum paid to any of these employees exceed the amount he would have earned as wages from [the shutdown date] to the time he secured equivalent employment elsewhere, or the date when Respondent offers to bargain, whichever occurs sooner; *provided, however, that in no event shall this sum be less than*

<sup>23</sup> *Transmarine Navigation Corp.*, 170 NLRB 389 (1968); see also *Royal Plating & Polishing Co.*, 160 NLRB 990 (1966), containing rationale invoked in *Transmarine*.

*these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondents' employ.*

Perhaps because of its complexity, because any bargaining which may result from such a remedy is likely to be perfunctory and quickly brought to a lawful impasse, and because the only thing which appears to be certain about it is that, in its last proviso, employees are guaranteed an indestructible minimum right to 2-weeks' "backpay," it is understandable that the General Counsel has customarily referred to the *Transmarine* remedy as a "standard 2-weeks' backpay" remedy.<sup>24</sup>

The General Counsel overlooks one feature of the *Transmarine* remedy as typically applied by the Board—that the Board customarily rationalizes its imposition of a "limited backpay requirement" on two grounds, that it is "designed both to make employees whole for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences" for the Respondent.<sup>25</sup> This is no accident; the paradigm *Transmarine* remedy situation, as regularly characterized by the Board, involves (my emphasis) "an employer's failure to bargain over the effects of its decision to shut down its operations."<sup>26</sup> And where a true "shutdown" occurs, this necessarily involves actual "losses" to the employees, lost jobs being only the most obvious consequence.

It would be too simple, however, to conclude that a *Transmarine* remedy is only appropriate where an employing operation has completely "shut down" or where employees' jobs with the employing entity have been "lost." Thus, the General Counsel points to *Signal Communications*, 284 NLRB 423 (1987), as an example of a case in which the employing entity (or a part of it, at least) continued intact under the operation of a "successor." Moreover, in *Signal*, four of the former unit employees were hired by the successor, without hiatus, and were nevertheless beneficiaries of a *Transmarine* inspired "minimum 2-weeks backpay remedy."<sup>27</sup> While there are distinguishing features in *Signal*, discussed below, which in my judgment make that case an unreliable guide to the disposition of this case, I do not deem it irrational for the General Counsel to infer from the above-mentioned feature of *Signal* that the question of "actual loss" is irrelevant to the considerations which inform the *Transmarine* remedy. I do not think that this is a necessary or inevitable reading of *Signal*, however, for the following reasons:

*Signal's* facts are complex, and in many respects obviously distinguishable from the facts of this case. Thus, *Signal* in-

<sup>24</sup> And see, e.g., *Van's Packing Plant*, 211 NLRB 692 fn. 3 (1974), characterizing the remedy as a "guarantee of at least 2 weeks' backpay."

<sup>25</sup> My emphasis. This formulation has made a standard appearance in Board cases starting with *Transmarine* itself (170 NLRB at 390) and has persisted in virtually unchanged form in the Board's more recent applications of *Transmarine*. See, e.g., *Metropolitan Teletronics*, supra, 279 NLRB at 961; *Al-dine Mfg. Co.*, 275 NLRB No. 217 (summary judgment; Aug. 27, 1985); *J-B Enterprises*, 237 NLRB 383 (1978). It is, moreover, a formulation adopted by Judge Shapiro in a decision (adopted by the Board) in a recent case on which the General Counsel relies heavily, *Signal Communications* (cited and discussed in main text below).

<sup>26</sup> E.g., *Cross Co.*, 274 NLRB 392 fn. 1 (1985).

<sup>27</sup> Judge Shapiro's decision in *Signal* was adopted by the Board with minimal comment, none of it pertinent to the issue under discussion.

involved a predecessor, SCI, which, without notice or bargaining with the union, terminated operations in its own name and formally discharged four unit electronics technicians on October 15. The next day, however, a successor, SEI, composed of several former SCI principals, commenced operations and reemployed those technicians, although at a reduced rate of pay amounting to \$2 per hour for three of them and 60 cents per hour for the fourth. In this regard, Judge Shapiro specifically found that these "four unit employees . . . did not secure equivalent or substantially equivalent employment by going to work for . . . SEI in view of [the hourly pay rate "losses" which they "suffered"]."<sup>28</sup> And later, in reiterating this finding, Judge Shapiro further suggested that the four electronics technicians were employed by the successor "perhaps with reduced fringe benefits."<sup>29</sup> In addition, although SEI also took over responsibility for SCI's work at a different project, which employed an additional seven former SCI unit installation and assembly employees, SEI "ceased to pay [them] their wages or other benefits, which, for the remainder of their employment, were paid by the project's general contractor."<sup>30</sup> Finally, and in distinct contrast to this case, SEI, found to have been a labor relations successor to SCI, notwithstanding its contrary claims, refused to recognize the union or to bargain collectively with it as the representative of its new work force.

I confess that I remain in doubt about Judge Shapiro's precise reasoning for recommending an order "requiring . . . SCI to pay backpay to its [four electronics technician] unit employees in a manner similar [my emphasis] to that required in *Transmarine*." It is true, as the General Counsel stresses, that Judge Shapiro "disagree[d]" with SCI's objection that "since the terminated unit employees obtained employment with the successor employer immediately, . . . the *Transmarine* backpay remedy is impermissibly punitive [sic] as the terminated employees were not adversely affected by the closure of SCI's facility"<sup>31</sup> What is not clear, however, is whether Judge Shapiro "disagree[d]" with SCI's claim that employees were not "adversely affected," or rather, whether Judge Shapiro would have found a *Transmarine* remedy appropriate even if there had been no "adverse" effect. In my view, Judge Shapiro's decision as a whole favors the former interpretation. Thus, as noted, there was plain evidence, which Judge Shapiro found worthy of specific comment, that the four electronics technicians "suffered" actual "losses" when their hourly pay rates were reduced by the successors. And, as noted, those losses could easily have ex-

<sup>28</sup> Id. at 428 fn. 15. I note in this regard that the hourly rate losses suffered by those four employees would, over time, easily match, and then exceed, the minimum "two weeks' pay" remedy for them which the Board ordered to "make them whole for the losses they suffered."

<sup>29</sup> Id. at 428.

<sup>30</sup> Id. at 426. I note in this regard that Judge Shapiro elsewhere appears to have treated the continuing assembly and installation work performed by these seven employees as having been work which was not SEI's; thus he found that the unit composition had changed after SEI's appearance in that "SEI only employed SCI's electronics technicians." Ibid. and see fn. 14.) Thus, unlike herein, the successor in *Signal* failed to "employ" more than half of the predecessor's pretakeover work force; manifestly, therefore, jobs were "lost" as a consequence of SCI's disappearance from the business and SEI's continuance of a certain portion of it thereafter. Moreover, it is not clear from the record whether the "general contractor," who took over paying wages and benefits to the seven installation and assembly employees, paid them the same wages and conferred the same benefits they would have received under the Union's contract with SCI.

<sup>31</sup> Id. at 428.

ceeded the minimum 2-weeks' backpay which Judge Shapiro's order contemplated for them. In any case, as further justification for a *Transmarine* remedy, Judge Shapiro explained that "The limited backpay remedy herein takes into account the changed circumstances since the closing, and two weeks of backpay for four employees represents an *insubstantial amount* [my emphasis] when viewed in the context of SCI's \$4 million lawsuit against Kings [sic] County." This passage seems only to reinforce the view that a *Transmarine* remedy is not to be inflexibly or woodenly applied, without regard to actual losses suffered by employees or the consequences to the respondent of imposing it.<sup>32</sup>

With the foregoing considerations in mind, I do not find in *Signal* any plain support for the General Counsel's view that actual losses are irrelevant to the imposition of a *Transmarine* remedy. Moreover, in focusing on *Signal*, the General Counsel has failed to note at least one other "successorship" case, *Raskin Packing Co.*, 246 NLRB 78 (1979), in which the Board appears to have relied in part on the absence of proof of any actual losses to employees in deciding not to impose a *Transmarine* remedy. Thus (id. at 80), the Board stated, "Additionally, in view of the fact that the new purchaser has offered the former Raskin employees employment, it is unnecessary to order the traditional [i.e., *Transmarine* backpay] remedies."<sup>33</sup>

To the extent doubt remains about the Board's view of the specific issue under discussion, I cannot ignore a more fundamental and general admonition expressed by the Board on the subject of remedies, one which clearly warns against the mechanical or inflexible imposition of a supposed "standard" remedy. Thus, in *Cities Service Oil Co.*, 158 NLRB 1204, 1207 (1966), the Board stated:

In devising all our affirmative orders, . . . we bear in mind that the remedy should be appropriate to the particular situation requiring redress, and should be tempered by practical considerations.

And it is with such considerations in mind that I now return to the facts of this case, with particular attention to the question whether employees herein suffered any actual losses which could only be remedied by a *Transmarine* "backpay" order, as opposed to an order directing Respondent to cease and desist, to furnish information, and to bargain in good faith.

First, I restate the obvious; not a single employee suffered a penny's loss of actual earnings (nor a moment's loss of work) as a result of Respondent's unlawfully unilateral implementation of its decision to transfer the operation to the

<sup>32</sup> Without purporting to liquidate the actual amount involved in such a remedy herein, it can be seen that in a unit of 80-90 employees earning \$4.28 and \$5.88 per hour, the required backpay amount would easily be within the range of \$30,000, and very possibly much more while the "substantiality" of the backpay imposition on a respondent may properly be given little weight where the losses suffered by employees are likewise substantial, surely it is relevant, as part of the Board's determination of remedies, to weigh the relative imposition on a respondent of a given remedy against the demonstrable losses suffered by employees due to the respondent's unfair practices.

<sup>33</sup> Admittedly, the significance of this language is clouded by the Board's other apparent rationale for declining to order a *Transmarine* remedy in *Raskin*, that the plant had been shut down due to an (apparently unforeseen) "emergency" and that it would thus have been impossible for the employer to have given prior notice or to have bargained in advance over the effects of the shutdown.

successor. This makes it odd at the outset to speak of the need for "backpay" to remedy this feature of Respondent's misconduct. Neither did employees, in fact, lose any traditional benefits, not even credit for their previously accrued vacation and sick leave, despite some ambiguity in the successor's position when pressed on this point early on after the takeover.

As noted, counsel for the General Counsel does not directly dispute these judgments on brief. At most, in remarks at trial, she suggested that the Union might have been able, had Respondent allowed effects bargaining to take place in advance, to secure Respondent's agreement to give employees additional cash benefits or rights in connection with their contemplated "termination." Thus, the General Counsel suggested that the Union, armed with the "bargaining strength" available to it prior to the takeover, might have successfully demanded "severance pay" for the employees Respondent intended to "terminate," or might have successfully demanded that employees receive a "cash payment" reflecting their "accrued" (unused) vacation time, or might have negotiated "transfer rights" to another of Respondent's operations for those "terminated" employees.

I am mindful, as the General Counsel has been quick to point out when confronted with the frailties of these claims on this factual record, that we should be reluctant to engage in "speculation" about what timely, good-faith bargaining might have secured for the employees, particularly where any "doubt" on that score is traceable to Respondent's failure to allow such bargaining to take place at a meaningful time. Thus, I intend in no way to take issue with the familiar principle that it is the wrongdoer, and not those wronged against, who must bear the burden of any doubts occasioned by its own failure to conform to the law. But here, the record affords no basis for reasonable "doubt" on any of those questions, and it is thus not merely "speculative" to judge that the Union would not even have pressed any such demands, had Respondent timely and candidly disclosed the details of its arrangements with the successor. Thus, "severance pay" for unit employees under circumstances where Respondent and the successor had made arrangements that there would be no "severance" of their employment, nor interruption in their work, nor diminution of their wages, would almost certainly never have been demanded by the Union, much less granted by Respondent, if the Union had been made aware in advance of those arrangements.<sup>34</sup> Similarly, there was not any likelihood that the Union would have made any demand for liquidated pay to compensate for "accrued" leave rights if Respondent had disclosed in advance of the takeover that (as far as it knew from its "gentlemen's agreement" on the subject with Anderson) the successor intended to credit employees for accumulated leave rights.<sup>35</sup> And, even though the

<sup>34</sup> Lasky substantially acknowledged that, while a demand to bargain about "severance pay" was included as part of her "standard" letter mailed to Respondent on October 3, it was not an item likely to have been pressed if the Union had been advised that the unit would remain intact, without loss in pay or benefits. In fact, as Lasky admitted, in the only prior instance where an employer signatory had transferred its operating rights in a health care facility to a new owner, the "standard demand" for "severance pay" was dropped—indeed it never emerged at the bargaining table—once the Union learned that no employees would be terminated or suffer lowered pay and that the successor would recognize the Union.

<sup>35</sup> Lasky admitted that the issue of cash-for-accrued leave had never even been raised by the Union in her prior experience in bargaining over other health-care successions where employees were retained as a unit.

Union alluded to a desire to bargain with Respondent over “transfer rights” in its October 3 “standard” letter to Respondent, it is ludicrous for the General Counsel to suggest that such “rights” would have been a live subject for bargaining where (a) employees were not, in fact, being “terminated” from employment with the ongoing employing entity, (b) no employee apparently had any interest, in fact, in such a “transfer” in lieu of staying on at the accustomed workplace, and (c) the only other facility in which this Respondent (or its principals) had any arguable ownership interest was near Fresno, in California’s Central Valley, roughly 150 miles of hard driving from Santa Cruz, on the Pacific Coast.

Accordingly, the Union’s October 3 demand to engage in “effects” bargaining over such issues as “severance pay,” pay for “accrued” leave entitlements, or “transfer rights,” cannot be taken as a sign that these demands would have been pressed at the bargaining table, had Respondent timely notified the Union of its intentions, disclosed in advance its arrangements with the successor, and engaged in good-faith discussion before the takeover concerning the actual impact on unit employees. To the contrary, the Union’s generalized demands in its October 3 letter were made precisely because the Union lacked the information and assurances from Respondent it needed to formulate a more specific agenda for effects bargaining. And, in summary, to the extent that the requested 2-weeks’ “backpay” remedy is urged as necessary to restore employees to the position they might have occupied had Respondent engaged in timely effects bargaining with the Union, it has been shown with reasonable certainty that timely effects bargaining could not have enhanced the entitlements actually received by the employees in connection with the takeover of the facility.

This is not to suggest that there would be nothing to “bargain” about if the Union were now to engage in bargaining with Respondent over the impact of Respondent’s quitting the scene. Clearly, Respondent’s withdrawal as an employer of the unit employees leaves lingering questions which the Union may responsibly insist that Respondent must meet to discuss. Thus, to cite some obvious examples invoked at various points in these proceedings by the General Counsel or the Union, the Union has not yet received enough information to know whether Respondent violated the contract or governing wage and hour laws in compensating certain employees at straighttime pay rates; and, assertedly, the Union has doubt that Respondent in fact has paid Jane Johnston the agreed-on sum associated with the settlement of the grievance over her disciplinary citation. Manifestly, the Union has a right to the information it sought on October 3 to determine whether further grievance or enforcement actions must take place, and Respondent’s failure to produce such information has made it difficult to determine whether further actions or discussions on those points would be worthwhile. But the central point here is that such issues do not stem from Respondent’s failure to give timely notice of the successor’s takeover; they were unrelated to the takeover, and they are matters which are only loosely termable as “effects bargaining” issues. Indeed, the matters specifically raised on this record would appear to depend for their resolution not so much on the give-and-take of collective bargaining as on the underlying facts, easily determinable by reference to Respondent’s records, once Respondent discloses them. And, to that extent, it does not require a *Transmarine* “backpay”

order to restore “bargaining strength” to the Union to achieve a resolution of them. The Union’s power to resolve such issues never depended on any such “strength”; it always depended solely on the underlying facts and the legal merit of any contractual or statutory claims which the Union might make once it was given access to those facts.

I thus repeat that, unlike all *Transmarine* cases cited by the General Counsel, including *Signal*, supra, in this case the General Counsel has failed to identify any “adverse” effect on unit employees occasioned by the successorship, and has further failed to demonstrate any reasonable possibility that the Union might have gained concessions from Respondent which would enhance the wages, benefits, or other employment conditions which the employees did receive in connection with the successorship. In the circumstances, the General Counsel’s regular invocation of the notion of “lost bargaining strength” amounts to hollow rhetoric, an insufficient basis on which to pin the General Counsel’s demand for a *Transmarine* “backpay” remedy.

I thus decline to recommend such a remedy and shall instead recommend that Respondent be ordered to cease and desist from the unfair labor practices found above, to furnish, on the Union’s demand, the information requested in its October 3 letter, to meet promptly, on the Union’s request, to bargain collectively in good faith with the Union with respect to all mandatory bargaining subjects, and to sign and post at the Santa Cruz hospital facility, the successor being willing, an appropriate notice.<sup>36</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>37</sup>

#### ORDER

The Respondent, Santa Cruz Convalescent Hospital, Inc., d/b/a Live Oak Skilled Care & Manor, Santa Cruz, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from failing and refusing to give the Union timely advance notice of its decision to assign its rights to the operation of the hospital facility in question to another operator, from failing and refusing to furnish to the Union the information it requested on October 3, 1989, and from failing and refusing to meet and bargain collectively in good faith with the Union about any and all mandatory subjects of collective bargaining associated with that transfer of operations or associated with Respondent’s own compliance with its collective-bargaining agreement with the Union, or 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) On the Union’s request, promptly furnish the Union with the information sought in its October 3, 1988 letter demanding the same.

<sup>36</sup> Should the successor be unwilling to allow its premises to be used for the posting of such a notice, Respondent shall mail copies of the notices to the unit employees on its payroll immediately before the successor’s takeover. Cf. *Raskin Packing Co.*, supra, 246 NLRB at 80.

<sup>37</sup> 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.

(b) On the Union's request, promptly meet with the Union at regular intervals and bargain collectively in good faith with respect to any and all mandatory subjects of bargaining and, if an agreement is reached on any such subjects, reduce the same to writing, and sign it.

(c) Sign copies of the attached notice marked "Appendix."<sup>38</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Re-

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<sup>38</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent's authorized representative, shall be posted by the successor here, Live Oak Care Center, Inc., at the Santa Cruz Hospital facility, if the said successor is willing, for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. If the said successor is not willing to post these notices, Respondent shall mail signed copies of the same individually to each bargaining unit employee employed by Respondent as of September 30, 1988.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.