

**Soshana Siev Baylin, Lazarus R. Baylin, Eva S. Goldstein, Morris Goldstein, Leon Siev, Zipora K. Wagreich, Vincent J. Castellucci, and Seymour Warshaw, a Co-Partnership d/b/a Sea Bay Manor Home for Adults, and its Successor, Ann S. Castellucci, Joseph C. Tomei, and Seymour Warshaw, a Co-Partnership d/b/a Sea Bay Manor Home for Adults<sup>1</sup> and Local 144, Hotel, Hospital, Nursing Home, & Allied Health Services Union, SEIU, AFL-CIO.** Case 29-CA-6572

January 31, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

On July 8, 1988, Administrative Law Judge Harold B. Lawrence issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

As set forth in the judge's decision, on December 15, 1980, the Board issued its Decision and Order<sup>2</sup> finding that the Respondent's predecessor (Sea Bay No. 1) had violated Section 8(a)(5) and (1) of the Act and directing Sea Bay No. 1 to: (1) honor and abide by a stipulation agreement, which provided for the submission to binding arbitration of all issues regarding wages, hours, and conditions of employment of unit employees; (2) cease and desist from unilaterally changing wage rates in the absence of a genuine impasse in bargaining; and (3) reinstate, on request by the Union, the wage rates that existed for unit employees prior to June 16, 1978, the date of Sea Bay No. 1's unilateral change in wages (except that the rescission of interim raises was not permitted). On February 5, 1982, the United States Circuit Court of Appeals for the Second Circuit granted enforcement of the Board's Order.<sup>3</sup>

In his decision here, the judge found the Respondent to be a successor-employer to Sea Bay No. 1 and further found that the Respondent took over its predecessor's business with notice of its predecessor's unfair labor practices. The judge ordered the Respondent, on the Union's request, to honor and abide by the stipula-

tion agreement<sup>4</sup> entered into by Sea Bay No. 1 and the Union. He further ordered that, on the Union's request, the Respondent reinstate any wage rates that existed for unit employees on June 16, 1978, but providing that his Order should not be construed as either requiring or permitting rescission of any wage increases previously granted. For the reasons set forth below, we agree with the judge that the Respondent is a successor-employer but we find, contrary to the judge, that the Respondent should not be required to abide by the stipulation agreement except insofar as engaging in the stipulated interest arbitration is necessary to compute the balance of backpay due its employees from June 7, 1978, the date when Sea Bay No. 1 entered into the stipulation agreement, to June 17, 1982, the date when the Respondent took over operation and ownership of its predecessor's facility, the Home.

The facts are fully set forth by the judge. In brief, on June 17, 1982, the Respondent took over the Home. The Respondent is a partnership consisting of Ann Castellucci, Seymour Warshaw, and Joseph Tomei, who each own 33.3 percent of the partnership. Ann Castellucci is the widow of Vincent Castellucci who owned 7.5 percent of the Sea Bay No. 1 partnership. Seymour Warshaw also owned 7.5 percent interest in the Sea Bay No. 1 partnership.<sup>5</sup> Tomei was a friend of Vincent Castellucci and, beginning about 1978, assisted the terminally ill Castellucci by serving as an advisor to the Home's administrator, Blisko. Blisko began as administrator in 1976 and remained as administrator after the Respondent took control of the facility. As found by the judge, Blisko enjoyed a high degree of authority and power in the management of the Home throughout his tenure and handled labor relations.

There was no hiatus in operations at the Home as a result of the transfer of ownership from Sea Bay No. 1 to the Respondent. The Respondent is engaged in the same business operation at the Home as was Sea Bay No. 1, retains the Sea Bay No. 1 clientele, and provides the same services as did Sea Bay No. 1. At hearing, the parties stipulated that: "[T]he employee complement employed by Sea Bay Manor Home For Adults, at 3300 Surf Avenue, was virtually the same just prior to and just . . . after the change in partnership, which would be 6/17/82." The parties further stipulated that: "[T]he employee classifications employed by Sea Bay Manor Home For Adults, just prior to and just after the change in partnership in 1982, remained the same."

<sup>1</sup> We have corrected two inadvertent errors in the caption of the judge's decision.

<sup>2</sup> 253 NLRB 739 (1980).

<sup>3</sup> 685 F.2d 425.

<sup>4</sup> The stipulation agreement read in pertinent part: "[T]he parties hereby agree that all issues regarding the wages, hours, and conditions of employment of the employees of Sea Bay Manor Home for Adults shall be submitted to binding arbitration."

<sup>5</sup> In 1975, Vincent Castellucci and Warshaw acquired complete ownership of the real estate on which the Home was built with each owning 50 percent.

As stated above, the judge concluded that the Respondent is a successor-employer that took over the Home with notice of Sea Bay Manor No. 1's unfair labor practices.<sup>6</sup> In finding that the Respondent is "responsible for remedying the unfair labor practices herein and complying with the Order of the Board and the judgment of the Circuit Court of Appeals," the judge concluded that an order requiring the Respondent to abide by the stipulation agreement would not have the effect of compelling the Respondent, as a successor-employer, to assume Sea Bay No. 1's collective-bargaining agreement. In this regard, the judge thus found that the stipulation agreement was not a substantive agreement, but merely a process for arriving at an agreement. Therefore, the judge concluded that an order directing the Respondent to remedy Sea Bay Manor No. 1's unfair labor practices by submitting to arbitration "has no more substantive content than any bargaining order."

For the reasons set forth in the judge's decision, we agree with the judge's finding that the Respondent is a successor-employer<sup>7</sup> responsible for remedying Sea Bay No. 1's unfair labor practices. However, as noted above, contrary to the judge we find that it is not appropriate to require the Respondent to abide by the stipulation agreement except for the limited purposes set forth below.

The issue presented here involves the nexus between two Supreme Court decisions. Initially, in *NLRB v. Burns Security Services*,<sup>8</sup> the Supreme Court held that a successor's obligation to bargain does not bind it involuntarily to the substantive terms of its predecessor's labor agreement. In that case, the Court held that Section 8(d) of the National Labor Relations Act and labor policy as manifested generally in the Act would not compel a party to abide by substantive contractual obligations to which it has not agreed to be bound.<sup>9</sup>

Subsequently, the Supreme Court held in *Golden State Bottling Co. v. NLRB*, that the duty to remedy unfair labor practices of a predecessor may be imposed on a successor who takes over a business with knowledge of the unfair labor practices or the pendency of unfair labor practice proceedings. Accordingly, the Court required the successor-employer to reinstate with

<sup>6</sup>In this regard, the judge found that there was complete continuity between the business of Sea Bay No. 1 and the Respondent with respect to the Home's employees, supervision and management, services, clientele, and physical plant. He also found that ownership interests in the Home and underlying real estate continued from Sea Bay No. 1 to the Respondent. The judge thus concluded that "[E]ven without the evidence of actual knowledge of and participation in the unfair labor practices by some of the owners of Sea Bay No. 1," the other indicia of successorship, "would justify an inference of knowledge on the part of" the Respondent.

<sup>7</sup>We note that the judge found continuity of ownership between Sea Bay No. 1 and the Respondent. In so finding, the judge erroneously stated that Tomei was related to Vincent Castellucci, and that the attorney for Sea Bay No. 1 was Allan Ross who was Vincent Castellucci's coexecutor. However, these factual errors are not sufficient to alter our decision.

<sup>8</sup>406 U.S. 272 (1972).

<sup>9</sup>Id. at 281-284, 291.

backpay an employee who had been found to have been unlawfully discharged by the predecessor. The Court, however, was careful to preserve its holding in *Burns* in stating:

We in no way qualify the *Burns* holdings . . . . [U]nlike *Burns*, where an important labor policy opposed saddling the successor employer with the obligations of the collective-bargaining agreement, there is no underlying congressional policy here militating against the imposition of liability.<sup>10</sup>

In the case at hand, the judge's conclusion that an order requiring the Respondent to abide by the stipulation agreement does not run afoul of *Martin J. Barry Co.*, 278 NLRB 393 (1986), a progeny of *Burns*, because the Respondent "is not being asked to assume substantive compacts arrived at between its predecessor and the Union," cannot be reconciled with the underlying Board Order in the present case and court decision enforcing it. Thus, in finding the Respondent's predecessor bound to its agreement to submit all bargaining issues to arbitration, the Board held in *Sea Bay Manor*, supra at 740:

[T]he instant case, in contrast to prior cases, does not involve one party's insistence to impasse on the inclusion of an interest arbitration clause in the contract then under negotiation to be applied in a subsequent contract. Rather, here, the parties, after considerable bargaining over mandatory subjects with respect to the contract then under negotiation, voluntarily entered into an agreement to resolve their differences over such terms by submitting them to binding arbitration. This agreement expressly was designed to establish all the terms and conditions of employment for the contract then under negotiation. Accordingly, it had an immediate and significant effect on the unit employees. In these circumstances the parties' agreement was so intertwined with and inseparable from the mandatory terms and conditions for the contract currently being negotiated as to take on the characteristics of the mandatory subject themselves. Indeed, the stipulation agreement was tantamount to a collective-bargaining agreement between the parties. [Emphasis added.]

Further, in its order granting enforcement of the Board's Order, the Second Circuit characterized the stipulation agreement as follows:

In view of the unique circumstances that the parties in mid-negotiation agreed to submit all the issues to binding arbitration we agree the agreement was "inextricably intertwined with and inseparable from the mandatory subjects of bargaining

<sup>10</sup>414 U.S. 168, 184-185 (1973).

themselves,” . . . and was “tantamount to a collective-bargaining agreement between the parties.”<sup>11</sup>

Clearly, given the unique circumstances of this case, we are compelled to hold that the stipulation agreement was the equivalent of a collective-bargaining agreement and, therefore, under the dictates of *Burns*, the Respondent cannot be required to abide by it subsequent to the date the Respondent commenced operations.

Nevertheless, as noted earlier, under *Golden State*, the Respondent has an obligation to remedy the unfair labor practices of its predecessor Sea Bay Manor No. 1 as it took over the predecessor’s business with knowledge of these unfair labor practices. This obligation encompasses the predecessor’s failure to abide by the stipulation agreement from June 7, 1978, until it ceased operations on June 17, 1982, and is analogous to that of a successor who must remedy a predecessor’s unlawful failure to implement the terms of an agreed-upon contract.<sup>12</sup> Accordingly, the Respondent will be required to submit to binding arbitration pursuant to the terms of the stipulation agreement under the Board’s prior order as enforced by the court for the limited purpose of determining the employees wages, hours, and conditions of employment during the approximately last 4 years of the predecessor’s operations.<sup>13</sup> The Respondent thus will be ordered to make the employees whole for their losses resulting from the

<sup>11</sup> We note that the court’s order is unpublished and may not generally be cited as precedent. In this instance, however, it is law of the case.

<sup>12</sup> As earlier found by the Board and the court, the stipulation agreement was “tantamount to a collective-bargaining agreement.” See *Martin J. Barry*, supra, in which the Board held that the predecessor’s collective-bargaining agreement could not be imposed on the successor for periods subsequent to the date it began operations, but that the successor was liable to make employees whole for losses they suffered between the date the predecessor unlawfully refused to honor its contract and the date it ceased operations.

The Board and the court also found that the predecessor violated Sec. 8(a)(5) by unilaterally changing the wage rates of the employees on or about June 16, 1978, in the absence of a genuine impasse in bargaining. However, because the unilateral change consisted of an increase in wage rates, the employees suffered no losses, and it is unnecessary to order the Respondent as a successor to take any affirmative action to remedy this unfair labor practice.

We note that the judge at least impliedly found that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing “to bargain collectively with the Union despite an order of the National Labor Relations Board directing it to do so, enforced by a judgment of the United States Court of Appeals” and framed his recommended Order to reflect that finding. In this regard, the Respondent was not a party to the underlying proceeding and the notice of hearing here did not allege the Respondent’s refusal to bargain. Thus, the remedy in this supplemental proceeding more appropriately is limited to ordering affirmative action necessary to remedy the predecessor’s unfair labor practices consistent with the Respondent’s status as a successor. We will modify the recommended Order accordingly.

<sup>13</sup> The Respondent is not foreclosed, however, from attempting to demonstrate in compliance that there is no available interest arbitration tribunal that would accept such a submission concerning 1978–1982 wages and benefits. Cf. *Overnite Transportation Co.*, 197 NLRB 894, 896 (1972), enf. mem. sub nom. *Teamsters Local 171 v. NLRB*, 473 F.2d 1386 (4th Cir. 1973) (employer not required to process grievances through a mechanism to which it does not have access).

predecessor’s unlawful failure to abide by the stipulation agreement during that period.<sup>14</sup>

## ORDER

The National Labor Relations Board orders that the Respondent, Ann S. Castellucci, Joseph C. Tomei, and Seymour Warshaw, a co-partnership d/b/a Sea Bay Manor Home for Adults, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act

1. Submit to binding arbitration for the limited purpose of determining the employees’ wages, hours, and conditions of employment during the period from June 7, 1978, to June 17, 1982, and make employees whole for any losses suffered as a result of its predecessor’s failure to abide by the stipulation agreement during this period in the manner set forth in this Decision and Order.

2. Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>14</sup> Backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest on any amounts due paid in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

*Lynn Neugebauer, Esq.*, for the General Counsel.  
*David Lew, Esq. (Goetz, Fitzpatrick & Flynn)*, of New York, New York, for the Respondent.  
*Louis Peckman, Esq. (Vladeck, Waldman, Elias & Engelhard)*, of New York, New York, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

HAROLD B. LAWRENCE, Administrative Law Judge. On November 18, 1987, December 23, 1987, and March 23, 1988, I conducted a hearing in Brooklyn, New York, on the single issue propounded in a notice of hearing issued by the Regional Director of Region 29 on 30 January 1988, pursuant to Sections 102.52 and 102.53 of the Board’s Rules and Regulations—Series B, as amended. The issue is whether the partnership which now operates an adult home called Sea Bay Manor Home for Adults should be required to comply with a 1982 judgment of the Circuit Court of Appeals for the Second Circuit enforcing a 1980 Order of the Board directing a partnership of the same name which formerly operated the institution to bargain collectively with Local 144, Hotel, Hospital, Nursing Home & Allied Health Services Union, SEIU, AFL–CIO (the Union) by submitting to binding arbitration.

Sea Bay Manor Home for Adults was owned by a partnership consisting of eight persons from July 1976 through June 1982, at which time the number of partners was reduced to three pursuant to a new partnership agreement. The partnership name “Sea Bay Manor Home for Adults” was retained. For the sake of clarity, I will, as occasion requires, refer to the original partnership as “Sea Bay No. 1” and to the

present owner and operator, the Respondent as "Sea Bay No. 2." The Regional Director's notice of hearing alleges that the partnership of the three persons who succeeded to the interests of the original partners constituted a successor employer which took over the business with notice of potential liability to remedy unfair labor practices under the outstanding Board's Order.

Sea Bay No. 2 interposed an answer denying all allegations except that Joseph Blisko has been the administrator of the home throughout the pertinent periods alleged in the notice of hearing and that the home is located at 3010 West 33d Street, Brooklyn, New York, where Sea Bay has been continuously engaged in operation of a home for adults.

The parties were afforded full opportunity to be heard; to call, examine, and cross-examine witnesses; and to introduce relevant evidence. Posthearing briefs have been filed on behalf of the General Counsel and the Respondent.

On the entire record, including my observation of the demeanor of Joseph Blisko, the only person who testified, and after consideration of the briefs filed, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Though not expressly raised in Respondent's answer, the question of jurisdiction over Sea Bay No. 2 is raised implicitly by Respondent's denial that it is a successor employer of the entity previously found guilty of committing unfair labor practices. The question is resolved by my finding herein, and Respondent's concession in its post hearing brief, that the operations of Sea Bay No. 2 are substantially the same as those which had been conducted by Sea Bay No. 1. The evidence demonstrated that it is necessarily operating under the very same circumstances which subjected its predecessor to the jurisdiction of the Board, and I find that Respondent is a successor of the former employer.

##### II. THE SUCCESSORSHIP ISSUE

###### A. Background<sup>1</sup>

Sea Bay No. 1 had six negotiation sessions with the Union between August 1977 and June 7, 1978, but they failed to arrive at a collective-bargaining agreement. On June 7, 1978, they entered into what they termed a "stipulation agreement," which provided that all issues relating to the wages, hours, and conditions of employment of the unit employees would be submitted to binding arbitration. However, Sea Bay No. 1 reneged and refused to submit the issues to arbitration. On December 15, 1980, the National Labor Relations Board issued a Decision and Order in Case 29-CA-6572, directing Sea Bay No. 1 to bargain collectively with the Union as the exclusive bargaining representative in an appropriate unit, by honoring and abiding by the stipulation agreement; to cease and desist from unilaterally changing wage rates in the absence of a genuine impasse in bargaining; and to reinstate, on request by the Union, the wage rates that existed for unit employees prior to June 16, 1978 (except that raises granted

<sup>1</sup>The matters narrated in this decision without evidentiary comment are those facts found by me on the basis of admissions in the answer, data contained in the exhibits, stipulations between or concessions by counsel, undisputed or uncontradicted testimony and, in instances where conflicts in the testimony did not warrant discussion, the testimony which I have credited.

in the interim were not required to be rescinded). On February 5, 1982, a judgment granting enforcement of the Board's Order was entered by the Circuit Court of Appeals for the Second Circuit.

Sea Bay No. 2 has refused to comply with the Board Order on the ground that it is a new owner and operator and not bound by the agreement of June 7, 1978, or the Board's Order.

###### B. The Nature of the Business

At the hearing, it was stipulated that on September 12, 1973, Sea Bay No. 1 was formed for the stated purpose of engaging in the business of leasing and operating a proprietary home for adults in a building which was to be erected at 3300 Surf Avenue, Coney Island, Brooklyn, New York. On December 16, 1976, the New York State Board of Social Welfare issued an operating certificate authorizing the eight co-partners of Sea Bay No. 1 to operate a private proprietary home for adults which would be located at 3010 West 33d Street, Brooklyn, New York, would have a maximum capacity of 176 residents, and would be known as the Sea Bay Manor Home for Adults. On November 23, 1982, the Department of Social Services (which succeeded the Board of Social Welfare) issued an operating certificate to Ann S. Castellucci, Joseph C. Tomei, and Seymour Warshaw, the three co-partners of Sea Bay No. 2, to operate a private proprietary adult home with a maximum capacity of 176 residents at the same location and to be known by the same name.

The nature of the business authorized to be conducted has thus remained the same. The posthearing brief submitted on behalf of Respondent concedes that no substantial change in operations has occurred since Sea Bay No. 2 took over from Sea Bay No. 1. In some particulars, in fact, operations had to remain the same because New York State regulations mandate performance of certain duties and maintenance of certain staffing.

###### C. Ownership

###### 1. The business

The members of Sea Bay No. 1 and their respective partnership interests were as follows: Lazarus Baylin, 10.62 percent; Soshana Siev Baylin, 10.625 percent; Vincent Castellucci, 7.5 percent; Eva Goldstein, 18 percent; Morris Goldstein, 3.25 percent; Leon Siev, 21.25 percent; Ziporah Wagreich, 21.25 percent; and Seymour Warshaw, 7.5 percent. Their partnership agreement contained a provision to the effect that the death of a partner would not terminate the partnership; a deceased partner's representative or committee would become the assignee of the ownership interest, receiving profits and assuming responsibility for losses, but having no voting privileges.

Sea Bay No. 2 came into existence on June 17, 1982. The partners, Ann Castellucci, Seymour Warshaw, and Joseph Tomei each had a one-third interest. Ann Castellucci was the widow and coexecutor of the estate of Vincent J. Castellucci. Warshaw had been a copartner of Sea Bay No. 1. As will be explained below, Tomei had been an important participant in the affairs of Sea Bay No. 1 and was related to Castellucci. There was thus significant continuity in ownership of the business.

## 2. The real estate

Title to the real estate on which the Home was built was held in the name of a separate entity, initially organized as a partnership, "Sea Gate Realty," but incorporated on August 16, 1973, as "Sea Gate Realty Corp." The original partnership agreement set forth that it was formed for the purpose of owning the land at 3300 Surf Avenue and building a home for adults on it. It contained a survivorship clause identical to that of the partnership agreement of Sea Bay No. 1. Initially, Soshana S. Baylin, Lazarus R. Baylin, Eva S. Goldstein, and Morris Goldstein each held a 12.5-percent interest and Ziporah Wagreich and Leon Siev each held a 25-percent interest. After September 12, 1973, the holdings were as follows: Lazarus R. Baylin and Soshana S. Baylin each held 6.25 percent; Eva S. Goldstein, 9 percent; Morris Goldstein, 3.5 percent; Leon Siev and Ziporah K. Wagreich, 12.5 percent each; and Seymour Warshaw and Vincent J. Castellucci, 25 percent each. In May 1975, Warshaw and Castellucci acquired complete ownership, each holding a 50-percent interest. The same persons were therefore interested in both the Home and the real estate at the pertinent times. Warshaw and Vincent J. Castellucci were the most important of these, owning all the real estate and a 15-percent interest in the Home during the period when Sea Bay No. 1 entered into and reneged on the arbitration agreement, when the Board issued its Order directing remedial action, and when the circuit court of appeals entered its judgment enforcing the Board's Order. Since then, Warshaw, Ann Castellucci (co-executrix of the estate of Vincent J. Castellucci), and Joseph Tomei have owned the entire business. It would therefore be an understatement to say that this case is one in which a bona fide successor may be found to have taken over a business under conditions in which it is chargeable with notice of violations and responsible for remedying them. In this case, the former and current owners and operators of the business had principals in common. The situation is governed by the logic of a comment relating to joint and several liability which appears in the decision in *Perma Vinyl Corp.*, 164 NLRB 968 (1967), enfd. sub nom. *United States Pipe v. NLRB*, 398 F.2d 544 (5th Cir. 1968):

Our discussion thus far has dealt only with the bona fide purchaser of the employing enterprise. With respect to the offending employer himself, it must be obvious that it cannot be in the public interest to permit the violator of the Act to shed all responsibility for remedying his own unfair labor practices by simply disposing of the business. [164 NLRB at 970.]

The continuity of ownership among the major principals and the conceded involvement of Tomei in the affairs of Sea Bay No. 1 during the incapacity and after the death of Castellucci, as well as Blisko's unbroken tenure as administrator of the home, furnish more than ample basis to charge Sea Bay No. 2 with notice of the unfair labor practices and of the directives of the Board and the circuit court of appeals.

### D. Management

Joseph Blisko, the only witness in this proceeding, has been employed as the administrator of the home since July 1976. He testified that, as administrator, he was responsible

for all phases of its operation and had been the sole representative of Sea Bay No. 1 in its negotiations with the Union in 1977 and 1978. While he testified that no attorney for Sea Bay No. 1 attended the negotiations with him, he mentioned an attorney being present while he was unsuccessfully attempting, in June 1978, to contact the owners (the partners of Sea Bay No. 1) to find out if they were amenable to the proposal for an arbitration agreement. The attorney was Alan Ross, who would later be coexecutor with Ann Castellucci of the estate of Vincent J. Castellucci. This suggests an ownership presence when Blisko made the decision to arbitrate. In any event, Blisko also testified that he consulted with Tomei regarding the advisability of agreeing to binding arbitration, because Tomei was related to Castellucci, who at that time was terminally ill, and because Tomei was more easily contacted than any of the other partners. Tomei and Castellucci were builders. During Castellucci's incapacity, Tomei helped out by advising Blisko, at his request, regarding problems in the new building. Their consultations, however, embraced other matters as well. Blisko consulted with Tomei regarding management problems. These consultations began approximately a year after he became administrator of the home, which is when the negotiations with the Union began, and continued after Tomei became one of the owners in 1982.

Blisko testified that he signed the stipulation agreement though Tomei opposed entering into the arrangement. The other partners later expressed their own keen dissatisfaction with his decision when he advised them of the anticipated cost of arbitration. He testified that Tomei was made aware of the fact that he had signed the agreement at or about the time he signed it, and that after the agreement was repudiated by Sea Bay No. 1, the partners were kept advised of the pendency of the NLRB proceedings which followed the repudiation.

Blisko's testimony, along with Respondent's admissions, establishes that he enjoyed a high degree of authority and power in the management of the Home throughout his tenure and that he handled the labor relations; to the extent that he consulted with the owners, the same persons were influential throughout, being the builders, Castellucci and his relative, Tomei, and Blisko thus consulted with the same persons all along; at the very least the major actors in both partnerships were apprised of all proceedings throughout the period of the negotiations and the proceedings before the Board and in the courts; and the partners overruled Blisko on rare occasions.

It is clear from Blisko's testimony that management has remained substantially unchanged. Blisko ran the day-to-day operations of the home and managed its labor relations and many other important matters, and the owning partners, who occasionally became directly involved in decision-making, were kept apprised of all important developments. In fact, Blisko never asserted that any change in management had ever occurred.

### E. Employee Complement

It was stipulated by counsel for the General Counsel and Respondent that

[T]he employee complement employed by Sea Bay Manor Home for Adults, at 3300 Surf Avenue, was vir-

tually the same just prior [to and] after the change in partnership, which would be 6/17/82.

It was further stipulated that at that time the employee classifications remained the same.

Retention of a large percentage of the former employer's work force is persuasive evidence of successorship. *NLRB v. Wayne Convalescent Center*, 465 F.2d 1039, 1041 (6th Cir. 1972); *NLRB v. Interstate 65 Corp.*, 45 F.2d 269 (6th Cir. 1971).

#### F. Respondent's Argument

Respondent concedes that as a successor employer it must recognize and bargain with the Union, but asserts that it cannot be compelled to comply with the Board's Order of December 15, 1980, because an order requiring Respondent to submit to binding arbitration would have the effect of compelling it to assume the collective-bargaining agreement negotiated by its predecessor.

Respondent mischaracterizes the issue. It is not being asked to assume Respondent mischaracterizes the issue. It is not being asked to assume substantive compacts arrived at between its predecessor and the Union. None were reached. The only agreement that exists is an agreement to recognize binding arbitration as the mechanism for arriving at a collective-bargaining agreement. Respondent is only being asked to comply with an agreed-upon process for arriving at an agreement, i.e., submission to arbitration. By submitting to arbitration, Respondent will remedy its predecessor's unfair labor practice in refusing to bargain collectively. An order directing Respondent to fulfill its obligations under Section 8(a)(5) of the Act in that fashion has no more substantive content than any bargaining order.

Respondent's reliance on *Martin J. Barry Co.*, 278 NLRB 393 (1986), is misplaced. The issue in that case was whether the Respondent, as a successor employer, was required to give effect to a fully negotiated collective-bargaining agreement and, if of course, the Board held that it was not required to do so because it was not required to assume the terms and obligations of the collective-bargaining agreements of its predecessor.

#### G. Conclusion

The Respondent introduced no evidence to demonstrate that it was operating the home any differently from the way Sea Bay No. 1 had operated it and therefore failed to meet its evidentiary burden. *Mansion House Management Corp.*, 208 NLRB 684, 686 (1974). Its failure in this regard was inevitable, for the home necessarily rendered the same services to the same clientele under both proprietors, with the same administrator and the same employee complement. Sea Bay No. 2 took over the operation of the home without 1 minute's hiatus. No change in physical plant occurred. The business was exactly the same in every respect that counted. Ownership interests in the home and in the underlying real estate continued from Sea Bay No. 1 to Sea Bay No. 2. Even without the evidence of actual knowledge of and participation in the unfair labor practices by some of the owners of Sea Bay No. 1, the other proven circumstances just noted would justify an inference of knowledge on the part of Sea Bay No. 2. *Perma Vinyl Corp.*, supra.

Substantial continuity is all that is required. In this case, however, there was complete continuity in employees, supervision and management, rendition of services, clientele and, of course, location. The name remained the same. The criteria for a finding of successorship are all present. *Premium Foods*, 260 NLRB 708, 714 (1982), enfd. 709 F.2d 623 (9th Cir. 1983); *Great Lakes Chemical Corp.*, 280 NLRB 1131 (1986). The decision in *Great Lakes* noted that the "critical focus of inquiry" is whether changes have occurred which would affect the employees' representational desires, not the extent of such change as may have occurred. When, as in this case, there is no discernible change at all, it would seem that there could be no change in the employees' representational desires, needs or entitlements. An employer may make changes, but they are not deemed sufficiently substantial to preclude a finding of successorship if they fail to change the day-to-day life of the employees. See *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 465 (9th Cir. 1985). In the absence of a change in the nature of the employer's industry, the duty to bargain remains. See *NLRB v. Interstate 65 Corp.*, 453 F.2d 269, 272 (6th Cir. 1971).

I find that Respondent, Sea Bay No. 2, is the successor of an employer which has refused to bargain collectively with the Union despite an Order of the National Labor Relations Board directing it to do so, enforced by a judgment of the U.S. court of appeals, and that, Respondent having assumed ownership and control of the business in question under circumstances rendering it chargeable with knowledge of the commission of the unfair labor practices and of the proceedings before the Board and the court of appeals, it is a successor employer responsible for remedying the unfair labor practices and complying with the Order of the Board and the judgment of the circuit court of appeals. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

#### CONCLUSIONS OF LAW

1. The partnership known as Sea Bay Manor Home for Adults, formed on June 17, 1982, and consisting of Ann Castellucci, Seymour Warshaw, and Joseph Tomei, is the successor employer of the employees of the Sea Bay Manor Home for Adults located in Brooklyn, New York.

2. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Union, at all pertinent times herein, was and continues to be, a labor organization within the meaning of Section 2(5) of the Act.

4. In and about November 1982, Respondent assumed ownership and control of the business of the Sea Bay Manor Home for Adults, with notice of an Order of the National Labor Relations Board, dated December 15, 1980, which directs a predecessor employer, a partnership also known as Sea Bay Manor Home for Adults, and which consisted of Lazarus and Soshana Siev Baylin, Eva and Morris Goldstein, Vincent J. Castellucci, Leon Siev, Ziporah Wagreich, and Seymour Warshaw, to bargain collectively with the Union pursuant to its agreement with the Union dated June 7, 1978, and with notice of judgment of the United States Court of Appeals, Second Circuit, dated February 5, 1982, enforcing the Order.

5. Respondent is responsible for compliance with the aforesaid Order of the National Labor Relations Board and judgment of the United States court of appeals.

6. By refusing to adhere to and abide by the stipulation agreement dated June 7, 1978, the Order of the National Labor Relations Board and the Judgment of the United States Court of Appeals, Second Circuit, Respondent has violated Section 8(a)(1) and (5) of the Act.

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

#### THE REMEDY

Having found that Respondent is in violation of Section 8(a)(1) and (5) of the Act, I will order Respondent to comply with the Order of the Board dated December 15, 1980 and to cease and desist from further violation. As matters now stand, there has been a failure to bargain collectively over a 10-year period, during which the same persons exercised significant control or influence over the affairs of the Home. The only way to comply with the mandate of *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 181 (1973), to “[strike] a balance between the conflicting legitimate interests of a bona fide successor, the public and the affected

employee[s]” is to direct Respondent to proceed to arbitration.

In view of the great amount of time which has elapsed since the original violation of the Act, it is essential to preserve such wage gains as the unit employees have achieved during—the period by reason of the operation of normal market forces. Accordingly, I have provided that rescission of wage increases which have been granted to date shall be neither required nor permitted. Imposition of this requirement does not constitute making an agreement for the parties, but is simply a means of preserving the status quo by preserving the wage rates fixed by market forces; the wage rates current in 1978 were arrived at in the same way. Permitting a roll-back to any extent would penalize the employees and give an unfair advantage to the employer in the arbitration which will now, presumably, take place. No hardship results to the employer, inasmuch as any case which it wishes to make for lowering the present wage level can be made to the arbitrator.

The nature of the appropriate remedy herein does not require an order with respect to the original partnership and to persons no longer involved in the enterprise.

[Recommended Order omitted from publication.]