

**Integrated Health Services, Inc. d/b/a IHS at West Broward and 1115, Florida Division of 1199, SEIU, AFL-CIO, CLC**

**Integrated Health Services, Inc. d/b/a Pinecrest Convalescent Center and 1115, Florida Division of 1199, SEIU, AFL-CIO, CLC**

**Integrated Health Services, Inc. d/b/a North Miami Nursing and Rehabilitation Center and 1115, Florida Division of 1199, SEIU, AFL-CIO, CLC**

**Integrated Health Services, Inc. d/b/a Fountainhead Nursing and Rehabilitation Center and UNITE! (Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC), Local 2000.** Cases 12-CA-20937, 12-CA-20938, 12-CA-20939, and 12-CA-20940

September 30, 2002

#### DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

This case involves the sale of four skilled nursing facilities, each of which was operated by one of the four Respondents. The complaint alleges that each Respondent failed and refused to bargain over the effects of the sale of its facility. The General Counsel seeks summary judgment because the Respondents have admitted all allegations in the complaint.

Upon charges filed on July 5, 2000, by 1115, Florida Division of 1199, SEIU, AFL-CIO, CLC (1115), and UNITE! (Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC), Local 2000 (UNITE!), the General Counsel issued a consolidated complaint on October 31, 2000, against the Respondents, Integrated Health Services, Inc. d/b/a IHS at West Broward (West Broward); Integrated Health Services, Inc. d/b/a Pinecrest Convalescent Center (Pinecrest); Integrated Health Services, Inc. d/b/a North Miami Nursing and Rehabilitation Center (North Miami); and Integrated Health Services, Inc. d/b/a Fountainhead Nursing and Rehabilitation Center (Fountainhead). The consolidated complaint was amended on December 8, 2000, and November 7, 2001. The amended consolidated complaint alleges that West Broward, Pinecrest, and North Miami each violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with 1115 over the effects of the sale of their respective skilled nursing facilities. The amended consolidated complaint further alleges that Fountainhead violated Section 8(a)(5) and (1) by failing and refusing to bargain with UNITE! over the effects of the sale of its skilled nursing facility.

On November 20, 2001, the Respondents filed a joint answer to the amended consolidated complaint. The

Respondents filed a joint amended answer dated February 1, 2002, in which they admitted all allegations in the amended consolidated complaint relating to the failure to bargain over the effects of selling their facilities.<sup>1</sup>

On February 19, 2002, the General Counsel filed a Motion to Transfer Proceedings to the Board and for Summary Judgment. On February 21, 2002, the Board issued an Order transferring the proceedings to the Board and a Notice to Show Cause why the Motion for Summary Judgment should not be granted. The Respondents filed no response. The allegations in the motion are therefore undisputed.

#### Ruling on Motion for Summary Judgment

The Respondents admit in their answer that they have failed and refused to bargain with 1115 and UNITE! regarding the effects of the sale of their facilities. As their only affirmative defense, the Respondents state that on February 2, 2000, proceedings were instituted in the United States Bankruptcy Court for the District of Delaware covering the Respondents, and that those proceedings remain ongoing. The Respondents contend that the unfair labor practices alleged in the complaint occurred prior to the filing of the bankruptcy petition, and therefore all liabilities arising from the unfair labor practices must be addressed solely in connection with the ongoing bankruptcy proceedings. It is well established, however, that “the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition.” *Ponce de Leon Healthcare, Inc.*, 334 NLRB No. 66, slip op. at 1 fn. 2 (2001) (not reported in bound volumes); *Phoenix Co.*, 274 NLRB 995 (1985). “Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers.” *Ponce de Leon*, supra, at fn. 2; *Phoenix Co.*, supra, at 995. Therefore, we find no merit to the Respondents’ affirmative defense, and we grant the General Counsel’s Motion for Summary Judgment.

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, West Broward, a Delaware corporation with an office and place of business in Planta-

<sup>1</sup> At the time the Respondents filed their amended answer, the complaint alleged additional violations of Sec. 8(a)(5) and (1) based on the alleged failure to provide information requested by 1115 and UNITE!. The Respondents denied these allegations. On February 8, 2002, at the request of 1115 and UNITE!, the Regional Director issued an order withdrawing these allegations from the complaint. The Respondents have admitted all of the allegations that remain in the complaint.

tion, Florida, was engaged in the business of operating a skilled nursing facility. During 1999, West Broward, in conducting its business operations, derived gross revenues in excess of \$100,000. Also during 1999, West Broward, in conducting its business operations, purchased and received at its Plantation, Florida facility goods and materials valued in excess of \$10,000 directly from points located outside the State of Florida.

At all material times, Pinecrest, a Delaware corporation with an office and place of business in North Miami, Florida, was engaged in the business of operating a skilled nursing facility. During 1999, Pinecrest, in conducting its business operations, derived gross revenues in excess of \$100,000. Also during 1999, Pinecrest purchased and received at its North Miami, Florida facility goods and materials valued in excess of \$10,000 directly from points located outside the State of Florida.

At all material times, North Miami, a Delaware corporation with an office and place of business in North Miami, Florida, was engaged in the business of operating a skilled nursing facility. During 1999, North Miami, in conducting its business operations, derived gross revenues in excess of \$100,000. Also during 1999, North Miami purchased and received at its North Miami, Florida facility goods and materials valued in excess of \$10,000 directly from points located outside the State of Florida.

At all material times, Fountainhead, a Delaware corporation with an office and place of business in Miami, Florida, was engaged in the business of operating a skilled nursing facility. During 1999, Fountainhead, in conducting its business operations, derived gross revenues in excess of \$100,000. Also during 1999, Fountainhead purchased and received at its Miami, Florida facility goods and materials valued in excess of \$10,000 directly from points located outside the State of Florida.

We find that each of the Respondents, West Broward, Pinecrest, North Miami, and Fountainhead, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We find that 1115 and UNITE! are labor organizations within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Respondent West Broward

The following employees of West Broward (the West Broward unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time and per diem licensed practical nurses (LPNs), employed by the Re-

spondent at its Plantation, Florida facility, but excluding all CNAs, restorative aides, housekeeping employees, laundry employees, maintenance employees, dietary aides, cooks, department heads, assistant department heads, unit managers, unit shift managers, registered nurses (RNs), office clerical employees, activity aides, medical records ward clerk, managers, guards, confidential employees and supervisors as defined in the National Labor Relations Act, as amended, and all other employees.

At all material times since at least February 1, 1998, 1115 and its predecessors were recognized by West Broward as the exclusive collective-bargaining representative of the West Broward unit. This recognition was embodied in a collective-bargaining agreement, which was effective by its terms from February 1, 1998, to April 29, 2000. At all material times, based on Section 9(a) of the Act, 1115 has been the exclusive collective-bargaining representative of employees in the West Broward unit.

About January 1, 2000, West Broward sold its lease and operations of its skilled nursing facility to Nationwide Senior Healthcare, Inc. West Broward informed 1115 of the sale on January 28, 2000. West Broward's notice to 1115 of the sale was not timely.

About February 2, 2000, by written correspondence, 1115 demanded bargaining with West Broward regarding the effects of the sale of its facility. At all material times, including since about February 2, 2000, West Broward has failed and refused to bargain over the effects of the sale of its facility.

### B. Respondent Pinecrest

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

CNAs, orderlies, housekeeping employees, dietary employees, and ward clerks, but excluding RNs, LPNs, office clerical and administrative employees, drivers, maintenance supervisors, supervisors, watchman [sic] and guards as defined in the Labor Management Relations Act.

Since at least September 1, 1996, 1115 and its predecessors were recognized as the exclusive collective-bargaining representative of the Pinecrest unit employed by Pinecrest and its predecessor. This recognition was embodied in a collective-bargaining agreement, which was effective by its terms from September 1, 1995, through August 31, 1999. At all material times, based on Section 9(a) of the Act, 1115 has been the exclusive collective-bargaining representative of Pinecrest's employees in the Pinecrest unit.

About February 1, 2000, Pinecrest sold its lease and operations of its skilled nursing facility to Pinecrest Limited Partnership, and informed 1115 of the sale on that same date. Pinecrest's notice to 1115 of the sale was not timely.

About February 2, 2000, by written correspondence, 1115 demanded bargaining with Pinecrest regarding the effects of the sale of its facility. At all material times, including since about February 2, 2000, Pinecrest has failed and refused to bargain over the effects of the sale of its facility.

#### *C. Respondent North Miami*

The following employees of North Miami (the North Miami unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All regular part-time and full-time employees, including nurses [sic] aides, laundry aides, dietary aides and cooks, excluding casual and temporary employees, registered nurses, licensed practical nurses, supervisors, office and clerical workers.

At all material times since at least February 10, 1996, 1115 and its predecessors were recognized as the exclusive collective-bargaining representative of the North Miami unit employed by North Miami and its predecessor. This recognition was embodied in a collective-bargaining agreement, which was effective by its terms from February 10, 1996, to February 10, 1999. At all material times, based on Section 9(a) of the Act, 1115 has been the exclusive collective-bargaining representative of North Miami's employees in the North Miami unit.

About January 26, 2000, North Miami sold its lease and operations of its skilled nursing facility to Elite Healthcare Management. North Miami informed 1115 of the sale on January 28, 2000. North Miami's notice to 1115 of the sale was not timely.

About February 2, 2000, by written correspondence, 1115 demanded bargaining with North Miami regarding the effects of the sale of its facility. At all material times, including since about February 2, 2000, North Miami has failed and refused to bargain over the effects of the sale of its facility.

#### *D. Respondent Fountainhead*

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

All full-time and regular part-time certified nursing assistants, dietary aides, cooks, maintenance employees,

activities assistants, rehabilitative assistants, and house-keeping and laundry employees, but excluding all other employees, office clericals, professionals, technicals, confidential employees, guards and supervisors as defined in the Act.

At all material times since at least April 7, 1997, UNITE! and its predecessor were recognized as the exclusive collective-bargaining representative of the Fountainhead unit by Fountainhead and its predecessor. This recognition was embodied in a collective-bargaining agreement, which was effective by its terms from April 7, 1997, to April 7, 2000. At all material times, based on Section 9(a) of the Act, UNITE! has been the exclusive collective-bargaining representative of Fountainhead's employees in the Fountainhead unit.

About January 26, 2000, Fountainhead sold its lease and operations of its skilled nursing facility to Elite Healthcare Management. Fountainhead informed UNITE! of the sale on January 28, 2000. Fountainhead's notice to UNITE! of the sale was not timely.

About February 2, 2000, by written correspondence, UNITE! demanded bargaining with Fountainhead regarding the effects of the sale of its facility. At all material times, including since about February 2, 2000, Fountainhead has failed and refused to bargain over the effects of the sale of its facility.

#### CONCLUSION OF LAW

By the acts and conduct described above, West Broward, Pinecrest, and North Miami have failed and refused to bargain collectively and in good faith with 1115 regarding the effects on unit employees of the sale of their respective facilities, and have thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act. Fountainhead has failed and refused to bargain collectively and in good faith with UNITE! regarding the effects on unit employees of the sale of Fountainhead's facility, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondents have violated Section 8(a)(5) and (1) of the Act, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we have found that West Broward, Pinecrest, and North Miami have violated Section 8(a)(5) and (1) by failing and refusing to bargain with 1115 concerning the effects on unit employees of the sale of their facilities.

We have also found that Fountainhead has violated Section 8(a)(5) and (1) by failing and refusing to bargain with Charging Party UNITE! concerning the effects on unit employees of the sale of Fountainhead's facility. Therefore, we shall order West Broward, Pinecrest, and North Miami, on request, to bargain with 1115 regarding the effects on unit employees of the sale of their respective facilities. We shall also order Fountainhead, on request, to bargain with UNITE! regarding the effects on unit employees of the sale of Fountainhead's facility.

As a result of the Respondents' unlawful failure to bargain in good faith with 1115 and UNITE! about the effects of the decisions to sell their facilities, the employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to 1115 and UNITE!. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondents to bargain with 1115 and UNITE! concerning the effects of selling their facilities on their employees, and shall accompany our Order with a limited backpay requirement designed both to make whole the employees 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 Respondents. We shall do so by ordering the Respondents to pay backpay to the employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).<sup>2</sup>

Thus, each Respondent shall pay its employees backpay at the rate of their normal wages when last in that Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the sale of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business

<sup>2</sup> *Transmarine* has been well-established Board precedent for more than 30 years. In addition, *Transmarine's* limited backpay remedy has been approved by the courts. E.g., *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1307 (8th Cir. 1988); *Yorke v. NLRB*, 709 F.2d 1138, 1145 (7th Cir. 1983). In any event, in the circumstances of this case, we find it unnecessary to address our colleague's concerns with *Transmarine*.

However, because the complaint and motion do not specify what, if any, actual impact the sale of the facilities had on the employees, we shall permit the Respondents to contest, in the circumstances of this case, the appropriateness of such a *Transmarine* backpay remedy at the compliance stage. See, e.g., *United Exposition Service*, 313 NLRB 1007, 1008 fn. 3 (1994).

days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union,<sup>3</sup> or (4) the Union's subsequent failure to bargain in good faith, but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date of the sale of the Respondent's facility to the time the employees secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In view of the fact that the Respondents' facilities have been sold, we shall order the Respondents to mail copies of the attached notices to 1115 and UNITE! and to the last known addresses of their former employees in order to inform them of the outcome of this proceeding.

#### ORDER

The National Labor Relations Board orders that

A. Respondent, Integrated Health Services, Inc. d/b/a IHS at West Broward (West Broward), Plantation, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with 1115, Florida Division of 1199, SEIU, AFL-CIO, CLC (1115), as the exclusive representative of the employees in the bargaining unit set forth below by refusing to bargain with 1115 regarding the effects on the unit employees of West Broward's sale of its facility in Plantation, Florida.

All full-time and regular part-time and per diem licensed practical nurses (LPNs), employed by the Respondent at its Plantation, Florida facility, but excluding all CNAs, restorative aides, housekeeping employees, laundry employees, maintenance employees, dietary aides, cooks, department heads, assistant department heads, unit managers, unit shift managers, registered nurses (RNs), office clerical employees, activity aides, medical records ward clerk, managers, guards, confidential employees and supervisors as defined in

<sup>3</sup> *Melody Toyota*, 325 NLRB 846 (1998).

the National Labor Relations Act, as amended, and all other employees.

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

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

(a) On request, bargain with 1115 concerning the effects on the unit employees of West Broward's sale of its facility in Plantation, Florida, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Pay the employees in the unit described above their normal wages when in West Broward's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date West Broward bargains to agreement with 1115 on those subjects pertaining to the effects of the sale of its Plantation, Florida facility; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of 1115 to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of West Broward's notice of its desire to bargain with 1115; or (4) the subsequent failure of 1115 to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from about January 1, 2000, when West Broward sold its Plantation, Florida facility to the time he or she secured equivalent employment elsewhere, or the date on which West Broward shall have offered to bargain in good faith, whichever occurs sooner; provided, however, 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 West Broward's employ, with interest, as set forth in the remedy portion of the decision.

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

(d) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by West Broward's authorized representative, copies of

the attached notice marked "Appendix A"<sup>4</sup> to 1115 and to all employees who were employed by West Broward when it sold its Plantation, Florida facility on about January 1, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that West Broward has taken to comply.

B. Respondent, Integrated Health Services, Inc. d/b/a Pinecrest Convalescent Center (Pinecrest), North Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with 1115 as the exclusive representative of the employees in the bargaining unit set forth below by refusing to bargain with 1115 regarding the effects on the unit employees of Pinecrest's sale of its facility in North Miami, Florida.

CNAs, orderlies, housekeeping employees, dietary employees, and ward clerks, but excluding RNs, LPNs, office clerical and administrative employees, drivers, maintenance supervisors, supervisors, watchman [sic] and guards as defined in the Labor Management Relations Act.

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

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

(a) On request, bargain with 1115 concerning the effects on the unit employees of Pinecrest's sale of its facility in North Miami, Florida, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Pay the employees in the unit described above their normal wages when in Pinecrest's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date Pinecrest bargains to agreement with 1115 on those subjects pertaining to the effects of the sale of its North Miami, Florida facility; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of 1115 to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of Pinecrest's notice of its desire to bargain with 1115; or (4) the subsequent failure

<sup>4</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."

of 1115 to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from about February 1, 2000, when Pinecrest sold its North Miami, Florida facility to the time he or she secured equivalent employment elsewhere, or the date on which Pinecrest shall have offered to bargain in good faith, whichever occurs sooner; provided, however, 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 Pinecrest's employ, with interest, as set forth in the remedy portion of the decision.

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

(d) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by Pinecrest's authorized representative, copies of the attached notice marked "Appendix B"<sup>5</sup> to 1115 and to all employees who were employed by Pinecrest when it sold its North Miami, Florida facility on about February 1, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Pinecrest has taken to comply.

C. Respondent, Integrated Health Services, Inc. d/b/a North Miami Nursing and Rehabilitation Center (North Miami), North Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with 1115 as the exclusive representative of the employees in the bargaining unit set forth below by refusing to bargain with 1115 regarding the effects on the unit employees of North Miami's sale of its facility in North Miami, Florida.

All regular part-time and full-time employees, including nurses [sic] aides, laundry aides, dietary aides and cooks, excluding casual and temporary employees, registered nurses, licensed practical nurses, supervisors, office and clerical workers.

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

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

(a) On request, bargain with 1115 concerning the effects on the unit employees of North Miami's sale of its facility in North Miami, Florida, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Pay the employees in the unit described above their normal wages when in North Miami's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date North Miami bargains to agreement with 1115 on those subjects pertaining to the effects of the sale of its North Miami, Florida facility; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of 1115 to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of North Miami's notice of its desire to bargain with 1115; or (4) the subsequent failure of 1115 to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from about January 26, 2000, when North Miami sold its North Miami, Florida facility to the time he or she secured equivalent employment elsewhere, or the date on which North Miami shall have offered to bargain in good faith, whichever occurs sooner; provided, however, 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 North Miami's employ, with interest, as set forth in the remedy portion of the decision.

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

(d) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by North Miami's authorized representative, copies of the attached notice marked "Appendix C"<sup>6</sup> to 1115 and to all employees who were employed by North Miami when it sold its North Miami, Florida facility on about January 26, 2000.

<sup>5</sup> See fn. 4, above.

<sup>6</sup> See fn. 4, above.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that North Miami has taken to comply.

D. Respondent, Integrated Health Services, Inc. d/b/a Fountainhead Nursing and Rehabilitation Center (Fountainhead), Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with UNITE! (Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC), Local 2000 (UNITE!), as the exclusive representative of the employees in the bargaining unit set forth below by refusing to bargain with UNITE! regarding the effects on the unit employees of Fountainhead's sale of its facility in Miami, Florida.

All full-time and regular part-time certified nursing assistants, dietary aides, cooks, maintenance employees, activities assistants, rehabilitative assistants, and housekeeping and laundry employees, but excluding all other employees, office clericals, professionals, technicals, confidential employees, guards and supervisors as defined in the Act.

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

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

(a) On request, bargain with UNITE! concerning the effects on the unit employees of Fountainhead's sale of its facility in Miami, Florida, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Pay the employees in the unit described above their normal wages when in Fountainhead's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date Fountainhead bargains to agreement with UNITE! on those subjects pertaining to the effects of the sale of its Miami, Florida facility; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of UNITE! to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of Fountainhead's notice of its desire to bargain with UNITE!; or (4) the subsequent failure of UNITE! to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from about January 26, 2000, when Fountainhead sold its Miami, Florida facility to the time he or she secured equivalent employment elsewhere, or the date on which Foun-

tainhead shall have offered to bargain in good faith, whichever occurs sooner; provided, however, 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 Fountainhead's employ, with interest, as set forth in the remedy portion of the decision.

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

(d) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by Fountainhead's authorized representative, copies of the attached notice marked "Appendix D"<sup>7</sup> to UNITE! and to all employees who were employed by Respondent Fountainhead when it sold its Miami, Florida facility on about January 26, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Fountainhead has taken to comply.

MEMBER BARTLETT, concurring.

I concur in the majority's use of a *Transmarine* remedy for the Respondent's undisputed effects bargaining violation.<sup>1</sup> I write separately, however, to express my doubts as to whether the *Transmarine* remedy represents a permissible exercise of the Board's remedial authority under Section 10(c) of the Act.

As stated by the Supreme Court:

Under § 10(c), the Board's authority to remedy unfair labor practices is expressly limited by the requirement that its orders 'effectuate the policies of the Act.' Although this rather vague statutory command obviously permits the Board broad discretion, at a minimum it encompasses the requirement that a proposed remedy be tailored to the unfair labor practice it is intended to redress. [*Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984).]

<sup>7</sup> See fn. 4, above.

<sup>1</sup> I note that the Respondent has failed to contest this remedy as a general matter. See, e.g., *Kathleen's Bakeshop, LLC*, 337 NLRB 1081, 1082 fn. 3 (2002).

With respect to backpay remedies, “it remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices.” *Id.*, citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941). More generally, a remedy is impermissible to the extent that it is punitive in nature. *NLRB v. Strong*, 393 U.S. 357, 359 (1969); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10–12 (1940); *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983), cert. denied 465 U.S. 1023 (1984).

The *Transmarine* remedy has two legitimate objectives: (1) to make employees whole for their losses, to a limited degree, and (2) to restore at least some economic inducement for an employer to bargain as the law requires. *O. L. Willis, Inc.*, 278 NLRB 203, 205 (1986). However, the means chosen to achieve these objectives are inconsistent with the foregoing principles. First, the 2-week minimum backpay provision is entirely speculative. Second, the use of a daily accruing backpay formula as an “inducement” to engage in remedial bargaining nunc pro tunc is punitive in nature.

On the first point, I agree with the dissent in *Transmarine* itself that there is no perceptible principle for establishing a 2-week backpay minimum. 170 NLRB at 391. As a measure of remedial compensation for employees, therefore, the backpay minimum is unduly speculative because it lacks the necessary relationship to losses that employees actually suffered or reasonably could be expected to suffer from the employer’s failure to bargain. This is particularly so if employees have secured equivalent new employment within 2 weeks of any termination resulting from the employer action at issue.<sup>2</sup> To that extent, the *Transmarine* remedy has the same flaw as the minimum backpay award rejected by the Supreme Court in *Sure-Tan*,<sup>3</sup> and the backpay award for a refusal-to-bargain violation that the Board rejected in *Ex-Cell-O Corp.*, 185 NLRB 107 (1970).

On the second point—the use of a daily accruing backpay remedy as an inducement to force a respondent employer to bargain nunc pro tunc—there is no apparent

<sup>2</sup> See *NLRB v. Waymouth Farms, Inc.*, 172 F.3d 598, 600–601 (8th Cir. 1999) (agreeing that the respondent employer unlawfully failed to engage in bargaining about effects of a plant closing, but denying enforcement of *Transmarine* remedy for employees who suffered no losses because they were immediately hired at a new facility). See also *Sea Jet Trucking Corp. v. NLRB*, 221 F.3d 196 (D.C. Cir. 2000) (unpublished opinion expressing concern that *Transmarine* remedy applied to the facts of that case “may in some respects be punitive rather than remedial”).

<sup>3</sup> 467 U.S. 883, 898–902. The Court found that the court of appeals below had impermissibly expanded the Board’s original remedial order by providing that undocumented alien employees who had been unlawfully discharged should receive a minimum of 6 months’ backpay.

authority for the Board to impose fines to compel compliant behavior. Under *Transmarine*, the backpay remedy *continues to run* while the parties are engaged in remedial bargaining, until they reach impasse or agreement. The remedy therefore does more than provide a union with some measure of the bargaining power it would have had if timely bargaining had taken place. Instead, the accumulating backpay remedy hangs like a Sword of Damocles over the bargaining table, distorting the employer’s economic position and arguably compelling agreement to terms that it would not otherwise have accepted. In this regard, the remedy contravenes the clear holding of *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970), that the Board lacks the “power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement.” I see no real difference between the Board’s direct imposition of substantive contract terms on a party and its imposition of sanctions that coerce agreement to terms that could otherwise be resisted in good faith bargaining.

I agree with the objectives and desirability of a meaningful remedy in the circumstances addressed by *Transmarine*. It may well be that, absent some economic compulsion, a wrongdoing employer will have little reason to engage in bargaining about the effects of a sale, closing, or relocation of operations that took place years ago. Nevertheless, the Board remains constrained to fashion an appropriate remedy within the defined limits of its statutory authority. The need for a more effective remedy may require action by Congress.

#### APPENDIX A

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 Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with 1115, Florida Division of 1199, SEIU, AFL–CIO, CLC, as the exclusive representative of the employees in the bargaining unit set forth below by refusing to bargain

concerning the effects on the unit employees of the sale of our facility in Plantation, Florida, on about January 1, 2000.

All full-time and regular part-time and per diem licensed practical nurses (LPNs), employed by us at our Plantation, Florida facility, but excluding all CNAs, restorative aides, housekeeping employees, laundry employees, maintenance employees, dietary aides, cooks, department heads, assistant department heads, unit managers, unit shift managers, registered nurses (RNs), office clerical employees, activity aides, medical records ward clerk, managers, guards, confidential employees and supervisors as defined in the National Labor Relations Act, as amended, and all other employees.

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

WE WILL, on request, bargain with the Union concerning the effects on the unit employees of the sale of our facility in Plantation, Florida, and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL pay limited backpay to the unit employees in connection with our failure to bargain with the Union over the effects of the sale of our Plantation facility.

INTEGRATED HEALTH SERVICES, INC. D/B/A IHS  
AT WEST BROWARD

#### APPENDIX B

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 Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with 1115, Florida Division of 1199, SEIU, AFL-CIO, CLC, as the exclusive representative of the employees in the bargaining unit set forth below by refusing to bargain

concerning the effects on the unit employees of the sale of our facility in North Miami, Florida, on about February 1, 2000.

CNAs, orderlies, housekeeping employees, dietary employees, and ward clerks, but excluding RNs, LPNs, office clerical and administrative employees, drivers, maintenance supervisors, supervisors, watchman [sic] and guards as defined in the Labor Management Relations Act.

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

WE WILL, on request, bargain with the Union concerning the effects on the unit employees of the sale of our facility in North Miami, Florida, and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL pay limited backpay to the unit employees in connection with our failure to bargain with the Union over the effects of the sale of our North Miami facility.

INTEGRATED HEALTH SERVICES, INC. D/B/A  
PINECREST CONVALESCENT CENTER

#### APPENDIX C

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 Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with 1115, Florida Division of 1199, SEIU, AFL-CIO, CLC, as the exclusive representative of the employees in the bargaining unit set forth below by refusing to bargain concerning the effects on the unit employees of the sale of our facility in North Miami, Florida, on about January 26, 2000.

All regular part-time and full-time employees, including nurses [sic] aides, laundry aides, dietary aides and

cooks, excluding casual and temporary employees, registered nurses, licensed practical nurses, supervisors, office and clerical workers.

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

WE WILL, on request, bargain with the Union concerning the effects on the unit employees of the sale of our facility in North Miami, Florida, and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL pay limited backpay to the unit employees in connection with our failure to bargain with the Union over the effects of the sale of our North Miami facility.

INTEGRATED HEALTH SERVICES, INC. D/B/A  
NORTH MIAMI NURSING AND REHABILITATION  
CENTER

#### APPENDIX D

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 Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on  
your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with UNITE! (Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC), Local 2000, as the exclusive representative of the employees in the bargaining unit set forth below by refusing to bargain concerning the effects on the unit employees of the sale of our facility in Miami, Florida, on about January 26, 2000.

All full-time and regular part-time certified nursing assistants, dietary aides, cooks, maintenance employees, activities assistants, rehabilitative assistants, and house-keeping and laundry employees, but excluding all other employees, office clericals, professionals, technicals, confidential employees, guards and supervisors as defined in the Act.

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

WE WILL, on request, bargain with the Union concerning the effects on the unit employees of the sale of our facility in Miami, Florida, and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL pay limited backpay to the unit employees in connection with our failure to bargain with the Union over the effects of the sale of our Miami facility.

INTEGRATED HEALTH SERVICES, INC. D/B/A  
FOUNTAINHEAD NURSING AND REHABILITATION  
CENTER