NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home *and* United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, CLC. Cases 28–CA–16762, 28–CA–17278, and 28–CA–17390

June 30, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

On May 13, 2002, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering 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 briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions and to adopt the recommended Order.

The judge's recommended Order includes a direction that the Respondent, on request, bargain with the Union. The Respondent excepts, contending that the issuance of a bargaining order is not supported by the record.

We agree with the judge, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is warranted as a remedy for the Respondent's unlawful refusal to bargain with the Union in this case. We adhere to the view, reaffirmed in *Caterair*, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). See also *Marion Hospital Corp. v. NLRB*, 321 F.3d 1178 (D.C. Cir. 2003) (enforcing bargaining order). In *Vincent*, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court would require and find that a balancing of the three factors warrants an affirmative bargaining order.[2]

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's refusal to recognize and bargain with the Union. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of those employees who may oppose continued union representation, because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to continue to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's refusal to bargain with

[1] In her decision, the judge denied Respondent's motion to reconsider her ruling denying Respondent access to witness Sanchez's witness statements that were given in preparation for the hearing in an earlier proceeding (*Mimbres Memorial Hospital*, 337 NLRB 998 (2002)). Members Schaumber and Meisburg believe that in cases such as this one where the witness gave testimony in an earlier proceeding in another case involving the same parties, and the facts of the two cases are related, the judge should have reviewed the requested witness statements from the earlier proceeding *in camera* to determine their relevance to the instant proceeding. However, since Respondent's attorney had reviewed the witness statements during the earlier hearing and therefore presumably had knowledge of their contents, but failed to make an offer of proof in the instant proceeding as to the specific relevance of those witness statements to the instant proceeding, Members Schaumber and Meisburg find that Respondent was not prejudiced by the judge's denial of its motion to reconsider her ruling.

[2] Member Schaumber does not agree with the view expressed in *Caterair International*, supra, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) violation." He agrees with the U.S. Court of Appeals for the District of Columbia Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. See *Eden Gardens Nursing Home*, 339 NLRB No. 12, slip op. at 2-3 fns. 9 and 10 (2003). On the facts of this case, Member Schaumber finds that a bargaining order is warranted.

the Union in these circumstances because it would permit a decertification petition to be filed before the Respondent has afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair here, in view of the Respondent's repeated unfair labor practices in violation of its duty to bargain, including its unilateral change in the work schedule of Garry Kavanaugh, the Union's committeeman and spokesperson in the bargaining unit, to include weekends, as well as Kavanaugh's later suspension. Further, the Respondent was also found to have committed earlier violations of its duty to bargain with the Union in *Mimbres Memorial Hospital*, 337 NLRB 998 (2002), in which the Board withheld an affirmative bargaining order. These unlawful actions, in their totality, occurred over a period of 2 years, for the better part of which the Respondent refused to recognize the Union and thereby prevented it from obtaining agreement on a contact. All these unfair labor practices, particularly those that personally affected Kavanaugh, were likely to have a demoralizing impact on employees and increase employee disaffection from the Union. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case. We also reiterate the judge's finding, which we affirm, that the Respondent failed to establish that, when it withdrew recognition, it had a reasonable uncertainty as to the Union's majority status.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home, Deming, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 30, 2004

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Richard A. Smith, Esq., for the General Counsel.
Don T. Carmody, Esq., P.C., of Woodstock, New York, for the Respondent.
Freddie Sanchez, of Tuscon, Arizona, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This case was tried in Deming, New Mexico, on March 13, 2002, upon the General Counsel's second consolidated complaint (complaint) issued October 16, 2001.[1] Upon charges filed by United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, CLC (the Union), the complaint alleges that Community Health Services, Inc., d/b/a Mimbres Memorial Hospital and Nursing Home (the Respondent) has failed and refused to recognize or to meet and bargain with the Union and has made unilateral changes in terms and conditions of employment of its employees represented by the Union in violation of Section 8(a)(5) and (1) of the Act.

At the close of the General Counsel's case, I granted the General Counsel's motion to withdraw complaint paragraphs 6(a) through (d) and 7(b). Although the General Counsel did not withdraw paragraphs 9 and 10, inasmuch as those allegations are underpinned by paragraphs 6 and 7(b), issues regarding independent violations of Section 8(a)(1) and violations of Section 8(a)(3) no longer exist.

Issues

1. Did Respondent violate Section 8(a)(5) and (1) of the Act by failing and refusing to respond to oral and written requests of the Union to meet and bargain since March 28, 2000?

2. Did Respondent violate Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union since March 28, 2000?

3. Did Respondent violate Section 8(a)(5) and (1) of the Act by taking the following unilateral actions:

(a) on January 31, modifying the shift schedules of its respiratory department employees?

(b) on January 31, ceasing its policy of allowing weekends off for respiratory department employees?

(c) on April 1, hiring non-bargaining unit employees to perform bargaining unit work?

(d) on April 23, reducing the work hours of its full-time employees?

(e) on June 18, implementing an employee fingerprinting policy?

[1] All dates are in 2001 unless otherwise indicated.

4. Did Respondent violate Section 8(a)(5) and (1) of the Act by suspending unit employee Garry Kavanaugh (Kavanaugh) pursuant to its unilateral implementation of an employee fingerprinting policy?[2]

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Mexico corporation, operates a hospital and nursing home providing inpatient and outpatient medical care at its facility in Deming, New Mexico (the Facility), where, during a representative 12-month period ending September 25, 2000, it derived gross revenues in excess of $250,000 and purchased and received goods valued in excess of $50,000 directly from points outside the State of New Mexico. Respondent stipulated and I find Respondent to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union to be a labor organization within the meaning of Section 2(5) of the Act.[4]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Relevant Credible Evidence

Prior to March 13, 1996, Luna County, New Mexico (Luna County) owned and operated Mimbres Memorial Hospital Nursing Home (MMH). On July 18, 1995, the Union was certified by the Public Employees Labor Relations Board of New Mexico (the New Mexico Board) as the exclusive collective-bargaining representative in two units essentially described as: (1) service, maintenance and clerical positions, excluding technical and all other positions as well as supervisory, managerial, confidential as those terms are defined under the [New Mexico Labor Relations] Act and [New Mexico Labor Relations] Board's rules and regulations; (2) technical, excluding service, maintenance clerical, and all others as well as supervisory, managerial, confidential as those terms are defined under the [New Mexico Labor Relations] Act and [New Mexico Labor Relations] Board's rules and regulations.[5]

On March 13, 1996, Respondent purchased MMH. Since March 13, 1996, Respondent has continued to operate MMH in essentially unchanged form, at the same location, providing the same healthcare services. Following its purchase of MMH, Respondent employed as a majority of its employees individuals who were previously employees of Luna County at MMH.

Following its purchase of MMH, Respondent recognized and bargained with the Union without achieving a final agreement. The last negotiating session was September 8, 1999. On November 2, 1999, Respondent withdrew recognition of the Union because (1) no employee had ever become a member of the Union,[6] (2) negotiations over a 4-year period produced no agreement, (3) substantial employee turnover had occurred, (4) the Union had not communicated regularly with employees, and (5) the employee representative of the union had dealt with Respondent in the absence of union officials. Thereafter, Respondent has at all times refused to bargain with the Union.[7]

After Respondent withdrew recognition, the Union kept in touch with Kavanaugh, union committeeman at Respondent. The Union did not otherwise communicate with unit employees. Upon receipt of Judge Rose's decision, Freddie Sanchez (Sanchez), Union staff representative responsible for the above units, by letter to Respondent's attorney dated August 7, 2000, "demand[ed] to meet and bargain for a . . . contract." Beginning with the August 7, 2000 letter through the date of the hearing, Sanchez wrote similarly worded letters to Respondent approximately biweekly. When Respondent made no reply, the Union filed the charge in Case 28–CA–16762 on September 25, 2000. At the hearing, counsel for Respondent stated that Respondent did not respond to the Union's letters on and following August 7, 2000, "because we've adopted a position which we had adopted before Administrative Law Judge Rose and now before Your Honor, and it's just simply not acting in any manner inconsistent with that, so that some defacto claim could

---

[2] The General Counsel does not seek reinstatement of Kavanaugh as a remedy of this alleged violation of Sec. 8(a)(5) and (1).

[3] General Counsel's unopposed motion to correct the transcript, dated May 2, 2002 is granted and received as GC Exh. 4.

[4] Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence. Administrative Law Judge James L. Rose held a hearing on May 2 and 3, 2000 (the Rose hearing), involving the same Respondent and similar issues in Cases 28–CA–15948 and 28–CA–16291. On August 2, 2000, Judge Rose issued his decision, which is currently before the Board on exceptions. In the instant hearing, Respondent adopted certain stipulations made in the Rose hearing. Respondent also did not contest certain of Judge Rose's findings, taking the position that the Board or a circuit court will resolve such issues as appropriateness of unit. The findings herein reflect findings made by Judge Rose that are uncontested for purposes of this hearing.

[5] In its complaint, the General Counsel describes Respondent's appropriate units as follows:

Unit A

All service, maintenance and clerical employees employed by the Respondent, but excluding technical and all other positions as well as supervisory, managerial, confidential [employees] as those terms are defined under the Act and the Board's rules and regulations.

Unit B

All technical employees employed by the Respondent, but excluding service, maintenance, clerical, and all other [employees] as well as supervisory, managerial, confidential [employees] as those terms are defined under the Act and the Board's rules.

In its answer, Respondent denied the appropriateness of both units and in its brief refers to the units as "foreign to Board health care law." At the hearing, Respondent's counsel stated that Respondent did not seek to litigate the appropriateness of the units in the instant proceeding any more than in the Rose hearing. Neither party briefed the issue of appropriateness of the units in the Rose hearing. As Respondent admits, the units designated in the complaint are those certified by the New Mexico Board. As the units pleaded in the complaint are substantially the same as those historically certified, I conclude they are appropriate.

[6] The Union does not solicit employees as members until a collective-bargaining agreement is reached covering them.

[7] At the hearing, Respondent adopted the same positions regarding its withdrawal of recognition as it had before Judge Rose and in its exceptions to the Board.

be made that we somehow, if anything, other than withdraw a recognition from the Union back in the Fall of 1999."

On January 31, Respondent modified the shift schedules of its respiratory department employees (including unit employees) without prior notice to the Union and without affording the Union an opportunity to bargain about the modifications.

Sometime in April, Respondent changed the work schedule of Kavanaugh to include weekend work without prior notice to the Union and without affording the Union an opportunity to bargain about Kavanaugh's changed schedule.

Sometime in April, Respondent reduced the hours of its respiratory department employees (including unit employees) from 40 hours per week to 32 to 36 hours. Respondent did so without prior notice to the Union and without affording the Union an opportunity to bargain about the reductions.

For at least the last 12 years, Respondent has employed on-call or as-needed employees (PRN employees) in the respiratory and other departments to cover vacations, days off, or sick leave taken by regular employees. Sometime in April, Respondent hired additional PRN employees for the respiratory department without prior notice to the Union and without affording the Union an opportunity to bargain about the decision.

On June 18, Respondent implemented an employee fingerprint policy for all employees, including unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain about the policy or its implementation.[8]

On July 2, Respondent suspended Kavanaugh because he refused to comply with Respondent's fingerprinting policy implemented on June 18.

B. Procedural Rulings

Because the General Counsel withdrew all Section 8(a)(3) and independent 8(a)(1) allegations, his case in chief concluded earlier than anticipated. At that time, Respondent's attorney, Carmody, stated that Respondent had planned to present two witnesses in its case: Timothy Schmidt and Carol Schmoyer. However, Carmody would not present them if he could intercept them in their travel to the hearing site. When Carmody was unable to intercept the two witnesses, he requested the hearing be continued to the following day when the witnesses would be available. In an offer of proof, Carmody said he expected Schmidt and Schmoyer to testify, essentially, that Respondent withdrew recognition in 1999 because it believed the Union had lost majority status. In its brief, Respondent asks me to reconsider my rejection of this offer of proof. Respondent was afforded an opportunity to argue loss of majority status as motivation for withdrawal of recognition. As I have fully considered that argument and supporting evidence, Respondent has not been prejudiced by my declining to continue the hearing for additional testimony on that question. Accordingly, I reaffirm my prior ruling.

At the hearing, pursuant to the *Jenks* rule, Respondent's attorney, Carmody, requested statements of Sanchez obtained during investigation of the instant charges, which counsel for the General Counsel provided. Respondent also requested statements obtained during investigation of the charges at issue in the Rose hearing, which had been provided to Carmody following Sanchez' testimony in that proceeding. As the prior statements were in the Region's files in Phoenix, a trial delay would occur if they were to be obtained. I ruled that the prior statements did not have to be produced as the only material contained therein that could relate to the subject matter of Sanchez' testimony was the parties' bargaining history, none of which was in dispute. In its brief, Respondent requests that I reconsider my ruling, pointing out that Sanchez testified to the history of negotiations between the parties prior to the Rose hearing, to his attendance at the Rose hearing, and his motivation for filing the first of the charges considered herein. Respondent argues that Sanchez' testimony brought the time period covered by the earlier statements into issue, and therefore Respondent was entitled to review all statements of Sanchez prior to cross-examination. Except for undisputed historical background, all of Sanchez' testimony in the instant case relates to conduct occurring after the Rose hearing. It is clear from chronological overview alone that the prior statements could not contain any information relating to the current allegations, including Sanchez' attendance at the Rose hearing, and his motivation for filing (on September 25, 2000), the first of the charges considered herein. Accordingly, I reaffirm my prior ruling and deny Respondent's motion to strike Sanchez' testimony in the instant hearing.

C. Discussion

1. Refusal to respond to the Union's requests to bargain and refusal to recognize and bargain with the Union

The complaint alleges that Respondent failed and refused to respond to the Union's oral and written requests to bargain and has refused to recognize and bargain with the Union since March 28, 2000. As explained hereafter, I will only consider refusal-to-bargain conduct alleged to have occurred after the conclusion of the Rose hearing (May 3, 2000).

There is no evidence of any specific oral request to bargain since the Rose hearing concluded on May 3, 2000. However, beginning August 7, 2000, the Union sent Respondent biweekly written requests to meet and bargain. Respondent admits receiving the Union's letters and admits that it has refused, and continues to refuse, to meet and bargain with the Union. Respondent's failure to respond to the Union's demand letters on and after August 7, 2000 constitutes a renewed refusal to bargain as well as a continuing refusal to bargain with the Union. See *Beachview Care & Rehabilitation Center*, 328 NLRB 278 (1999).

With regard to the allegations of complaint paragraph 8(b), there is no dispute that Respondent has refused and is refusing to bargain with the Union. Whatever may have been Respondent's posture or the evidence relating to withdrawal of Union recognition at the Rose hearing, Respondent now concedes that it has withdrawn recognition.

As discussed below, I reject Respondent's defense that it was not obligated to bargain with the Union because the Union had,

[8] A stipulation of the parties set the date of implementation as June 18 although a memorandum to Respondent's supervisors stating that supervisors were to notify employees of the fingerprinting policy is dated July 2.

since 1999, ceased to represent a majority of the unit employees.

2. Alleged unilateral changes

It is clear that Respondent's admitted unilateral modifications of the following employment matters are material, substantial, and significant changes to unit wages, hours, and other terms and conditions of employment.[9] Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally made the following changes:

> January 31—respiratory department shift schedule modifications. See *Meat Cutters Local Union 189 v. Jewell Tea Co.,* 381 U.S. 676, 691 (1965).
>
> April—modification of Mr. Kavanaugh's work schedule. *Ibid.*
>
> April—reduction in respiratory department employees' hours. *Eugene Iovine, Inc.,* 328 NLRB 294 (1999).
>
> June 18—implementation of an employee fingerprint policy. The policy presumably provides new grounds for discipline, thus impacting job security. *Bath Iron Works Corp.,* 302 NLRB 898 (1991). See *Brimar Corporation,* 334 NLRB [1035] (2001).

With regard to Respondent's April employment of PRN employees, it is not clear from the evidence that any change in past practice occurred. Respondent has hired and used PRN employees since before the New Mexico Board's 1995 unit certifications. There is no evidence that the April hiring of PRN employees differed in any way from past procedures. A continuation of a past practice is not a unilateral change in working conditions. *KDEN Broadcasting Co.,* 225 NLRB 25 (1976), distinguished in *Mackie Automotive Systems,* 336 NLRB 347 (2001). Accordingly, I conclude the General Counsel has not met his burden of proving that Respondent unilaterally hired PRN employees in violation of Section 8(a)(5) and (1) of the Act.

3. Suspension of Kavanaugh

Since Respondent's unlawfully implemented fingerprinting policy was a factor in the suspension of Kavanaugh, his suspension violates Section 8(a)(5) of the Act. See *Consec Security,* 328 NLRB 1201 (1999), citing *Great Western Product Inc.,* 299 NLRB 1004 (1990).[10]

4. Respondent's defenses

A. As affirmative defenses, Respondent argues that litigation of the alleged unfair labor practices is barred by Section 10(b) of the Act, that the alleged unfair labor practices are derivative of the earlier complaint, are based upon facts known to the General Counsel at the time of the Rose hearing, are an attempt to litigate compliance issues related to Cases 28–CA–15948 and 28–CA–16291 (covered in the Rose hearing) and deny Respondent's due process. Essentially, Respondent argues that the General Counsel is precluded from litigating the instant issues because the General Counsel knew or should have known of the underlying facts at the time of the Rose hearing on May 2 and 3, 2000. See *Jefferson Chemical,* 200 NLRB 992 (1972); *Highland Yarn,* 310 NLRB 644 (1993).

In his decision, Judge Rose considered whether Respondent had made unilateral changes in violation of Section 8(a)(5) and (1) of the Act in the following areas and on the following dates: (1) absence and sick leave policy in April and October 1999, (2) overtime policy in April 1999, (3) increased pay rates for new hires beginning August 1999, (4) employee payment for training courses in August 1999, (5) creation of a new policy manual,[11] and (6) policy changes pursuant to the new policy manual.[12]

As to Respondent's alleged withdrawal of recognition from the Union on March 23, 2000, Judge Rose concluded that although certain letters from the Union to Respondent went unanswered, there was no evidence Respondent actually withdrew recognition. Judge Rose sustained Respondent's objection to the General Counsel's motion to amend or clarify the complaint to allege a constructive withdrawal of recognition. Judge Rose found Respondent violated Section 8(a)(5) only as to unilateral changes to its absence and sick leave policy, unspecified policy changes made prior to May 2, 2000, and refusal to furnish information on March 23, 2000.

For the most part, the complaint herein alleges that Respondent violated the Act by conduct separate and discrete from that considered by Judge Rose. Thus, the asserted unilateral changes are all alleged to have occurred in 2001, several months after Judge Rose's decision issued. As to all 2001 conduct, the General Counsel clearly has not attempted to relitigate the same acts or conduct addressed in the Rose hearing. See *Beverly Health & Rehabilitation Services,* 332 NLRB 347 fn. 1 (2000), where the Board quoted with approval the administrative law judge's conclusion that "*Jefferson Chemical* is not meant to apply . . . [to] litigation spanning several years [where] the General Counsel pursues the litigation in reasonable, self-contained segments." Moreover, allegations pertaining to conduct occurring after a trial are not barred under *Jefferson Chemical.* See *New Surfside Nursing Home,* 330 NLRB 1146 (2000). I conclude that Respondent's affirmative defenses regarding the alleged unilateral changes fail.

As to the allegations of complaint paragraphs 8(a) and (b), there appears to be some overlap between the allegations considered by Judge Rose and those in the instant complaint. The complaint alleges at paragraph 8(a) that "[s]ince on or about March 28, 2000, and continuing to date, the Respondent has failed and refused to respond to numerous oral and written requests of the Union to meet and bargain with the Union as the exclusive collective-bargaining representative of the [unit employees]. The complaint further alleges at paragraph 8(b) that

[9] *NLRB v. Katz,* 369 U.S. 736 (1962); NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958); *NLRB v. Dothan Eagle,* 434 F.2d 93 (5th Cir. 1970); in *re Beverly Health and Rehabilitation Service,* 335 NLRB 635 (2001).

[10] It is immaterial that the General Counsel does not intend to seek reinstatement of Kavanaugh. *Consec Security,* above.

[11] It is unclear from Judge Rose's decision when the policy manual was created, but it appears to have been prior to April 2000.

[12] It is unclear from Judge Rose's decision which specific policies were instituted or when. Presumably, the changes were made prior to the hearing dates of May 2 and 3, 2000.

"[s]ince on or about March 28, 2000, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the [unit employees]." For the period of March 28, 2000 through the date of the Rose hearing, the General Counsel either litigated, or knowingly failed to litigate, similar refusal to bargain allegations. This is apparently not a situation where the General Counsel exercised his discretion not to include conduct encompassed by a pending charge in the Rose complaint. See *Frontier Hotel,* 324 NLRB 1225 (1997). Rather, it appears to be an inadvertent attempt by the General Counsel to relitigate the same conduct in different cases, which the Board will generally not permit. *Detroit Newspapers,* 330 NLRB 524 (2000). Therefore, I have not considered conduct alleged to have occurred before the close of the Rose hearing in finding that Respondent violated Section 8(a)(5) and (1) of the Act. Inasmuch as I have not considered conduct before May 4, 2000 in reaching my decision, all conduct dealt with herein is within the relevant 10(b) period and does not overlap any of the Rose hearing allegations. Accordingly, Respondent has not been denied due process.

B. Respondent contends it properly withdrew recognition as it had a good-faith doubt of the Union's majority status. Respondent's withdrawal of recognition was effected prior to the Board's decision in *Levitz,* 333 NLRB 717 (2001). As *Levitz* is not to be applied retroactively, the "good-faith uncertainty" standard explicated by the Supreme Court in *Allentown Mack Sales & Service v. NLRB,* 522 U.S. 359 (1998), is controlling in the analysis of this case. See *Horizon House Developmental Services,* 337 NLRB 22 fn. 4 (2001).

Respondent's stated basis for a good-faith doubt of the Union's majority status prior to its withdrawal of recognition are that: (1) no employee had ever become a member of the Union, (2) negotiations over a 4-year period had produced no agreement, (3) substantial employee turnover had occurred, (4) the Union did not communicate with employees, and (5) the employee representative of the Union rather than union officials had dealt with Respondent. Respondent's reasons, neither singly nor collectively, are sufficient to establish that it had a good-faith reasonable uncertainty as to the Union's continuing majority status when it withdrew recognition or that it now has a good-faith reasonable uncertainty.

As to Respondent's first basis, ". . . a showing that less than a majority of the employees in the union are members of the union is not the equivalent of showing lack of majority support." *Bartenders Association of Pocatello,* 213 NLRB 651, 652 (1974); *Rodgers & McDonald Graphics,* 336 NLRB 836 (2001). That Board's position in this regard is particularly apt where, as here, the Union does not solicit or encourage union membership in the absence of an agreement. There is no evidence that any unit employees ever sought to decertify the Union or otherwise expressed to Respondent their desire not to be represented by the Union. Respondent's first basis is without validity. See *Rodger & McDonald Graphics,* above.

Respondent's second basis—the fact that extended negotiations between Respondent and the Union have not produced a contract—also has no merit. See *Spillman Co.,* 311 NLRB 95, 95 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994); *Flex Plastics, Inc.,* 262 NLRB 651 (1982), enfd. 726 F.2d 272 (6th Cir. 1984).

Respondent's third basis—that substantial employee turnover has occurred is likewise unpersuasive. The Board applies a presumption that newly hired employees support the union in the same proportion as the employees they have replaced, absent strong evidence to the contrary. *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 779 (1990); *Kelly's Private Car Service,* 289 NLRB 30, 43 (1988). Although the evidence shows significant employee turnover in the past several years, there is no credible evidence that the succeeding employees do not support the Union in the same proportion as the employees they replaced. While the General Counsel concedes that unit employees have not joined the Union, Respondent has not established a basis for inferring that they do not want to be represented by the Union. In addition to the Union's policy of not encouraging membership in the absence of a contract, employees may have many reasons for wanting union representation, but not wanting to be union members. Respondent has not presented any evidence that employees expressed dissatisfaction with the Union. The Board has made clear that "in the absence of evidence that employees expressed dissatisfaction with the Union, the Respondent's reliance on employee turnover fails." *Spillman Company,* above. Accordingly, I find that employee turnover is not a sufficient basis for uncertainty.

Respondent's bases four and five are essentially that the Union's inactivity supports a good-faith uncertainty. Not only is Respondent's argument unfounded in Board law,[13] it is disingenuous. By refusing to bargain further with the Union and by withdrawing recognition, Respondent effectively vitiated the Union's role as the representative of unit employees. Respondent cannot now assert the Union's reduced representational profile as a defense to its refusal to bargain. Moreover, the Union has consistently asserted its bargaining rights through NLRB litigation and through renewed written bargaining requests, all of which negates the inference Respondent seeks to draw. *Spillman Co.,* above.

Applying the *Allentown Mack* standard, I find that the evidence on which Respondent relied is insufficient to establish that it had a good-faith reasonable uncertainty as to the Union's majority status at the time it refused to bargain further with the Union and withdrew recognition.

C. Respondent argues that as to the fingerprinting policy, New Mexico law requires fingerprinting of caregiver employees under the Caregivers Criminal History Screening Act.[14] Respondent may have had no discretion in applying fingerprint-

[13] See *Marion Memorial Hospital,* 335 NLRB 1016, 1018 (2001); *Spillman Co.,* above.

[14] As requested by Respondent, I take administrative judicial notice of 29-17-2 to 29-17-5 NMSA, which provides, essentially, that New Mexico health care providers shall submit a set of fingerprints of applicants and caregivers to the New Mexico department of health for nationwide criminal history screening pursuant to an applicant's or caregiver's authorization for such nationwide criminal history screening. The term "caregiver" would, by definition, include some of the units' classifications, and no caregiver may be employed by a care provider unless the caregiver first has submitted to a request for a nationwide criminal history screening prior to beginning employment.

ing procedures to certain of its employees. It is, however, well settled Board law that although an employer may not be obligated to bargain over certain ultimate decisions, the Act requires that the employer afford a union the opportunity to discuss the impact and effects of the decision on bargaining unit employees. This obligation is not voided by the fact that the bargaining, or some of it, may have to take place after implementation. *Gannett Co.*, 333 NLRB 355 fn. 1 (2001). Therefore, this defense also fails.

CONCLUSIONS OF LAW

1. The following described units are appropriate for collective-bargaining purposes:

Unit A

All service, maintenance and clerical employees employed by the Respondent, but excluding technical and all other positions as well as supervisory, managerial, confidential employees as those terms are defined under the New Mexico Labor Relations Act and the New Mexico Labor Relations Board's rules and regulations.

Unit B

All technical employees employed by the Respondent, but excluding service, maintenance, clerical, and all other employees as well as supervisory, managerial, confidential employees as those terms are defined under the New Mexico Labor Relations Act and the New Mexico Labor Relations Board's rules and regulations.

2. At all material times, the Union has been the exclusive collective-bargaining representative of the units described above for the purposes of collective bargaining.

3. Respondent has 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 by the following conduct:

(a) failing and refusing, since August 7, 2001, to respond to written requests of the Union to meet and bargain regarding the above unit employees,

(b) refusing to recognize and bargain with the Union regarding the above unit employees since May 4, 2000,

(c) unilaterally implementing changed terms and conditions of employment for employees employed in the above units during January 2001 through June 2001,

(d) suspending Garry Kavanaugh on July 2, 2001.

4. Respondent has not violated the Act as otherwise alleged in the complaint.

REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since Respondent has refused to bargain with the Union about certain terms and conditions of employment of represented employees and has suspended an employee pursuant to its unlawfully implemented fingerprint policy, I shall order Respondent to rescind its January 31, 2001 respiratory department shift schedule modifications, its April 2001 modification of Garry Kavanaugh's work schedule, its April 2001 reduction in respiratory department employees' hours, its June 18 implementation of an employee fingerprint policy, and its suspension of Garry Kavanaugh pursuant to the unlawfully implemented fingerprint policy. Respondent shall also make whole any employee for any loss of earnings and other benefits suffered as a result of its unlawful actions computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Community Health Systems, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union concerning the wages, hours, working conditions and other terms and conditions of employment of employees in the following units:

Unit A

All service, maintenance and clerical employees employed by the Respondent, but excluding technical and all other positions as well as supervisory, managerial, confidential employees as those terms are defined under the New Mexico Labor Relations Act and the New Mexico Labor Relations Board's rules and regulations.

Unit B

All technical employees employed by the Respondent, but excluding service, maintenance, clerical, and all other employees as well as supervisory, managerial, confidential employees as those terms are defined under the New Mexico Labor Relations Act and the New Mexico Labor Relations Board's rules and regulations.

(b) Failing and refusing to respond to bargaining requests of the Union as the exclusive collective-bargaining representative of employees in the above units.

(c) Unilaterally implementing changes in the terms and conditions of employment of the above unit employees, including shift schedule modifications, weekend work schedule modifications, reduction in employee work hours, and employee fingerprinting policy implementation.

(d) Suspending, or otherwise taking adverse action against any employee pursuant to any unlawfully implemented change in terms and conditions of employment of the above unit employees.

(e) 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.

[15] 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.

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

(a) On request, bargain with the Union as the exclusive representative of the employees in the above appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Rescind unilateral changes in the terms and conditions of employment of the above unit employees, including shift schedule modifications, weekend work schedule modifications, reduction in employee work hours, and employee fingerprinting policy implementation.

(c) Rescind the July 2, 2001 suspension of Garry Kavanaugh given pursuant to the unlawfully implemented fingerprint policy.

(d) Make employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes in the manner set forth in the remedy section of the decision.

(e) Make Garry Kavanaugh whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension.

(f) 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.

(g) Within 14 days after service by the Region, post at its facility in Deming, New Mexico, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 4, 2000.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, at San Francisco, California May 13, 2002.

[16] 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."

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 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 do anything that interferes with these rights.

WE WILL NOT fail or refuse to recognize and bargain with the United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, CLC concerning the wages, hours, working conditions and other terms and conditions of employment of employees in the following units:

Unit A

All service, maintenance and clerical employees employed by the Respondent, but excluding technical and all other positions as well as supervisory, managerial, confidential employees as those terms are defined under the New Mexico Labor Relations Act and the New Mexico Labor Relations Board's rules and regulations.

Unit B

All technical employees employed by the Respondent, but excluding service, maintenance, clerical, and all other employees as well as supervisory, managerial, confidential employees as those terms are defined under the New Mexico Labor Relations Act and the New Mexico Labor Relations Board's rules and regulations.

WE WILL NOT fail or refuse to respond to bargaining requests of the United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, CLC, as the exclusive collective-bargaining representative of employees in the above units.

WE WILL NOT unilaterally change terms and conditions of employment of the above unit employees, including changing shift schedules, changing weekend work schedules, reducing employee work hours, and implementing an employee fingerprinting policy.

WE WILL NOT suspend, or otherwise take adverse action against any employee, pursuant to any unlawfully implemented change in terms and conditions of employment of the above unit employees.

WE WILL NOT in any like or related manner refuse to recognize and bargain with the United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, CLC concerning wages, hours, working conditions and other terms and conditions of employment of employees in the above units.

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

WE WILL notify the United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, CLC, in writing, that we recognize that Union as the exclusive collective-bargaining representative of our employees in the above units under Section 9(a) of the Act and will bargain with that Union concerning terms and conditions of employment for those employees.

WE WILL, on request, bargain with the United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, CLC as the exclusive representative of the employees in the above appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL rescind unilateral changes in the terms and conditions of employment of the above unit employees, including shift schedule modifications, weekend work schedule modifications, reduction in employee work hours, and employee fingerprinting policy implementation.

WE WILL rescind the July 2, 2001 suspension of Garry Kavanaugh.

WE WILL make employees whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes we made.

WE WILL make Garry Kavanaugh whole, with interest, for any loss of earnings and other benefits suffered as a result of his unlawful suspension.

COMMUNITY HEALTH SERVICES, INC., D/B/A MIMBRES MEMORIAL HOSPITAL AND NURSING HOME