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Elmhurst Care Center *and* Local 1115 Service Employees International Union[1] and Local 300S, Production Service and Sales District Council, UFCW,[2] and Local 300s, Production Service and Sales District Council, UFCW and Local 1115, Service Employees International Union. Case 29–CA–22674 and 29–CB–10843

September 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 21, 2000, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The judge found that the Respondent Employer extended, and the Respondent Union Local 300S accepted, recognition prematurely, thereby violating Sections 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2) of the National Labor Relations Act, respectively. The Respondent Employer and the Respondent Union filed separate exceptions and supporting briefs, and the Charging Party Union Local 1115 filed a brief in opposition to the Respondents' exceptions and in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified.[3]

I.

The essentially uncontested facts are set forth more fully in the administrative law judge's decision. The Respondent Employer operates a 240-bed skilled nursing facility. In February 1999,[4] the Employer began hiring and employing employees. On March 5 the Respondent Union demanded recognition. An authorization card check was conducted by an arbitrator. Notification of the results was sent to the Respondents on March 8. On March 12, when there were 47 unit employees on staff,[5] the Employer recognized the Union, and the Respondents executed a bargaining agreement with a union-security clause on March 19. The first patient was admitted on April 15, when there were 63 unit employees. By September 1, there were 107 patients and 87 employees. The Employer expects the number of employees to be 110 when the facility is fully occupied.

The unit employees worked a limited number of hours during the 2-week payroll period in which the Employer extended recognition. Until April 15, the employees were engaged exclusively in setting up the facility and training. The first employees who were hired worked one shift and operated and maintained the boiler and heating equipment. The housekeeping employees cleaned the floors and bathrooms, emptied waste containers, and replenished supplies. Meanwhile, the CNAs were trained in the Respondent Employer's policies and procedures. They also set up patient charts and made beds, in preparation for the facility's opening. The dietary employees, similarly, were trained in tray cart and equipment setup and they set up storage rooms. Until April 15, their only cooking was the preparation of staff meals.

The judge found that the grant of recognition was premature because (1) the Employer did not at that time employ a substantial and representative complement of its projected work force and (2) the Employer was not then engaged in normal business operations. We find it unnecessary to pass on the judge's first finding. We adopt the judge's second finding, and therefore affirm the judge's decision on that basis.

II.

An employer may grant a union voluntary recognition if the union presents evidence of majority support in an appropriate unit. However, a grant of recognition when the union does not have majority support is unlawful because it violates the principle of majority rule, embedded in Section 9 of the Act.[6] Where a newly opened business has granted recognition, an issue concerning the timing of recognition can arise. The Board has long balanced competing interests in these cases. On the one hand, the Board seeks to vindicate the right of those employees, already employed, to engage in collective bargaining should they so choose. On the other hand, the

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO, effective July 25, 2005.

[2] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO, effective July 29, 2005.

[3] We shall delete from the judge's recommended Order the statement that nothing therein authorizes the Respondent Employer to withdraw terms or conditions of employment that may have been established pursuant to its collective-bargaining agreement with Local 300S Production Service and Sales District Council, UFCW. See *Cascade General*, 303 NLRB 656 fn. 14 (1991). We shall also modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co*., 335 NLRB 142 (2001). We shall also substitute a new "Notice to Employees" as well as a new "Notice to Members," both of which will reflect these changes to the Order.

[4] All dates are in 1999 unless otherwise indicated.

[5] We note that the payroll records for this period only include data for 44 of these employees.

[6] *Ladies Garment Workers v. NLRB*, 366 U.S. 731, 738 (1961).

Board seeks to have that choice made, not by a small, unrepresentative group of employees, but by a group that adequately represents the interests of the anticipated full complement of the unit employees—all of whom will be bound, at least initially, by the choice of those who were hired before them.[7]

Balancing those two interests, the Board has long held that an employer's voluntary recognition of a union is lawful only if, at the time of recognition, the employer: (1) employed a substantial and representative complement of its projected workforce, and (2) was engaged in its normal business operations. See, e.g., *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984). The test is in the conjunctive: if either prong is not met, a grant of recognition is unlawful. See *A.M.A. Leasing*, 283 NLRB 1017, 1024 (1987) (a finding that the employer "was not engaged in normal business operations . . . would alone establish a violation").[8] In this case, as mentioned, we do not address the judge's findings concerning the substantial and representative complement prong of the test because we find that the evidence plainly establishes that the Respondent Employer was not engaged in its normal business operations at the time it extended recognition to the Respondent Union.[9]

In the instant case, on the date recognition was granted, March 12, there were no patients; the first would not arrive for about 1 month. Also, the employees were working relatively few hours and their responsibilities were limited to training and other tasks in preparation for receiving patients. The absence of any patients at the time of recognition is significant because the LPNs and CNAs were not performing the principal duties of their positions, "hands-on nursing care." Indeed, once patients began to arrive, the Respondent Employer hired many more LPNs and CNAs[10] to assure adequate nursing coverage.

Further, the limited number of hours worked by employees at the time of recognition also substantiates the fact that the facility was not in normal operation. During the March 7 through March 20 payroll period in which recognition was extended, more than half of the employees worked fewer than 10 hours; only 25 percent of the employees worked more than 20 hours. The payroll records reflect that 44 of the bargaining unit employees worked a total of 721.5 hours, an average of less than 17 hours per employee during this 2-week period. Also, although housekeeping employees constituted almost 40 percent of the employees, only 1 housekeeping employee worked more than 10 hours. In contrast, 1 month later, during the April 11 through April 24 pay period, when the facility admitted its first patient, 63 employees worked a total of 3252 hours, an average of 51.6 hours per employee.

Considering the above, we find that at the time of recognition the Employer was involved in preparation for the opening of the facility. It was not engaged in "normal business operations." Our conclusion is supported by extant Board law.

In *Hilton Inn Albany*, supra, a case similar to this one, the Board found that neither prong of the premature recognition test had been met. Included among the factors relied on by the Board for finding the facility was not in normal operation at the time of recognition was the fact that the facility was not open to the public but was in the

[7] See *Scottex Corp*., 200 NLRB 446, 451 (1972), citing *Lianco Container Corp.*, 173 NLRB 1444, 1447–1448 (1969). ("[A] bargaining agreement executed before a substantially normal complement of employees is at work, or at a time when the employer's operations are incipient, merely preliminary, or insubstantial, tends to foist that union and that agreement upon the working force to be hired, and deprives the employees of the freedom of choice guaranteed by the Act.")

[8] Our dissenting colleague acknowledges that the Board applies the two-pronged test to determine whether there has been premature recognition of a bargaining representative. Nevertheless, she contends that any inquiry into whether the employer was engaged in normal business operations at the time of recognition is "arguably superfluous" and "serves no clear statutory purpose." She contends that the legality of recognition should focus only on whether there is a representative complement to decide the question of union representation. The short answer to our colleague is that no party has asked that this precedent be overturned, and the matter has not been briefed. Thus, quite apart from our view that the two-prong test is appropriate and proper in cases of this nature, we rely on extant Board law.

[9] The Respondent Employer filed a posthearing motion to supplement the record. On January 13, 2000, the judge denied the Respondent Employer's motion. The Respondent Employer excepts to the judge's ruling denying its motion. The evidence that the Employer seeks to adduce goes to the issue of substantial and representative complement. Because we are not deciding the case on that basis, and because in any event the evidence antedates the hearing, we deny the motion. See Board's Rules and Regulations Sec. 102.48(d)(1).

Before the Board, the Respondent Employer moved that the judge's ruling denying its motion to supplement the record and the related correspondence be included in the record, citing Sec. 102.26 of the Board's Rules and Regulations. We grant that motion in so far as it pertains to the judge's ruling, consistent with Sec. 102.26.

[10] As of March 12, LPNs accounted for 1 and CNAs for 16 of the Respondent Employer's 47 employees. For the payroll period during which the first patient was admitted there were 8 LPNs and 23 CNAs. By September 12, LPNs accounted for 15 and CNAs accounted for 61 of the Respondent Employer's 87 employees.

Our colleague states that hiring patterns [the number hired, when and their work hours] with regard to the CNAs and LPNs should be evaluated when considering the substantial and representative prong of the *Hilton Inn* test. However, the two prongs of the test are separate, and hiring patterns may, as here, be appropriate to consider under the second prong of the *Hilton Inn* test as well. Here, the normal business operation of the Respondent Employer is providing nursing care to its patients. This fact is reflected in the Respondent's hiring patterns. Thus, the number of housekeeping and dietary employees remained more or less stable while the number of LPNs and CNAs, whose duty it is to provide that nursing care, increased as the number of patients increased.

early stages of preparations for opening. Id. at 1366 ("The record evidence clearly supports a finding that the hotel on the day recognition was granted was closed to the public and only in the earliest stages of preparation for serving the public with respect to either accommodations or dining.").

Our dissenting colleague contends that a nursing home is engaged in "normal business operations" when it trains employees for an upcoming start of operations. Respectfully, our colleague's position is at odds with the words she interprets. A nursing home is in the business of caring for patients—24/7. Training and setting up shop a few hours a week in preparation for doing so is simply not normal operations. Normal operations for a nursing home ordinarily begin when patients are admitted and the demands attendant thereto are felt.[11]

Our colleague also states that a staff must be trained before patients are admitted. We agree. However, the point is that the employees and the nursing home here were not engaged in normal business operations before opening day because the business of this Respondent is to care for patients**,** it is not in the business of running a training school. Training may be essential to the operation of its business, but it is not the business itself.

The Respondents argue that *Klein's Golden Manor*, 214 NLRB 807 (1974), supports the position that only the first prong of the *Hilton Inn* test is necessary. This is not correct. As the Board made clear in *Hilton Inn Albany*, supra, and reaffirmed in *A.M.A. Leasing*, supra at 1024 fn. 7 (last two sentences), the test has two parts. The first prong takes into account the right of employees who have already been hired to representation without undue delay as well as the right of employees who will be hired in the future to exercise their choice. The second prong recognizes the fact that employees are better able to register their electoral choice when they are actually engaged in the work for which representation is sought.

Unlike the Respondents, our dissenting colleague asserts that the second part of the test was actually met in *Klein's*, which also involved employees working at a nursing home before opening day. We disagree. In *Klein's*, the "normal business operations" prong was not specifically discussed because the General Counsel focused on the first prong of the test. The General Counsel claimed, albeit unsuccessfully, that the test of a "substantial and representative complement" of employees was not met.[12] For this obvious reason, in *Klein's* "there [was] little discussion of the employer having engaged in normal business operations at the time of recognition."[13] Indeed, "the work in preparation for the opening of the nursing home in that case [was] essentially the same as the work after [the employer] opened its doors to patients."[14]

By contrast, the General Counsel in the instant case focuses directly on the "normal business operations" prong of the test,[15] prudentially so. For, as discussed above, the activities being performed before the nursing home opened for business on April 15 were not the normal business operation, viz caring for patients. Before the opening of the Respondent's business the employees were engaged in training and familiarizing themselves with the facility in preparation for engaging in the business of Respondent, and their hours were accordingly confined. After the opening, the employees were caring for patients, and their hours were not so confined.

Here, in concluding that the Respondent Employer was not engaged in "normal business operations" at the time of recognition, we have balanced the interests of the first group of employees hired but not yet performing the duties for which they were employed and the interests of the anticipated full complement of unit employees. Thus, on the one hand, we have considered that at the time of recognition the majority of employees hired were housekeepers and dietary employees engaged in only limited work activities for limited hours of work. This factor is instrumental in establishing that the Respondent Employer was not engaged in normal operations, and that postponing recognition would have had limited im-

[11] Our dissenting colleague finds support in *Hilton Inn* for the proposition that "substantial[ly] full scale training and preparation" for a facility opening constitutes "normal business operations." While the Board in *Hilton Inn* did say that the hotel there was not even engaged in "substantially full scale training and preparation for its later opening," 270 NLRB at 1366, the Board was merely stressing how remote from normal business operations the hotel was at the time of recognition. The Board in that case stated: "[U]nder the circumstances of this case we find that the Employer on 4 November was simply not engaged in normal hotel operations or even substantially full scale training and preparation for its later opening." 270 NLRB at 1366. Like the Board in *Hilton Inn*, we could say that the Employer here was not even engaged in "substantially full scale training and preparation" at the time of recognition. But, even if it was, that full scale training and preparation would not constitute the normal business operation of a nursing home such as the Respondent Employer's, i.e. caring for patients.

[12] The judge in *Klein's* stated that "[t]he thrust of the complaint's allegations remaining for disposition in this case is to the effect that [r]espondent, in violation of Sec. 8(a)(2) and (1), recognized and entered into a collective bargaining agreement with Local 4 . . . at a time . . . when [r]espondent did not yet employee a representative complement of employees in that unit." *Klein's*, supra at 808.

[13] See *A.M.A. Leasing*, 283 NLRB 1017, 1024 fn. 2.

[14] *Klein's*, supra, at 809, cited in *A.M.A. Leasing*, id.

[15] The complaint in the instant case alleges that the Respondent Employer's recognition of the Respondent Union and their subsequent collective-bargaining agreement violated the Act because at the time of recognition the Employer "did not employ in the Unit a representative segment of its ultimate employee complement" *and* "was not engaged in its normal business operations."

pact on the employees' immediate terms and conditions of employment. On the other hand, about the time the first patient was admitted, a month later, the number of CNAs and LPNs began to increase while the number of dietary and housekeeping employees held relatively steady. In addition, the number of hours worked by the unit as a whole, and by individual employees, increased rapidly after the first patient was admitted. Thus, waiting to grant recognition until the facility had opened would have increased the number of unit employees participating in the decision regarding representation while having minimal impact on those employed earlier.[16] Our colleague's charge that we are imposing a "paternalistic rule" is of no moment. We are simply being faithful to our charge to apply Board law to the facts found. Board law, as set forth in *Hilton Inn*, balances the competing interests and concludes that employees may best decide their choice regarding representation once an employer is engaged in its normal business operations, that is, when employees are actually engaged in the work for which representation is sought.

In sum, we find that the Respondent Employer was not engaged in normal operations when recognition was extended by the Respondent Employer and accepted by the Respondent Union. Therefore, the recognition was premature and the collective-bargaining agreement is void. Accordingly, we find that by recognizing the Respondent Union, and by executing and maintaining a collective-bargaining agreement with a union-security clause, the Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act, and that by accepting recognition and by executing and maintaining a collective-bargaining agreement, the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Elmhurst Care Center, Queens, New York, its officers, agents, successors, and assigns, and the Respondent Local 300S, Production Service and Sales District, UFCW, its officers, agents, and representatives shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph A. 1(b).

"(b) Maintaining or giving any effect to the collective-bargaining agreement between Elmhurst Care Center and Local 300S entered into about March 19, 1999, or any renewal, extension, or modification thereof unless and until Local 300S is certified by the Board as the collective-bargaining representative of such employees; however, that nothing in this Order shall require any changes in wages or other terms and conditions of employment that may have been established pursuant to the collective-bargaining agreement."

2. Substitute the following for paragraph A. 2(c).

"(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."

3. Substitute the attached notices "Appendix A" and "Appendix B" for those of the administrative law judge.

Dated, Washington, D.C. September 30, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

When the Employer recognized the Respondent Union, 54 percent of its ultimate employment complement was working, in 100 percent of the Employer's job classifications. This was a "substantial and representative complement" of workers, easily satisfying the commonly-used *General Extrusion* guideline, as the judge acknowledged.[1] Permitting recognition, then, would adequately protect the interest of later-hired employees in having a voice in selecting their representative, while promoting the interest of current employees in promptly securing representation. The majority nevertheless finds a violation of Section 8(a)(2), after determining that the employer was not yet engaged in "normal business operations."

As I will explain, that requirement—which the Board has discarded in representation cases, but retained in un-

[16] An additional advantage of waiting is that it would have increased the likelihood that the employees would be aware of what their normal work activity and everyday terms and conditions of employment would consist of, before making the decision regarding representation.

[1] *General Extrusion Co.*, 121 NLRB 1165, 1167 (1958) (collective-bargaining agreement will bar representation election "if at least 30 percent of the complement employed at the time of the hearing had been employed at the time the contract was executed, *and* 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed"). The Board looks to *General Extrusion*, a representation case, for guidance in unfair labor practice cases involving premature recognition of a union. See, e.g., *Hilton Inn Albany*, 270 NLRB 1364, 1365 & fn. 10 (1984).

fair labor practice cases—serves no clear statutory purpose. In any event, the requirement was satisfied here. While the Employer's facility, a nursing home, was not yet open for business, some employees were effectively doing their jobs already (housekeepers and dietary employees), while others (a Licensed Practical Nurse and Certified Nurses Aides) were in substantial training, in preparation for the home's opening.

I.

The majority correctly points out that the Board has come to apply a two-part test in unfair labor practice cases:

> At the time of the recognition (1) an employer must employ a substantial and representative complement of its projected work force, that is, the jobs or job classifications designated for the operation must be substantially filled, and (2) the employer must be engaged in normal business operations.

Hilton Inn Albany, supra, 270 NLRB at 1365 (footnote omitted). The majority declines to address the first requirement and instead decides the case based on the second.

But the second part of the test is arguably superfluous, as well as difficult to apply. Indeed, the Board has rejected it in the context of representation cases posing essentially the same premature-recognition issue as do unfair labor practice cases under Section 8(a)(2)[2]—which means, of course, that under the facts here, the Board would dismiss a representation petition by the Charging Party Union, as barred by the existing collective-bargaining agreement between the Employer and the Respondent Union.

Apart from that anomalous difference between representation cases and unfair labor practice cases,[3] it seems clear that, at a minimum, the second part of the test must be grounded in the balancing of interests (current employees versus future employees) implicated in premature-recognition cases. In this case, the majority not only finds it unnecessary to decide whether a substantial and representative employee complement was in place, but also fails persuasively to explain how its conclusion with respect to "normal business operations" reflects the balancing of interests. That balance is all about *which* employees may decide the question of union representation, not *what* employees are doing at the time of recognition (provided they occupy the relevant job-classifications). The majority cites no decision in which the Board has found that a substantial and relevant complement of employees was in place at the time of recognition, and yet has concluded that recognition was premature.[4]

The majority states that the reasoning of *Hilton Inn Albany* in support of a second prong is that "employees are better able to register their electoral choice when they are actually engaged in the work for which representation is sought." Precisely what this rationale means is unclear: it was not spelled out by the *Hilton Inn* Board, nor do my colleagues fully explain it. The majority appears to suggest (see fn. 16) that employees should not be permitted to choose union representation until they have gained experience working under "normal business operations." There is no clear basis in the Act for such a paternalistic rule, which is unworkable in any case. On the majority's rationale, surely some substantial period of time should be required before employees are deemed to know enough to decide whether to unionize. Yet no such period is actually required—one day of "normal business operations" suffices—and determining the length of that period would be an arbitrary exercise.

In short, the "normal business operations" test, which survives only in the unfair labor practice context, is of doubtful value and should be revisited by the Board.

II.

That issue aside, the majority's application of the "normal business operations" test in the circumstances of this case is also flawed.

The majority claims that it is merely following precedent. That is hardly the case. First, the majority neglects the clear implication of *Hilton Inn Albany* that substantial full scale training and preparation before opening day may constitute "normal business operations." 270 NLRB at 1366. Applying a prerequisite that an employer must be open to the public (and not in pre-opening training of its employees), the majority rejects any interpretation of *Hilton Inn Albany* that the second prong of the test can be met by substantial full scale training and preparation. A fair reading of *Hilton Inn Albany* suggests otherwise.

Second, the majority gives short shrift to precedent most similar to the present case. Thus, in *Klein's Golden Manor*, 214 NLRB 807 (1974), a senior-citizens home recognized a union three weeks before it opened its doors, and while training its workforce. The home had no residents or patients and employees were engaged in preparatory training. And, just as in the present case, the

[2] See *General Extrusion*, supra, 121 NLRB at 1167 (establishing complement test and observing that it will "simplify the heretofore existing rules by eliminating contract-bar issues based upon whether operations had begun or had assumed normal proportions").

[3] The majority makes no attempt to defend the distinction. The stability of a bargaining relationship is implicated in the unfair labor practice context as well in the representation context. The underlying question in both contexts is whether, and why, to permit the existing relationship to be challenged, either through an unfair labor practice charge or through a representation petition.

[4] In both *Hilton Inn Albany*, supra, and *A.M.A. Leasing*, 283 NLRB 1017 (1987), cited by the majority, *neither* part of the two-part test was satisfied.

home employed a substantial and representative complement of employees at the time of recognition. The recognition was deemed lawful.

The majority claims that *Klein's Golden Manor* does not stand for the proposition that the "normal business operations" prong was met in that case. But, the majority concedes, as it must, that the training work in *Klein's Golden Manor*—in preparation for the facility's opening—was essentially the same as the work after it opened its doors to patients. This precedent would seem to belie the notion that the "normal business operations" prong can only be satisfied when the doors to a facility have opened and patients are on hand. Indeed, my colleagues do not assert that *Klein's Golden Manor* was wrongly decided.[5] Instead, they assert that the present case is distinguishable because the employees here were engaged in "training and familiarization" and there were no patients. But the same was true in *Klein's Golden* Manor. In both cases, there were no patients at the time of recognition and employees were engaged essentially in the same type of work before and after opening day.

Further, if substantial full scale training and preparation is insufficient to constitute normal business operations under the majority's view of *Hilton Inn* Albany, then the result reached by the Board in *Klein's Golden Manor* is irreconcilable with the result reached here as the majority should acknowledge.[6] Here, the Board "has not adopted a reasoned approach because it has failed to distinguish adequately its prior decisions." *Brewers Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 47 (D.C. Cir. 2005).

As noted, in both *Klein's Golden Manor* and the present case, there were no patients or residents at the time of recognition. Obviously, before patients are admitted, kitchen and housekeeping personnel, for example, who are in training, are not actually cooking for and cleaning up after patients. They are doing the same work they will be doing later nevertheless. There is no basis in law, policy, or logic to require face-to-face contact with a live patient—on opening day—to give effect to the desires of a substantial and representative complement of employees. Taken to its logical conclusion, the majority's apparent insistence on hands-on contact between employees and customers would foreclose recognition in virtually any service establishment during the training process.

Further, it makes even less sense to limit "normal business operations" to the opening date of the nursing home when we consider that state regulations here require that a patient floor in a nursing home must be staffed before any patients can be admitted. As a practical matter, staff must be trained and in place before the home can legally open its doors to patients. These preparatory activities are just as much normal business operations, at least in light of the Board's concerns, as the resident-care activities that followed the opening of the home in *Klein's Golden Manor*.

Finally, the majority argues that fluctuations in the Respondent Employer's workforce, pertaining to the composition of employees within classifications, and the number of hours worked by them changed after patients were admitted. But the issue here is continuity of the work force, not how many hours of work were available. If the majority is of the view that the Respondent Employer's hiring patterns with regard to LPNs and CNAs are important, that inquiry should properly be considered under the first prong of the *Hilton Inn Albany* standard.

Instead, the majority bypasses that prong entirely and grafts onto the second prong an inquiry that seems to hold some unit classifications in higher regard than other classifications. It is worth noting, again, that 100 percent of the Respondent Employer's job classifications were in place at the time of recognition, as well as 54 percent of the eventual employee complement. Fluctuations within those classifications, as well as increased work hours as the business takes root, are not a basis to repudiate a voluntary bargaining relationship chosen by that work force and embraced by their employer.

III.

If there are good reasons why unions and nursing-home employers who wish to enter into voluntary recognition agreements must wait until the doors are open, the majority has failed to offer them. Accordingly, I would find that the Employer's recognition of the Respondent Union was lawful, and I would dismiss the complaint.

[5] The majority attempts to minimize the impact of *Klein's Golden Manor* by asserting that the complaint there was more narrow than the complaint here. If my colleagues intend to suggest that the Board did not implicitly make a finding pertinent to the "normal business operations" prong in that case, they are wrong. In *A.M.A. Leasing*, supra, cited by the majority, the Board expressly found that, in *Klein's Golden Manor*, "the Board viewed" the preparatory work as sufficient to show normal business operations. 283 NLRB at 1024 fn. 7. Moreover, inasmuch as both prongs must be satisfied to meet the prevailing standard, the Board presumably would not have dismissed the complaint in *Klein's Golden Manor* if the "normal business operations" prong had not been satisfied.

[6] With regard to the continuity of pre-opening and post-opening work under the prevailing "normal business operations" prong, *A.M.A. Leasing* is instructive. In that case, a meat processing business hired clean-up and painting employees to render a plant operational. The employer there did not tell employees what their jobs would be after the initial work was completed, the employees no longer performed the kind of cleanup they did beforehand, and the employer did not train these employees for meat processing work. Once the plant became a meat processing facility, the jobs of these employees changed substantially. 283 NLRB at 1023–1024. In the present case and in *Klein's Golden Manor*, there is continuity between the training and the tasks to be performed after opening day.

Dated, Washington, D.C. September 30, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

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 recognize or contract with Local 300S, Production, Service and Sales District Council, UFCW, as the bargaining representative of our employees, until it has been certified as such representative by the National Labor Relations Board.

WE WILL NOT maintain or give effect to our March 19, 1999 contract with Local 300S or to any renewal, extension, or modification thereof, unless and until Local 300S is certified by the Board as the collective-bargaining representative of our employees; but we are not required to make changes in wages or other terms and conditions of employment that may have been established pursuant to the collective-bargaining agreement.

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 withdraw and withhold all recognition from Local 300S as the collective-bargaining representative of our employees.

WE WILL, jointly and severally with Local 300S, reimburse, with interest, all our present and former employees for all initiation fees and dues paid by them or withheld from them pursuant to the union-security clause and the dues-checkoff clause in the March 19, 1999 contract. However, reimbursement will not extend to those employees who voluntarily joined Local 300S prior to March 19, 1999.

ELMHURST CARE CENTER

APPENDIX B

NOTICE TO MEMBERS
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 act as the exclusive bargaining representative of any employees of Elmhurst Care Center unless and until we have demonstrated our majority status and have been certified by the National Labor Relations Board.

WE WILL NOT maintain or give effect to the March 19, 1999 contract between Elmhurst Care Center and us or to any renewal, extension or modification thereof.

WE WILL NOT in any like or related manner restrain or coerce the employees of Elmhurst Care Center in the exercise of the rights guaranteed them by Section 7 of the Act, except to the extent that such rights may be affected by an agreement authorized in Section 8(a)(3) of the Act.

WE WILL, jointly and severally with Elmhurst Care Center, reimburse, with interest, all present and former employees of Elmhurst Care Center for all initiation fees and dues paid by them or withheld from them pursuant to the union-security clause and the dues-checkoff clause in the March 19, 1999 contract. However, reimbursement will not extend to those employees who voluntarily joined Local 300S prior to March 19, 1999.

LOCAL 300S, PRODUCTION SERVICE AND SALES DISTRICT COUNCIL, UFCW

Joanna Piepgrass, Esq., for the General Counsel.
Eric J. LaRuffa, Esq. (Office of Richard M. Greenspan), for the Charging Party.
Morris Tuchman, Esq., for the Respondent Employer.
Bruce J. Cooper, Esq., for the Respondent Union.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on October 12, 1999,[1] in New York, New York. The consolidated complaint, which issued on July 8, and was based on unfair labor practice charges and amended charges that were filed by Local 1115, Service Employees International Union, AFL–CIO (the Union), on April 9 and July 7, alleges that on or about March 7, Elmhurst Care Center (Respondent Employer), recognized Local 300S, Production, Service, and Sales District Council, UFCW, AFL–CIO, CLC (Respondent Union and/or Local 300S), and on or about March 19, the Respondent Employer entered into a collective-bargaining agreement with the Respondent Union covering certain of its employees at a time that the Respondent Employer did not employ in the unit a representative segment of its ultimate employee complement and was not engaged in its normal business operations. It is alleged that by this conduct the Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act and that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act. The record herein was established almost entirely through stipulations.

FINDINGS OF FACT

I. JURISDICTION

The Respondent Employer admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondent Employer admits, and I find, that the Union and the Respondent Union are each labor organizations within the meaning of Section 2(5) of the Act.

III. THE FACTS

It should initially be noted that the sole allegations herein are that the Respondent Employer recognized, and entered into a collective-bargaining agreement with Local 300S at a time when the Respondent Employer did not employ in the unit a representative segment of its ultimate employee complement and was not engaged in its normal business operations. There is no allegation herein of tainted or coerced authorization cards affecting the Respondent Union's majority status.

The facility involved herein is a licensed skilled nursing residence located in Queens, New York. The facility contains six patient floors and is capable of caring for 240 patients. The bargaining unit at the facility is composed of all full-time and part-time LPNs, CNAs, housekeepers, and dietary technicians, excluding guards and supervisors as defined in the Act. State regulations require that a patient floor be fully staffed prior to the admission of any patients on that floor. The first patient was admitted on April 15. Subsequently, the resident census increased as follows: by June 23–52 and by July 8–69. On July 27, the Respondent opened two additional floors at the facility, and by August 1 there were 87 residents, by September 1, 107 residents and by October 6, there were 121 residents. By October 11, four of the six patient floors were operating with patients.

Although the first patient was not admitted until April 15, the Respondent began hiring and paying employees in February for training purposes and to ensure that by the time patients were admitted, the facility was operating smoothly. The first employees who were hired in February worked one shift and operated and maintained the boilers and heating equipment at the facility. During the payroll period March 7–19, the Respondent also employed housekeepers who cleaned floors and bathrooms, emptied waste containers, and replenished supplies; the CNAs who were employed at that time were trained on the Respondent's policies and procedures, and set up patient charts, made beds, and performed all functions except hands-on nursing care. Dietary employees who were employed during this period cleaned the kitchen, set up storage rooms, cooked meals for staff, and were trained in tray cart setup, and equipment. The employees who were employed during March were also paid for 3.5 to 5 hours of in-service training covering patient abuse, resident rights, fire and safety, accident prevention, elderly needs, and infection control. The number and job classifications of the unit employees employed at the facility from March through September is as follows:

Payroll Period	LPNs	CNAs	Housekeeping	Dietary	Total
3/7–3/20	1	16	21	9	47
3/21–4/3	1	16	18	9	44
3/28–4/10	1	28	14	11	54
4/11–4/24	8	23	18	14	63
4/25–5/8	8	23	18	14	63
5/9–5/22	7	22	19	14	62
5/23–6/5	10	31	18	10	69
6/6–6/19	11	33	0[2]	11	55
6/20–7/3	10	37	0	12	59
7/4–7/17	10	46	0	13	69

[1] Unless indicated otherwise, all dates referred to relate to the year 1999.

[2] Beginning with this pay period, the housekeeping employees are no longer included in the payroll list that is included in the stipulated facts. Subsequent to the receipt of briefs herein, counsel for the Respondent Employer, by letter dated December 7, notified me and fellow counsel that beginning in late July the Respondent Employer subcontracted the work of the housekeeping department at the facility. However, counsel does not explain what happened to the housekeeping employees from early June until late July. In the absence of these figures, based principally on the number of other employees and residents during this latter period, I find that there were 20 housekeeping employees for the pay periods June 6 through July 25, and 30 housekeeping employees for the pay periods from August 1 through September 26.

7/19–7/25	10	52	0	13	75
8/1–8/14	15	60	0	14	89
8/15–8/28	16	54	0	13	83
8/29–9/11	17	59	0	11	87
9/12–9/26	15	61	0	11	87

When all the floors are opened and occupied, the number of employees in the unit is projected to be 110.

Local 300S made a demand for recognition on the Respondent Employer on March 5; a card check of the Local 300S authorization cards was conducted by Jay Nadelbach, arbitrator, on March 7. By letter dated March 8 to the Respondent Employer and the Respondent Union Nadelbach certified that the Respondent Union represented a majority of the employees at the facility, although the letter does not give a breakdown of the number of employees employed at the facility on that date or the number of authorization cards submitted by the Respondent Union. On or about March 12, the Respondent Employer granted recognition to Local 300S and on March 19, the Respondent Employer and Local 300S executed a collective-bargaining agreement effective March 12, 1999, to March 11, 2003. The record establishes that Local 300S submitted 47 authorization cards to Nadelbach for the March 7 card check; 2 are undated. The rest are dated March 7 or earlier. Of these 47 card signers, 9[3] do not appear on the Respondent Employer's payroll list for the period March 7–20, which list was given to Nadelbach for use in his card check. The remaining 38 card signers worked during the 2-week pay period March 7–20 from 5 hours to 72-1/2 hours, for an average of about 17 hours. The Respondent's payroll records for the pay period through September 26 establishes the employment longevity of the card signers: 10 card signers[4] worked the pay period commencing March 7 and never again; 21[5] of the card signers worked, at least, through the payroll period May 9–22; 9[6] worked every pay period, or almost every pay period, from March 7 through September 26; 1, Gusna Dockery, worked 5-1/2 hours the pay period commencing March 7, and did not work for the Respondent Employer again until the work week commencing July 19. From that date through September 26, he worked on almost a full-time basis; and Patricia Scott, who worked 8 hours for the pay period ending March 28, and did not work for the Respondent Employer again until the work week ending July 25, and then worked continuously for the Respondent Employer, at least, through the pay period ending September 26.

IV. ANALYSIS

As stated above, the Respondent Employer recognized Local 300S on March 12 and entered into a collective-bargaining agreement with Local 300S on March 19, based upon the card check which showed that a majority of the Respondent's employees who were employed at the time had signed authorization cards for Local 300S. Counsel for the General Counsel, in arguing that these actions violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act, does not allege any irregularities in the authorization cards or the card check that resulted in the recognition of the Respondent Union, but rather alleges that at the time of the recognition and the execution of the agreement the Respondent Employer did not employ a representative segment of its anticipated employee complement and was not engaged in its normal business operations.

In determining whether recognition was premature, the Board, in *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984), relies upon a twofold rule:

> At the time of recognition (1) an employer must employ a substantial and representative complement of its projected workforce, that is, the jobs or job classifications designated for the operation must be substantially filled, and (2) the employer must be engaged in normal business operations. The Board has not established any mathematical formula or any per se rule for resolving the issue of premature recognition but has evaluated the facts in each case to decide whether employees realistically have had an opportunity to select a bargaining representative. Although not determinative in an unfair labor practice case the Board has looked for guidance to the test set forth in *General Extrusion*,[7] 121 NLRB 1165.

See also *A.M.A. Leasing, Ltd.*, 283 NLRB 1017, 1023 (1987). At the time of recognition herein the Respondent Employer employed approximately 47 unit employees in all the job classifications for training purposes; since there were no residents at the facility at that time; these employees were there solely to learn the operational and safety rules at the facility. Beginning on April 15, when the Respondent Employer admitted its first resident, the employees had to engage in actual patient care, and the number of employees increased. By late September or early October, when the facility had about 120 residents, it employed 117 unit employees, including my estimate of the number of housekeeping employees. Additionally, the number of LPNs and CNAs, the actual care givers, increased from 1 to 15 and from 16 to 61 respectively for the payroll periods March 7–20, and September 12–26.

Under a strict interpretation of the *General Extrusion* rule, the Respondent Employer has satisfied the first requirement: there were employees employed in all job classifications during that first pay period, and, at that time, the Respondent Employer employed approximately 40 percent of the unit employ-

[3] Altemary Francois, Paulette Laird, Benonie Chery, Dieufils Brice, Natascha Dockery, Suzette Fagan, Marie Louise Joseph, Renee Belizaire, and Clemene Vertus.

[4] Marie Belhomme, Ronald Boone, Lance Bradley, Betty Dardignacs, Natasha Denny, Bari Johnson, Marita Murphy, Kowsilla Persaud, Eddy Charles Pierre, and Gwendolyn Spence.

[5] Bibi Jaikaran, Ella Johnson, Ivrose Guerrier, Tanbir Ahmed, Radika Appadoo, Jean Barreau, Vanice Blackwood, Dieufils Brice, Chenier Pierre (or Pierre Chanier), Miryam Fernandez, Romdhanie Nauth, Jacque Pierre Louis, Dawatto Ramsammy, Talaimay Sawh, Martine Samedi-Azor, Bibi Shabbeer, Margaret Simpson, Simonis Yvon, Barrington Stewart, Juliet Thomas, and Gloria Sibbles.

[6] Jaikaran, Guerrier, Blackwood, Nauth, Ramsammy, Sawh, Shabbeer, Thomas, and Viran.

[7] In *General Extrusion*, a representation matter, the Board found that a contract would bar an election if, at the time of execution as compared to the hearing date, the employer employed 30 percent of its employees in 50 percent of the job classifications.

ees who were employed in late September or early October. However, as the Board stated in *Ten Eyck*, supra, and *Herman Bros.*, 264 NLRB 439, 440–441 (1982), this is not meant to be a per se rule or a mathematical formula, and the Board, in *Herman Bros.* stated: ". . . in deciding whether recognition has been improperly extended, has attempted to protect the rights of employees who *are* working, as well as those who were to work in the future." (Emphasis supplied.) In this regard, it should be noted that only about 25 percent of the unit employees who signed authorization cards for Local 300S in March were still employed by the Respondent Employer at the end of September, and only about 10 percent of the unit employees at the end of September had signed authorization cards for Local 300S in March. Further, I find the second part of the test has not been satisfied herein. At the time that the Respondent Employer recognized Local 300S there were no residents at the facility; in fact, the first resident was not admitted until 5 weeks later. This is not the normal operation of the facility. The normal operation is caring for the facility's residents; at the time in question the employees were being trained for, and preparing for, the facility's normal operation. *Flatbush Manor Care Center*, 287 NLRB 457 (1987); *Ten Eyck*, supra.

Klein's Golden Manor, 214 NLRB 807 (1974), which is cited in the briefs herein, is clearly distinguishable from the instant matter. In *Klein's*, as in the instant matter, it was alleged that at the time of recognition and the execution of a contract 8 days later, the Employer did not yet employ a representative complement of employees in the bargaining unit for which it accorded the Union recognition. The Employer therein employed 18 employees at the time of recognition and the execution of the contract. During the first week that it was open for business it employed 20 unit employees. Therefore, 90 percent of the unit employees had been employed by the Employer at the time of recognition and the execution of the contract, and this percentage remained the same for the next 3 months of the Employer's operation. During the balance of the year, this percentage was 65 percent. For these reasons the judge found that there was no premature recognition, and dismissed the complaint. The 65 percent in *Klein's* can clearly be distinguished from the instant matter.

I therefore find that by recognizing Local 300S, and by entering into a collective-bargaining agreement which contained a union security clause, the Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act and the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

2. The Union and the Respondent Union are each labor organizations within the meaning of Section 2(5) of the Act.

3. By recognizing the Respondent Union on or about March 12 as the exclusive collective-bargaining representative of its employees, and by executing a collective-bargaining agreement with the Respondent Union on or about March 19, the Respondent Employer has unlawfully assisted and supported the Respondent Union and has thereby violated Section 8(a)(1) and (2) of the Act.

4. By accepting recognition as the exclusive bargaining representative of the Respondent Employer's employees, and by executing and maintaining the March 19 collective-bargaining agreement, the Respondent Union has restrained and coerced the employees in the exercise of rights guaranteed them by Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

5. By maintaining and enforcing the union-security and dues-checkoff provisions of the March 19 collective-bargaining agreement, the Respondent Employer has violated Section 8(a)(1) and (3) of the Act and the Respondent Union has violated Section 8(b)(2) of the Act.

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

REMEDY

Having found that the Respondent Employer has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) of the Act and that the Respondent Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I shall recommend that each Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I recommend that the Respondent Employer be ordered to withdraw recognition from the Respondent Union and the latter to cease accepting recognition from the former unless certified by the Board. I also recommend that both Respondents be ordered to cease giving effect to their March 19, 1999 collective-bargaining agreement, including all renewals, extensions, and modifications, and to cancel it entirely. I further recommend that the Respondent Employer and the Respondent Union be ordered jointly and severally to reimburse, with interest, all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the union-security and dues-checkoff provisions of the March 19 collective-bargaining agreement. However, reimbursement shall not extend to those employees who voluntarily joined and became members of the Respondent Union prior to March 19.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

A. Respondent Elmhurst Care Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing Local 300S as the collective-bargaining representative of its employees unless and until it is certified by the Board as the collective-bargaining representative of such employees pursuant to Section 9(c) of the Act.

(b) Maintaining or giving any effect to the collective-bargaining agreement between Elmhurst Care Center and Local 300S entered into on or about March 19, 1999, or any renewal,

[8] 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.

extension or modification thereof unless and until Local 300S is certified by the Board as the collective-bargaining representative of such employees; provided, however, that nothing in this recommended Order shall authorize or require any changes in wages or other terms and conditions of employment that may have been established pursuant to the collective-bargaining agreement.

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

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

(a) Withdraw and withhold all recognition from Local 300S as the exclusive collective-bargaining representative of its employees unless and until it has been duly certified by the Board as the exclusive representative of such employees.

(b) Jointly and severally with Local 300S reimburse with interest all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues check-off and union-security clauses of the March 19 collective-bargaining agreement. However, reimbursement does not extend to those employees who voluntarily joined and became members of Local 300S prior to March 19, 1999.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports and all other records necessary to analyze the amounts of reimbursement due herein.

(d) Post at its Elmhurst, New York facility copies of the attached notice marked "Appendix A."[9] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent Employer's authorized representative, shall be posted 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 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 Employer has gone out of business or closed the facility involved in these proceedings, it 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 March 19, 1999.

(e) 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 it has taken to comply.

B. The Respondent, Local 300S, Production, Service, and Sales District Council, its officers, agents, and representatives shall

1. Cease and desist from

(a) Accepting recognition from, and executing a collective-bargaining agreement with, it when Elmhurst Care Center does not employ a representative number of its ultimate complement of unit employees and before it is engaged in its normal business operation.

(b) Giving effect to the March 19, 1999 collective-bargaining agreement between the Respondent Elmhurst Care Center and the Respondent Local 300S, or to any extension, renewal or modification thereof.

(c) In any like or related manner restraining or coercing employees in the exercise of their rights as guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

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

(a) Jointly and severally with Elmhurst Care Center reimburse with interest all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues-checkoff and union-security clauses of the March 19, 1999 collective-bargaining agreement. However, reimbursement does not extend to those employees who voluntarily joined and became members of Local 300S prior to March 19, 1999.

(b) Post at its business office and other places where notices to employees are customarily posted copies of the attached notice marked "Appendix B."[10] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by an authorized representative of Local 300S, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Furnish the Regional Director with signed copies of the notice for posting by Elmhurst Care Center where notices to employees are customarily posted. Copies of the notice, to be furnished to the Regional Director, shall be signed and forthwith returned to the Regional Director.

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

Dated, Washington, D.C. January 21, 2000

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

[9] 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."

[10] See fn. 9.

WE WILL NOT recognize or contract with Local 300S, Production, Service and Sales District Council, UFCW, AFL–CIO, CLC (Local 300S) as the bargaining representative of our employees, until it has been certified as such representative by the National Labor Relations Board.

WE WILL NOT maintain or give effect to our March 19, 1999 contract with Local 300S or to any renewal, extension or modification thereof, but we are not authorized or required to withdraw or eliminate any wage rates or other benefits, terms, and conditions of employment that we have given to our employees under the contract.

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 withdraw and withhold all recognition from Local 300S as the collective-bargaining representative of our employees.

WE WILL, jointly and severally with Local 300S, reimburse with interest all our present and former employees for all initiation fees and dues paid by them or withheld from them pursuant to the union-security clause and the dues-checkoff clause in the March 19 contract. However, reimbursement will not extend to those employees who voluntarily joined Local 300S prior to March 19, 1999.

ELMHURST CARE CENTER

APPENDIX B

NOTICE T MEMBERS
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

WE WILL NOT act as the exclusive bargaining representative of any employees of Elmhurst Care Center unless and until we have demonstrated our majority status and have been certified by the National Labor Relations Board.

WE WILL NOT maintain or give effect to the March 19, 1999 contract between us and Elmhurst Care Center, or to any renewal, extension or modification thereof.

WE WILL NOT in any like or related manner restrain or coerce the employees of Elmhurst Care Center in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement authorized in Section 8(a)(3) of the Act.

WE WILL, jointly and severally with Elmhurst Care Center, reimburse with interest all present and former employees of Elmhurst Care Center for all initiation fees and dues paid by them or withheld from them pursuant to the union-security clause and the dues-checkoff clause of the March 19, 1999 contract. However, reimbursement will not extend to those employees who voluntarily joined Local 300S prior to March 19, 1999.

LOCAL 300S, PRODUCTION, SERVICE, AND SALES DISTRICT COUNCIL, UFCW, AFL–CIO, CLC