Regency Grande Nursing & Rehabilitation Center *and* SEIU 1199 New Jersey Health Care Union[1] and Local 300s, Production Service & Sales District Council, a/w United Food and Commercial Workers International Union.[2] Case 22–CA–26231

August 30, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On August 5, 2005, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision, and the Charging Party, SEIU 1199 New Jersey Health Care Union (SEIU 1199) filed an answering brief to the Respondent's exceptions.

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, findings,[3] and conclusions as modified, and to adopt the recommended Order as modified.[4]

The judge found, among other things, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to grant an April 1, 2004 wage increase to employees Belinda Walling, Amarjeed Kaur, and Norma Harvey because those employees had not signed Local 300s membership and dues-checkoff authorizations. The judge rejected the Respondent's affirmative defense that this allegation was time-barred by Section 10(b) of the Act. Contrary to the judge, we find merit in the Respondent's 10(b) defense, and we dismiss this allegation.

The Charging Party, SEIU 1199, filed its original charge on February 19, 2004, alleging that, since January 9, 2004, the Respondent recognized Local 300s at a time when that union had not obtained authorization cards from a majority of the unit employees. On September 30, 2004, SEIU 1199 filed its first amended charge additionally alleging that, on January 9, 2004, the Respondent entered into a collective-bargaining agreement with Local 300s that contained a union-security clause at a time when Local 300s did not represent a majority of the unit employees. The complaint, which also issued on September 30, 2004, contained both of these allegations.

SEIU 1199 filed a second amended charge during the hearing on January 14, 2005, alleging that on and after various dates in January 2004, the Respondent conditioned the employees' receipt of wages and bonuses on employees' signing forms in support of Local 300s. When the General Counsel introduced this second amended charge into the record, he simultaneously orally amended the complaint to allege that, in April 2004, the Respondent unlawfully failed to pay contractually-required wage increases to employees who had not signed union membership and dues-checkoff authorization cards.

Applying the *Redd-I* test (*Redd-I, Inc*., 290 NLRB 1115 (1988)), to the second amended charge (as clarified in the amended complaint), we find that the April 2004 denial-of-wage-increase allegation was not closely related to a timely filed charge.[5] Accordingly, it cannot survive the Respondent's 10(b)-based challenge.

With respect to the first *Redd-I* factor, we find that the otherwise untimely allegations of the second amended charge do not involve the same legal theory as the allegations in the timely charge. The legal theory behind the timely filed allegation of unlawful recognition was that the Respondent recognized Local 300s at a time when the employees had not selected it as their collective-bargaining representative. In contrast, the alleged unlawful denial of a wage increase to three employees rests on a legal theory of discriminatory motive or disparate treatment.[6]

[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 further 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] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We shall modify the judge's recommended Order and substitute a new notice to reflect: (a) our reversal of the 8(a)(3) finding that the Respondent unlawfully denied an April 2004 wage increase to three employees, discussed infra; and (b) that employees who voluntarily joined Local 300s prior to January 8, 2004, are not entitled to reimbursement of their dues and fees. See, e.g., *Dairyland USA Corp*., 347 NLRB No. 30, slip op. at 5 (2006); *Elmhurst Care Center*, 345 NLRB No. 98, slip op. at 7 (2005).

[5] Under *Redd-I*, in determining whether an amended charge relates back to an earlier charge for 10(b) purposes, the Board applies a three-pronged "closely related" test. See *Redd-I*, 290 NLRB at 1118. "The Board considers (1) whether the otherwise untimely allegations of the amended charge involve the same legal theory as the allegations in the timely charge; (2) whether the otherwise untimely allegations of the amended charge arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations." *WGE Federal Credit Union*, 346 NLRB No. 87, slip op. at 2 (2006).

[6] See, e.g., *WGE Federal Credit Union*, supra, where the Board found that different legal theories underlay the timely 8(a)(3) discharge allegation and the subsequent allegation that the employer violated Sec.

Considering the second *Redd-I* factor, we find, contrary to the judge, that the wage-increase allegation does not arise from the same set of facts as the original charge. The failure to provide the wage increase occurred on April 1, 2004, almost 3 months after the Respondent unlawfully entered into the collective-bargaining agreement with Local 300s. It affected only three employees, while the unlawful recognition affected the entire unit.[7] Finally, the failure to provide the wage increase was not part of the Respondent's overall scheme to extend unlawful recognition and engage in a collective-bargaining relationship with a minority union, as were the earlier allegations.

With respect to the third *Redd-I* factor, we find that the Respondent would not raise the same or similar defenses to the wage-increase allegation as it would to the timely-filed charges. The Respondent's defense to the original charge and, indeed, to the first amended charge, is that it recognized Local 300s only after 300s attained majority status. As to the wage-increase allegation, however, the defenses might include whether the alleged discriminatees were actually denied the wage increase, or whether there is a legitimate, nondiscriminatory explanation for the Respondent's failure to provide it to them; indeed, the Respondent has asserted both of those defenses. Thus, we conclude that the defenses to the wage-increase allegation differ from the defenses to the earlier allegations.

For the foregoing reasons, we find that the second amended charge is not closely related to any timely filed charge. Therefore, we reverse the judge and dismiss the allegation that the Respondent violated Section 8(a)(3) and (1) by failing to provide Belinda Walling, Amarjeed Kaur, and Norma Harvey with the April 1, 2004 wage increase because they had not yet joined Local 300s.

On the other hand, we find no merit to the Respondent's 10(b) defense to the other allegations. Specifically, we adopt the judge's finding that the original charge was timely, even though the Respondent initially recognized Local 300s in May 2003, more than 6 months before the original charge. The charge was filed by SEIU 1199. We need not pass on the issue of whether SEIU 1199 or the employees are the "adversely affected party" for purposes of 10(b) notice.[8] The record establishes that the Respondent intentionally concealed its recognition of Local 300s, and that neither its employees nor SEIU 1199 learned of that recognition until after January 8, 2004. The original charge was filed within 6 months of that date.

As to the 8(a)(3) allegation based on the Respondent's entering into a contract with Local 300s containing a union-security clause, the judge found, and we agree, that this additional allegation was closely related to the original charge, and therefore was not barred by Section 10(b).[9] The allegation concerning the union-security clause involves the same legal theory as the initial charge (entering into a collective-bargaining relationship with a minority union), arises from the same sequence of events (the collective-bargaining agreement flows from the unlawful recognition), and the Respondent's defense to both allegations would be the same (that it lawfully recognized Local 300s as the exclusive representative of the Respondent's employees).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Regency Grande Nursing & Rehabilitation Center, Dover, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and reletter the subsequent paragraph.

2. Substitute the following for paragraph 2(b):

"(b) Reimburse, with interest, all of its former and present unit employees for fees and moneys deducted from their pay pursuant to the union-security and dues-checkoff clauses of the contract dated January 8, 2004. However, reimbursement does not extend to those employees who voluntarily joined and became members of Local 300s prior to January 8, 2004."

3. Delete paragraph 2(c) and reletter the subsequent paragraphs.

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

APPENDIX

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

8(a)(1) by threatening potential postelection job losses. The Board explained that the timely charge focused on the employer's discriminatory motivation, while the later charge rested on a legal theory of unlawful interference with Sec. 7 rights.

[7] See *Ajoma Lumber, Inc.*, 345 NLRB No. 19, slip op. at 3 (2005) (events found not to arise from same set of facts, where the event alleged in the timely-filed charge was specifically limited to five named employees, while the later-alleged event affected an entire shift).

[8] See *Brown & Sharpe Mfg. Co*., 321 NLRB 924 (1996), enfd. sub nom. *Machinists District Lodge 64 v. NLRB*, 130 F.3d 1083, 1087 (D.C. Cir. 1997), cert. denied 524 U.S. 926 (1998).

[9] *Redd-I, Inc*., 290 NLRB at 1118.

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 Local 300s, Production Service & Sales District Council a/w United Food and Commercial Workers International Union, as the exclusive collective-bargaining representative of our employees and enter into, maintain or enforce a collective-bargaining agreement containing union-security and dues-checkoff provisions with Local 300s when Local 300s does not represent a majority of our employees in the following unit, unless and until such time as Local 300s shall have been certified by the Board:

> All full time and regular part time service employees, maintenance employees and LPNs employed by us at our Dover, New Jersey facility, but excluding all officers, managerial and professional employees, confidential employees, temporary employees, all other employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL withdraw and withhold recognition from Local 300s as the exclusive bargaining representative of the employees in the above unit, and cease maintaining or giving effect to any collective-bargaining agreement with it, or any modifications, renewals, or extensions thereof, concerning the employees in the above unit, unless and until such time as Local 300s shall have been certified by the Board as your exclusive collective-bargaining representative, provided, however, that nothing herein shall require us to withdraw or eliminate any wage increase, benefit, or other terms and conditions of employment which may have been established pursuant to any such agreement.

WE WILL reimburse, with interest, all of our former and present unit employees for fees and moneys deducted from their pay pursuant to the union-security and dues-checkoff clauses of the contract dated January 8, 2004. However, reimbursement does not extend to those employees who voluntarily joined and became members of Local 300s prior to January 8, 2004.

REGENCY GRANDE NURSING & REHABILITATION CENTER

Bernard Mintz, Robert Gonzales, and *Brian Caufield, Esqs.,* for the General Counsel.

Morris Tuchman, Esq., of New York, New York, for the Respondent.

Ellen Dichner, Esq. (Gladstein, Reif & Meginnis, LLP), of New York, New York, for the Charging Party.

Bruce Cooper, Esq. (Haydon, Straci & Cooper, Esqs.), of New York, New York, for the Party in Interest.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. This case was tried in Dover, New Jersey on 12 days between January 5 and March 11, 2005. The original charge and a first amended charge were filed by SEIU 1199, New Jersey Health Care Union, AFL–CIO (SEIU 1199) on February 19, and September 30, 2004, respectively, and a complaint was issued on September 30, 2004 against Regency Grande Nursing & Rehabilitation Center (Respondent or Regency). Local 300s, Production Service & Sales District Council a/w United Food and Commercial Workers International Union, AFL–CIO (Local 300s) was named as a Party in Interest. On January 14, 2005, a second amended charge was filed by SEIU 1199.

The complaint, as amended at the hearing, alleges that on about May 22, 2003 the Respondent unlawfully granted recognition to Local 300s as the exclusive collective-bargaining representative of a unit of service, maintenance and licensed practical nurses, and on about January 8, 2004, executed a contract with that union containing union-security and dues-checkoff provisions notwithstanding that Local 300s did not represent a majority of the employees in that unit. The complaint further alleges that since on about April, 2004, the Respondent failed to grant a 3-percent wage increase required by the collective-bargaining agreement to employees who had not signed membership and dues-checkoff authorizations on behalf of Local 300s.

The Respondent and Local 300s filed answers denying the material allegations of the complaint. Both answers assert as affirmative defenses that Section 10(b) of the Act requires dismissal of the complaint since the charges were untimely filed. The Respondent's answer also asserts that the Board must defer to the arbitration award which found that Local 300s represented a majority of the unit employees. Prior to the opening of the hearing, the Respondent filed a Motion for Summary Judgment with the Board, demanding dismissal of the complaint based on the above affirmative defenses. On December 8, 2004, the Board denied the motion stating that the Respondent "has failed to establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law."

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed

by the General Counsel, SEIU 1199, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation having an office and place of business in Dover, New Jersey, has been engaged in the operation of a nursing home and rehabilitation center. During the past 12 months the Respondent derived gross revenue in excess of $100,000, and purchased goods valued in excess of $5000 directly from points outside New Jersey. The Respondent admits and I find that it is 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, and that SEIU 1199 and Local 300s are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

In about May or June, 2002, David Gross began operating a management company in behalf of the Dover Christian Nursing Home, a nonunion facility. Dover Christian ceased operating the facility on December 31, 2002, and the Respondent was issued a license to immediately begin operating the facility, which is a long-term care facility consisting of 135 long-term care and 20 residential health care beds. Gross is the president of the Respondent. Ray Crossen, the administrator for Dover Christian, remained employed by the Respondent in that capacity until about April, 2003, when Joseph Olszewski became the administrator. Gross also owns two other nursing homes in New Jersey, both of which have contracts with SEIU 1199.

B. The Organizing Drive and the Authorization Cards

James Robinson, the president of Local 300s, has been affiliated with that union since 1973, and has been its president for 10 years. Local 300s has collective-bargaining agreements with about 44 employers, three of which are nursing homes and two are assisted living centers.

According to Robinson, the Local 300s campaign was prompted by an employee who works at Confidence Management, a company which does the laundry at the two other nursing homes owned by Gross. The laundry workers are represented by Local 300s, and one told an official of Local 300s that Gross was opening a nonunion home in Dover.

Robinson testified that he first appeared at the Respondent's facility in mid-February 2003, but did not begin organizing there until late February or early March 2003. His pretrial affidavit contradicts this testimony somewhat in that it states that organizing did not begin until about mid-March. In the beginning, he was present at Regency every other day, and then every few days, always accompanied by other union agents. In addition to Robinson, three other union agents were involved in the organization of Regency, but there was no employee organizing committee. Robinson stated that a Local 300s agent was present outside the facility about once every 3 days through April 2003. Their practice was to arrive in the morning for the incoming shift and outgoing late night shift, and then attempt to return in the afternoon for the incoming evening shift. During this period of organization, Local 300s agents distributed leaflets, flyers and authorization cards in the form of a postage-paid postcard.

Gross testified that in late winter or early spring 2003, administrator Crossen told him that union agents were distributing cards and leaflets outside the building in an attempt to organize the employees. Gross determined, based on literature he was given by a supervisor, that Local 300s was organizing. Gross saw the union agents, including Robinson, outside the building for about 1 month. Crossen told Gross that when organizing activity occurred in the past, Dover Christian campaigned against the union. Gross told his department heads not to permit access to the property to the union agents. Gross knew that he had to be very careful if he spoke to employees about unionization, so he decided that the Respondent would be "silent" on the issue, and not present an antiunion campaign, asserting that this was a "free country" and he could not tell his employees what to do.

On April 22, 2003, Robinson wrote to the Respondent, stating that Local 300s has been actively engaged in organizing its employees. Robinson denied otherwise having any contact with the Respondent during the organizing drive, except being told that he could not enter the Respondent's property.

In support of Robinson's testimony concerning the organizing drive of Local 300s, the Respondent adduced testimony concerning organizational activity in and around the facility during the time that Local 300s distributed literature from February to April, 2003. Thirty employees heard conversations in the facility during the first half of 2003 concerning the issue of a union's attempting to organize the employees, and 36 workers, some of whom are the same as those who heard such conversations, saw people outside the building soliciting membership in a union at such time. One employee, Juanito Pasion, stated that he saw employees signing papers outside the building, and Nora Aguado testified that certain unnamed employees told her that they signed cards and mailed them to a union.

As further proof of Local 300s' organizational activity, Gross testified that in late spring or early summer, 2003, he and Administrator Olszewski received requests for raises from certain unnamed employees. The workers were told that the Respondent was negotiating a contract with a union and all raises had to be negotiated with the union and none could be given until the contract was signed. This testimony was somewhat corroborated by Kathy Rohde, the Union's shop steward. She stated that in the spring and summer of 2003 she heard rumors that a union would represent the employees. In September or early October 2003, she asked Olszewski a question on some matter and he replied that it depended on what the contract provided which had to be discussed with the union, and "that could change if we get the union." He then asked Pam Alvarez, the nursing director "the union's in, right?" Alvarez said it was. Nancy Groman testified that in about April 2003, she asked Olszewski for a raise based on her promotion. He replied that he could not get her any more money because "there was union activity going on."

Robinson stated that the union obtained a total of 68 signed authorization cards from employees at Regency from February or March to April, 2003. He testified that during the 2-month

period of organizing, Local 300s agents received only three or four signed cards in person at the facility. The remainder, about 64 or 65 cards, were mailed to that union.

Apparently the authorization card was attached to a questionnaire which asked employees only to indicate which of 23 items they were "most interested in" so that Local 300s "may start research and development programs to assist us to prepare for the time when we are able to start negotiations with your employer." The questionnaire asked the workers to fill it out and return it and the attached authorization card to the Union. Despite the fact that 64 or 65 cards were allegedly returned by mail to the union, no completed questionnaires were received in evidence. Robinson's testimony that he received some responses, but did not retain them is doubtful since he stated that the questionnaire asked employees to list their current benefits. However, the questionnaire asked only what the employees wanted in negotiations with the Respondent, and not their current benefits.

Robinson stated that he and his agents were informed by employees that there were about 120 employees in the unit, and on May 5, Robinson wrote to the Respondent, advising it that Local 300s represented a majority of its employees, and requesting that its representative call within 24 hours to discuss a contract.

In contrast to Robinson's testimony concerning Local 300s's organizing efforts, testimony was received from 81 unit employees who were employed on May 22, 2003 when the Respondent recognized Local 300s. Of those witnesses, 74 credibly testified that they did not sign a card for Local 300s prior to that Union's recognition, or indeed at any time before January, 2004.[1] Two additional witnesses testified that they could not recall signing a card for that Union.[2] Only one employee, Aida Basualto, testified that she signed a card before Local 300s was recognized, and as set forth below there is some question about whether she actually signed a card before May 22, 2003.[3] The five remaining employees were not asked directly whether they signed a card for Local 300s.[4] As set forth below, following the recognition of Local 300s, Robinson threw out the cards received by employees, and none were received in evidence. Accordingly, not one employee unequivocally testified that he or she signed a card for Local 300s before that union was recognized on May 22.

In addition, 38 employees testified that they were unaware of Local 300s's presence prior to January, 2004, 27 workers, some of whom are the same as those who were unaware of Local 300, stated that they did not see any union organizers outside the building soliciting membership in a union, and 28 workers did not recall seeing such people. Twenty workers heard no conversations in the facility about a union trying to organize employees during that period of time, and 15 could not recall if there were such discussions.

Most of the employees who testified that they saw a union organizing in the first part of 2003, or heard conversations regarding a union at that time, were either not asked which union they were referring to, did not know which union was organizing at that time, or simply did not identify which union was organizing.

The following evidence relates to questions whether employees saw a union organizing in the first half of 2003. Castro testified that SEIU 1199 was organizing at that time, and not Local 300s. Valentin stated that in April or May, 2003 or in late 2003, SEIU 1199 distributed cards outside the building. He denied any knowledge of Local 300s prior to January 9, 2004. Morillo stated that she signed a paper for "311," but then noted that she signed such a document in 2004. Romero stated that she was given a card from SEIU 1199. Oulds stated that before Regency Grande purchased the facility, SEIU 1199 tried to organize the employees, but that after the sale, another union, not 1199, tried to distribute papers and become the employees' representative. She said that probably there were two unions at that time. Montanez stated that he saw Local 300s outside the facility, and perhaps SEIU 1199 was there also. Harvey stated that SEIU 1199 was outside the building in the summer of 2003, following the purchase by the Respondent. Armstrong believed that employees were talking about Local 300s, but is not certain, and he was given a postage-paid postcard by the agents. Similarly, after the purchase by the Respondent, Waysome was given a postage-paid postcard by Local 300s agents. Rohde saw the same Local 300s agents in the facility in January, 2004 that she saw in the first half of 2003, speaking outside to employees. Roberts said that she received a card in late 2003 which was from either Local 300s or SEIU 1199, but believes that it was for SEIU 1199. She noted that at the time of the purchase of the facility by the Respondent, there was first one union organizing and then another. She did not see two unions organizing at the same time. Aguado was told by other unnamed employees that they mailed back cards to a union, but she did not know which union it was. Montoya stated that

[1] Clara Raab Contreras, Shila Smith, Mauricio Gonzalez, Paola Mella, Leatha Gatling, Vanessa Cuartes, Shaun Dindial, Minnie Conklin, Joshua Waer, Michele Meikle, Sheena Joy, Dana Spangler, Steven Shann, Nattie Thomas, Ana Camacho, Manuela Figueroa, Jose Omar Fauste, Andrea Kimbrough, Eliana Muneton, Elvira Tavera, Sebastian Gimenez, Rosana Coppola, Francisco Castro, Lucrecia Artigas, Carlos Balbuena, Maria Carmona, Harry Smith, Carole Carr, Michele Harris, Shenette Williams, Belinda Walling, Frieda Palomba, Patricia Secola, Carole Gardner, Robin McCord, Mary Walker, Elizabeth Barbounis, Helen Phelan, Patricia Bendsen, Eleanor Augustine, Angela Zaretskie, Florie Archer, Victoria Montenegro, Amarjeed Kaur, Krystal Lloyd, Alnora Sturdivant Finlayson, Jaclyn Sgro, Francisco Valentin, Juana Greta Heath Morillo, Jose Sanchez, Rosita Romero, Maria Cocio, Maria Oulds, Michael Gibbons, Anna Ferreira, Cristal Estudillo, Kerry Hickenbottom, Rita Noel, Carmen Montanez, Alba Franco, Nilsa Ayala, Norma Harvey, Johanna Rudas, Marion Culleny, Kelly Armstrong, Juanito Pasion, Azra Ali, Vivienne Waysome, Selina Akther, Kathy Rohde, Marion Roberts, Heather McQuown, Claudia Cortes, Ella McKlin, Donna Nunn, Nora Aguado, Aida Basualto, Claudia Montoya Agrensoni, Nancy Groman, and Belinda Walling.

[2] Swalaha Mohamed and Mary Terry.

[3] The testimony of Juana Greta Heath Morillo was confusing on this issue. She first testified that in the first half of 2003, she signed for a union whose name she does not recall, possibly "311," but then said she believes that she signed in about 2004. Then she testified that in the first half of 2003 no one gave her a card outside the facility.

[4] Carole Carr, Minnie Conklin, Claudia Cortes, and Kerry Hickenbottom.

shortly after the purchase of the facility in early January, 2003, Local 300s agents solicited employees outside the building, and that there were two unions organizing at that time. Groman could not recall the name of the union which solicited employees at that time, but believed that it was a grocery store union and Robinson was involved in the solicitation. She also stated that when Robinson was introduced at the January 9 meeting, she recognized him as being the union agent who was distributing literature the previous winter. She further stated that SEIU 1199 began organizing after Local 300s.

Robinson could recall the name of only one employee, Aida Basualto, who signed a card for Local 300s before that union was recognized. Basualto testified that she signed two cards for Local 300s in late winter or early spring 2003 and mailed at least one of them to that union. Even this is in doubt, however, since a card signed by her and received in evidence was dated December 8, 2003.[5] She stated that she signed another card either the day before or the day after she signed the December 8 card. Thus, some doubt is cast on her testimony that she signed a card for Local 300s before that union was recognized in May 2003. Robinson did not ask his other organizers if they remembered the names of any employees who signed cards for Local 300s.

The Respondent adduced much testimony concerning affidavits and petitions signed by employees after the contract was executed. The affidavit prepared by counsel for the general counsel, asked the following questions, among others: "Did you sign a card for Local 300s sometime in about the spring of 2003 (on or before May 21, 2003) authorizing it to represent you for the purpose of collective bargaining?" A petition, circulated by employees or SEIU 1199 agents, stated: "Before January 1, 2004, I had not signed a Union authorization card or any other document selecting Local 300s, UFCW as my union representative."[6]

This evidence was adduced in order to prove that SEIU 1199 pressured employees into signing the petition saying that they did not sign a card for Local 300s, and that the Board agent had an "agenda" which included a belief, before fully investigating the case, that the Respondent deliberately recognized a minority union. At most, the SEIU 1199 solicitors said that the employees would get better benefits if that union represented the employees. Regarding the Board agents, one was quoted by employee Williams as saying that the "employees . . . fighting against the union . . . because they're not being treated right. So they don't want . . . that union . . . and "trying to get the union out." None of these comments, or other matters relied on the Respondent regarding this issue rise to a level that it could be said that employee testimony was compromised. Indeed, there was absolutely no evidence that the Board agents conducted themselves in any way other than the highest standard expected of government attorneys.

Employees who may have been confused by questioning concerning the petition and affidavit nevertheless testified at the hearing that they did not sign cards for Local 300s. No physical or other credible evidence was presented that they did, and I credit their testimony.

C. The Card Count

Sometime after May 5, 2003, Robinson told Gross that they should obtain an arbitrator who could confirm or reject the union's claim of majority status. Gross testified that he did not believe that he was aware that the Respondent had a right to insist on a Board election to prove the union's claim.

On May 21, a card count was conducted by arbitrator Jay Nadelbach, pursuant to a written agreement requested by the arbitrator. The agreement provides that the arbitrator will determine the claim of Local 300s to represent a majority of employees in the service and maintenance unit. The licensed practical nurses (LPNs) were not separately mentioned. Robinson considered those workers to be part of the service and maintenance unit. Nadelbach was selected because he was known to the parties. He had done a prior card count for Local 300s and for Morris Tuchman, the Respondent's attorney. Robinson testified that he presented 68 signed authorization cards to the arbitrator.

Prior to the card count, Robinson did not receive W-4 documents or any other papers which bore the signatures of employees. He denied that either he or any Local 300s representative signed any of the cards which were presented to the arbitrator. Robinson did not have a list of employee names prior to the card count, and did not know how many names were on the payroll. However, prior to the count, he and Gross discussed the job titles of the workers employed at the Respondent.

According to the parties, the arbitrator requested and was given W-4 forms signed by employees, and a list of all employees employed at the facility, with notations as to who were supervisors. The list was prepared by payroll clerk Connie Lampron from the last payroll preceding May 21, which would have been the payroll period ending May 10. The list which was presented to the arbitrator was not retained, so the record does not contain the actual document that the arbitrator used in the card count.

A recreated list was prepared by Lampron for this hearing. The first list she prepared was for a later payroll period, which was thus was not in existence at the time of the card check. When informed of this error, she prepared a second recreated list, containing the names of 117 unit employees, but contained certain errors. Thus, Paulette Tammone was included in the unit although it was stipulated that she should have been excluded as a professional employee. In addition, that list does not contain the name of Alnora Sturdivant Finlayson, a unit employee, or Juanito Pasion. He was excluded from the unit, but at hearing, the parties stipulated that he should have been included in the unit.

Nadelbach worked alone for about 3 to 3-1/2 hours, and then told Robinson that Local 300s had proven its majority status. Robinson then "discretely" told some employees he saw in the building at that time whose names he cannot remember, that following a card count his union represented a majority of employees, an arbitrator had just certified it, and negotiations would begin as soon as possible.

[5] GC Exhibit 63.

[6] Castro, Sanchez, and Valentin testified that office clerk Lampron gave them the petition to sign. Such testimony is not believable.

On May 22, the arbitrator issued the following Award, in relevant part:

> The Union furnished me with the signed authorization cards it had obtained from bargaining unit employees authorizing it to represent them for the purposes of collective bargaining. And the Employer furnished me with a complete set of W-4 forms containing the signatures of all eligible employees.
>
> In accordance with the parties' agreement and with the authority vested in me, I then compared the signatures on the cards provided by the Union with the signatures on the W-4 forms. Based upon that comparison, I hereby certify that the Union has been selected by a majority of eligible employees as their collective bargaining representative.
>
> I hereby further direct the Employer to recognize the Union as the collective bargaining representative for the agreed upon bargaining unit.

About 6 months after the card count, in about late November 2003, Robinson threw out the signed cards, before substantial progress had been made in negotiations, because he believed that they were no longer needed. He was advised by his attorney that if no charge was filed or issues raised regarding the cards within 6 months of recognition they were no longer needed.

Robinson conceded that when he received the charge in the instant case which was filed on February 19, 2004, and which alleged that the Respondent recognized Local 300s at a time when that union "had not obtained authorization cards from a noncoerced majority of employees", he knew that the question as to whether Local 300s had obtained cards from a majority of employees was a "significant issue." Nevertheless, following the filing of the charge he did not attempt to have any employees verify that they had signed cards on or before May 21, 2003, the date of the card count.[7] In addition, Robinson did not retain copies of the cards, a list of the card signers or their addresses, notes showing which employees were contacted who supported the union, or those who may have been helpful in organizing and representing the workers. Moreover, although Robinson had diaries showing the dates of his organizing efforts, he discarded them at the end of 2003.

D. The Negotiations and the Contract

Immediately after the card count on May 21, Robinson told Gross that he wanted to immediately send a letter to employees advising them of its majority status, but Gross asked him not to do so, and requested that he wait until he received a letter from the arbitrator. The letter arrived the next day at which time the Respondent recognized Local 300s. Gross further suggested that they "keep everything at a low, quiet, even-keel pace" while they negotiated. Accordingly, Robinson did not notify any employees in writing that Local 300s had been recognized. Nor did the Respondent meet with employees to let them know that Local 300s had been recognized as their representative. Gross' reasoning was that if Robinson's letter caused the employees to be "stirred up," they would take a more "adversarial or militant" approach to wage raises. So he sought to avoid the issue altogether until it was "appropriate" to grant a raise, inasmuch as he had granted all employees a raise in March, 2003.

Robinson agreed with these suggestions. He stated that employees were kept uninformed about the fact that negotiations were taking place, no employees participated in the negotiations, employees were not part of a negotiating committee, no employees were told that he was negotiating a contract, none were told about the progress of the talks, and no letters were sent to employees asking them for their input in negotiations. In fact, following the union's recognition on May 22 until the contract was executed 7-1/2 months later on January 8, 2004, Robinson had no meetings with the employees. This is consistent with many employees' testimony, as set forth above, that they never heard of Local 300s prior to the execution of the contract. In addition, this is also consistent with the testimony of Patricia Secola, who testified that she asked Robinson on January 9 who negotiated the contract and how were the terms agreed to because no one asked her for her input. Robinson's response that he spoke to certain unnamed coworkers about the terms they desired is not credible, as follows.

According to Robinson, during the organizing campaign he asked certain unnamed employees what benefits they had and what they were most concerned about, and distributed a leaflet asking for a response to those questions. He did not retain the responses, and worked from memory as to the benefits the employees had. This testimony regarding his contact with employees is suspect in that Robinson also testified, as set forth above, that no employees were told that he was negotiating a contract, none were told about the progress of the talks, and no letters were sent to employees asking them for their input in negotiations. The leaflet received in evidence was a questionnaire which asked employees only to indicate which of 23 items they were "most interested in" so that Local 300s "may start research and development programs to assist us to prepare for the time when we are able to start negotiations with your employer." It is significant that the questionnaire did not ask employees what benefits the employees had, as Robinson testified. A fair inference may be drawn that Robinson did not retain the responses because there were none, and even if there were any, the questionnaire did not ask for the workers' current benefits.

As set forth below, Robinson's first offer was the Elmhurst Care Center contract to which Local 300s was a party. Since Robinson believed that the employees' current benefits were less than provided in the Elmhurst contract, he felt certain that they would be receiving greater benefits if the Elmhurst contract was agreed to. However, the Elmhurst contract's terms were reduced in the negotiations with the Respondent, so the unit employees here did not receive even those terms in the contract executed on January 8. Accordingly, I cannot find that Robinson involved any employees in the discussion of a new contract or asked any what terms they desired. If he conducted even a rudimentary review of their basic, current terms of employment, he would have learned that they were receiving

[7] The charge was filed against the Respondent only, and accordingly a copy of the charge was mailed to the Respondent and apparently not to Local 300s. However, it may reasonably be assumed that Robinson received a copy of the charge or was notified of its filing immediately by the Respondent or its counsel since its valid representation of the unit was in question.

greater benefits, prior to being represented by Local 300s, than the contract he executed on January 8.

Before beginning negotiations, Robinson was aware that Gross had contracts with SEIU 1199 at the two other facilities he owned, Regency Park and Regency Gardens. Nevertheless, Robinson did not ask Gross for copies of those contracts notwithstanding that Robinson was "curious" as to employees' wages and benefits in those agreements, because he did not believe that he had a right to obtain those contracts from him, or even ask for them. Interestingly, Robinson stated that if he knew that SEIU 1199 had "excellent" contracts with Gross at the other facilities, he may have wanted to know that information so that he could request the same wages and benefits. However, inasmuch as he did not believe that those contracts contained excellent terms, he did not pursue it. Nor did Robinson even ask Gross what wages and benefits he was providing at the other unionized locations since it is his practice to negotiate a contract for the location involved, and try to get the best package for those employees.

In preparation for the negotiations, Robinson did not ask for payroll records or current wage rates, and he received no list of employee seniority dates, no detailed description of the health and dental plan provided by the Respondent or their cost, and no employment or personnel manuals regarding the terms and conditions of the employees' employment. An employee told Robinson that the amount of their last raise was 3 percent, but Robinson did not confirm that figure with Gross during negotiations.

On June 8, Robinson sent a letter to Gross which stated that Nadelbach conducted a card count to establish whether the union had a "sufficient showing of interest. I have received an award . . . certifying that the union in fact had a sufficient showing of interest and directed the Employer to recognize the Union for the agreed to bargaining unit." The letter requested an appointment to begin negotiations.

Gross stated that in response to the letter he was not anxious to meet with Robinson or sign a contract. He wanted to delay the negotiations, and "buy myself time." The Respondent had given a 3-percent wage increase to the workers only 3 months before, in March, and Gross wanted to delay having to pay more money in wages or increased benefits.[8] Not having received a response to his June 8 letter, Robinson sent another letter on July 1 asking for a meeting before July 24.

Robinson called Gross periodically after that. Gross agreed to meet but did not do so. Finally, before July 24, Gross told Robinson that they could discuss language and benefits, but that any discussion of increased money would have to be deferred. Gross warned Robinson that he should not get the employees "worked up" into believing that they would get more money because he could not give another raise immediately.

Robinson testified that negotiations began in July, when he sent Gross, by e-mail, the Union's first proposal, which was the contract with Elmhurst Care Center. Robinson believed that the terms of that contract would be acceptable to Gross. They used that contract as a framework for a new agreement. He and Gross offered proposals to each other by making changes to the Elmhurst contract and e-mailing the contract back and forth between themselves and Respondent attorney Morris Tuchman.[9] Robinson estimated that 90 percent of the negotiation was done by e-mail. They made proposed changes concerning the number and method of payment of sick days and vacation days, holidays, pay raises, and dates of pay raises. Robinson's first proposed pay raises were the amounts set forth in the Elmhurst contract. According to Robinson, such e-mailed changes continued to late August or early September. Robinson estimated that he made three or four proposals by modifying the Elmhurst contract. The major modifications were to the amount and method of payment of sick days and holidays.

The above testimony, that negotiations were a lengthy, leisurely, contemplative process is contradicted by the documentary evidence. Thus, SEIU 1199 subpoenaed all records concerning bargaining and bargaining proposals. The earliest e-mail communication provided was that of December 17, 2003, in which Robinson sent the Elmhurst contract to Gross. Since 90 percent of the bargaining was conducted by e-mail, it would be expected that earlier communications, if they took place, would be represented by e-mail messages. I have taken into consideration that the Elmhurst contract was sent back and forth between the parties with proposed changes, but if the contract was sent earlier than December 17, it would have made its appearance in an earlier e-mail. Robinson stated that his first proposal was the Elmhurst contract which he sent by e-mail. Accordingly, it appears that bargaining, as represented by the first proposal, did not begin until December 17.

Robinson and Gross met face-to-face only two times. The first time was at a negotiation session in late September or early October at which they had a 30-minute discussion concerning language in the proposed contract, including how unused sick days would be paid. At that meeting, Robinson proposed a reduction in the amount of raises from the amount set forth in the Elmhurst contract. The second in-person meeting was on January 8, 2004 when the contract was executed.

Robinson stated that agreement on wages, which was not a major issue, was reached in late November, 2003. In December 2003, Robinson received an e-mail copy of the Elmhurst contract which was modified for this facility. No wage rates were contained in the contract. Robinson stated that after this document was sent, he and Gross exchanged proposals and attempted to reach final agreement. Gross stated that before that contract was sent, he discussed a new contract with Robinson but did not know if he made any written proposals.

On about December 29, 1993, Gross received an e-mail from the Respondent's controller, Aaron Stefansky, regarding his review of the Dover Christian employee manual and other items which he believed should be included in the new contract. Gross received a final draft of the contract on January 5.

At 5:34 p.m. on Thursday, January 8, 2004, Stefansky sent an e-mail to Robinson, attaching the "final contract." Robinson

[8] The employees received wage raises every year, in November or December. During the transition from Dover Christian to the Respondent, the raise expected in late 2002 was deferred until March 2003.

[9] Robinson did not take any notes of the negotiations, other than the contract which was e-mailed. Robinson discarded old copies of the contract once it was revised.

and Gross met at about 10:45 p.m. that evening at a diner where 30 or 40 minutes were spent during which Robinson read the contract and it was executed by both men. Gross stated that he had "run out" of his home to sign the contract, conduct which he called "very unusual." The contract, which was retroactive to January 1, 2004, had a 4-year term, expiring on December 31, 2007, and contained union-security and dues-checkoff clauses.

A record of SEIU 1199 house visits to the homes of employees shows that three homes were visited by that union's agents on January 6, three homes were visited on January 7, and one home was visited on January 8 at 2 p.m. In addition, as set forth above, a number of employees testified that SEIU 1199 was organizing in the period of time shortly before they became aware, on January 9, that Local 300s would be their representative.

Robinson denied signing the contract because he knew that SEIU 1199 was organizing the employees, adding that he did not know whether that union was attempting to organize the Respondent's employees. Robinson denied rushing into signing the contract, noting that it took 8 months to negotiate. He first learned of SEIU 1199's organizing effort among the employees 2 to 3 days after the contract was signed.

Similarly, Gross testified that he first learned that SEIU 1199 was organizing on January 11 when he was told by Olszewski that employees were approached by that union. Olszewski's e-mail of January 11, in relevant part is as follows: "Update—new info filtering in—Staff reports that 1199 is aggressively going door to door telling staff not to sign Local 300 union cards because 1199 has a better deal . . . ." Gross also testified, however, that there was a "very, very active grapevine" in the facility and the town of Dover, with many of his employees being related, and most employees walking to work. He stated that "when anything happened in the building, within, really, before the end of the day, there were not [sic] secrets, many employees knew what was going on and would come down to my office to talk about it or to some other department head. It would circulate." This "active grapevine" undermines Gross' testimony that he did not learn that grapevine that SEIU 1199 was organizing prior to January 11, particularly in view of Olszewski's "update."

The contract provides that Local 300s is the exclusive collective-bargaining representative of the Respondent's employees in the following unit:

> All full time and regular part time service employees, maintenance employees and LPNs employed by Respondent at its Dover, New Jersey facility, but excluding all officers, managerial and professional employees, confidential employees, temporary employees, all other employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

E. The Events of January

Robinson testified that on January 9, the day after he signed the contract, he went to the Respondent's premises, at Gross' invitation, in order to meet with the workers and advise them of the contract. Gross escorted Robinson and three of his agents into the cafeteria, where they remained for about 3 hours, from 1:45 p.m. to 5 p.m.

At the meeting, Gross announced that a card count had taken place, and that he had signed a contract with Local 300s, which he described, including that it provided for a 3-percent wage increase effective in April, and noted that the employees would receive a $100 bonus that day. The $100 bonus paid to employees on January 9 was authorized by Gross early that week, and it appeared in their paycheck that day. Gross, who was at the meeting for about 30 minutes, introduced Robinson, and then left. That was the first time since the recognition of Local 300s that Gross notified a group of employees that they were represented by that union, although he testified that he had informed unnamed individual employees prior to that time. Gross had not posted any notices or sent notices to employees prior to January 9 notifying them that they were represented by a union.

Robinson introduced himself to the employees and told them that dues would be deducted from their pay beginning in April. The employees then signed dual purpose dues-checkoff and authorization forms for Local 300s.[10] Robinson explained the benefits and other provisions set forth in the contract, but he did not distribute copies of the contract. Certain workers told him that the benefits he described were inferior to what they already received without a union. For example, their preunion benefits included eight holidays and two personal days, but the new contract provided for only seven holidays and no personal days. Further, their current vacation benefit was 2 weeks for employees who worked less than 5 years, but with representation by Local 300s such employees received only a 1-week vacation.

Robinson stated that Gross told the employees at the meeting that if they had benefits in excess of those provided in the contract they would continue to receive those additional benefits. Accordingly, additional benefits provided before the contract's execution were added to the contract on January 19. In addition to the above, such additional benefits included sick days, dental benefits, night-shift differentials, and life insurance benefits.

On Monday January 12, Gross and Robinson again met with other employees, at which time Robinson obtained more signed cards for Local 300s. Some asked him about SEIU 1199, specifically whether representation by that union would be better or worse than Local 300s, and whether SEIU 1199 could offer a better contract. In late January and early February, Robinson distributed copies of the contract, in English and Spanish, to the employees.

F. The Conditioning of Pay Raises on Joining the Union

The contract provides that "effective April 1, 2004, the facility shall increase the wages of all post probationary employees by three percent (3%)."

Belinda Walling was told by the Respondent's payroll office that since she worked only part time and was not entitled to bene-

[10] There was much conflicting testimony concerning employees allegedly being threatened that they would not receive their paychecks or would be discharged if they did not sign union cards, whether Lampron gave them union cards to sign, and whether union agents distributed paychecks. I need not resolve any of this testimony because none of these allegations have been made the subject of a charge, they are not before me, and the General Counsel does not rely on them to support the allegations of the complaint.

fits, she did not have to join the Union. She did not sign a card for Local 300s until May 14, and did not receive the 3-percent wage increase in April. Robinson testified that Walling told him that she was told that she would not receive a raise unless she signed a union membership form. Robinson told Gross that Walling, and all unit members are entitled to all contractual benefits regardless of whether they signed that form.

Amarjeed Kaur did not receive the 3-percent raise in April, 2004, and had not signed a card for Local 300s by that time He told Lampron on May 13 that he did not receive the raise, and she advised him to sign a card for Local 300s. He did so and thereafter received the raise. It was stipulated that Norma Harvey did not receive the wage increase in April. She did not sign a card for Local 300s until April 26, 2004. Walling, Kaur, and Harvey were postprobationary employees.

Robinson testified that certain employees did not receive the raise because "in some cases the facility for whatever reason did not implement a raise unless they received back a signed form from us indicating the person had joined the union." Robinson told Gross that all unit members are entitled to all contractual benefits regardless of whether they signed such a form.

Analysis and Discussion

I. THE UNLAWFUL RECOGNITION OF LOCAL 300S

An employer violates Section 8(a)(1) and (2) when it extends recognition to a union as the exclusive representative of its employees at a time when the union represents only a minority of the employees in the appropriate unit. *International Ladies' Garment Union, AFL-CIO (Bernhard-Altmann Texas Corp), v. NLRB*, 366 U.S. 731 (1961). The employer also violates Section 8(a)(3) of the Act when it executes a contract with such a union containing a union-security clause. *Duane Reade, Inc*., 338 NLRB 943, 944 (2003). The burden is on the General Counsel to establish that the union does not represent a majority of the employees at the time of recognition. I find that the General Counsel has met his burden.

The main question before me is whether Local 300s represented a majority of employees in an appropriate unit when it was recognized on March 22, 2003. Absent an election, the usual method of proving such status is the presentation at hearing of cards signed by employees designating the union as their representative. In this case, however, the cards were destroyed by Local 300s. The General Counsel argues that Local 300s did not have signed cards from a majority of the unit employees. Respondent asserts that it did, and they were used by the arbitrator in a valid card count, the results of which may not be disturbed.

None of the 81 employees who testified stated that he or she signed a card for Local 300s before it was recognized on May 22. Seventy four employees in a unit of 117 testified that they did not sign a card or authorize Local 300s to represent them before it was recognized. Robinson, however, said that he presented 68 signed cards to the arbitrator. His explanation that he discarded the cards 6 months after obtaining recognition is reasonable, inasmuch as Section 10(b) would ordinarily toll any challenge to the cards. However it is somewhat unusual that as an experienced union president who has been affiliated with the labor movement for more than 30 years, he would have kept no record of who signed the cards, and could not identify the names of anyone who did.

Sprain Brook Manor, 219 NLRB 809 (1975), a case quite similar on its facts to this case, involved a situation where Local 999 presented signed authorization cards to an arbitrator, who after conducting a card count, found that it represented a majority of the 77 unit employees. Following the count, Local 999 destroyed the cards. Seventy employees testified or it was stipulated that they would have testified that they never authorized Local 999 to represent them. The Board rejected the respondent's defenses that the arbitrator's award was binding pursuant to *Spielberg Manufacturing Co*., 112 NLRB 1080 (1955), holding that the charging party was not a party to the card-check agreement or award. The Board held that the general counsel made a prima facie showing that neither a majority of the respondent's employees in the recognized or contractual unit authorized Local 999 to represent them, and that the burden thus shifted to the respondent to establish the majority status of Local 999. In finding that the respondent had not met its burden, the Board found a violation of Section 8(a)(1), (2), and (3) of the Act.

In commenting on the testimony by employees in that case that they had not signed cards for Local 999, the Board noted that "conventional proof is not available here because the cards . . . were destroyed by Teamsters, Local 999."

> [I]n presenting 70 employees who were willing to testify and be subject to cross-examination as to whether they authorized the Teamsters to represent them, the General Counsel presented the best objective evidence available as to the validity of the cards in question and presented the same type of evidence which has consistently been accepted by the Board as proof as to the lack of majority status on the part of a union. 219 NLRB at 810.

In *Windsor Castle Health Care Facilities*, 310 NLRB 579, 590 (1993), in finding that the union did not represent a majority of the unit employees, notwithstanding that an arbitrator issued an award that it did, the Board noted that, as here, the precise cards and the list of employees which were submitted to the arbitrator were not presented at hearing. Thus, there, as here, the reliability of the count is questionable. It was also noted that the employer rushed to recognize the union with little evidence of negotiations at a time when another union was soliciting the workers to join. It was also observed that the unit description in the contract varied from the one described in the arbitrator's award.

In *American Service Corp*., 227 NLRB 13 (1976), the union and employer respondents refused to produce any material evidence of the union's majority status. The general counsel called 22 witnesses in a unit of 39 who testified that they had not signed authorization cards for the union. The Board, in holding that the respondents violated Section 8(a)(1), (2) and 8(b)(1)(A) stated:

> [A]part from using any inference from Respondents' failure to put on a defense, the General Counsel's evidence, by itself, proved the charged violations. The record shows that the . . . unit, of which the Respondent Union claimed to be exclusive bargaining representative, consisted of 39 em-

ployees and that 22 of these employees testified that they had not authorized the Union to be their bargaining representative at the time the Respondent Employer recognized the Union. 227 NLRB 13, fn. 1.

The administrative law judge, affirmed by the Board in *Crest Containers Corp*., 223 NLRB 739, 742 (1976), stated, in language applicable to the instant case: "But in a situation where it has been established, as I find it has here, that the union granted recognition was a minority union, nothing further must be shown to support a finding of a statutory violation. For majority designation is a sine qua non to lawful recognition of an exclusive bargaining agent under the statute."

In applying the above precedents to this case, and in determining whether the Respondent recognized Local 300s at a time when it did not represent a majority of the unit employees, I have also taken into consideration the facts that the Local 300s president destroyed the cards following the card count, and that prior to their destruction he did not record the names of the employees, notwithstanding that a contract had not been achieved.[11] Further, I have considered that Robinson did not inquire of the Respondent the size of the unit so that he could test whether the cards he allegedly received constituted a majority of the unit. I have also considered that the arbitrator did not identify in his award the number of cards he received, the number of employees in the unit, or which categories of employees were encompassed in the unit. In addition, not only were the cards which were presented to the arbitrator not available at hearing, but the precise list the arbitrator worked from was also not available.

In this regard, it is possible that the list presented to the arbitrator was not accurate. Thus, the first recreated list prepared for this hearing used the wrong payroll period. The second contained the name of one employee who should not have been included, and omitted the names of two other workers which should have been included. Thus, there is some question whether the list provided to the arbitrator which was prepared by the same person as the one who prepared the subsequent lists suffered from similar irregularities. Further, the arbitrator did not mention in his Award that he even received a list, or that he compared the names on the list with the names on the cards and the W-4 forms. He stated only that he compared the signatures on the cards to those on the W-4 forms.

The Respondent cannot argue that it honored the arbitrator's award in good faith because it believed, based on the award, that Local 300s represented a majority of the unit employees. The Supreme Court held in *Bernhard-Altmann* that an employer's "good faith" does not preclude a finding that the employer violated Section 8(a)(1) and (2) of the Act by recognizing a union which, in fact, represented a minority of the employer's employees at the time of the union's demand for recognition. Based on the reasoning in *Sprain Brook Manor*, I also reject the Respondent's defenses here that it was bound by the arbitrator's award, and it could not challenge that award.

"The Board is not bound, as a matter of law, by an arbitration award. . . . The Board has exercised its discretion in the past to remedy an unfair labor practice even though the parties had used arbitration to dispose of an issue." *Spielberg*, above, at 1081–1082. As the policy of deferring to an arbitrator's award originates from theories of contract and estoppel, third parties, such as SEIU 1199 which are not subject to an arbitration agreement are not bound thereby. *Sprain Brook Manor*, above, at 810. Accordingly, since SEIU 1199 was not a party to the arbitration award, it is not bound by it. Based on all of the above, I find that deferral to the arbitrator Nadelbach's award is not warranted. *Windsor Castle*; *Sprain Brook Manor*, above.

I further find that the Respondent's reaction to the request for a card count was not consistent with Gross' desire to delay the time when he would have to give a wage raise to employees. Why would he immediately agree to a card count if the result of such an action could have been, as occurred here, the award of majority status to Local 300s, and perhaps an immediate demand by that union for wage raises for the workers. Gross could have deferred an obligation to recognize Local 300s if he exercised his right to a Board election. In this connection, I cannot credit Gross' testimony that he did not believe that he was aware that the Respondent had such a right. If he was not aware of it, certainly his able labor counsel would have brought it to his attention. The answer to this question is that the Respondent sought to conceal from the employees, and ultimately from SEIU 1199, the fact that it had recognized Local 300s. A Board election, which would immediately become public knowledge, could not have been concealed from the employees or SEIU 1199.

In viewing all of the circumstances surrounding the recognition, this appears to have been a "desk-drawer" recognition kept secret from the employees and arranged for the purpose of providing the Respondent with a readily-available method of supporting a hastily agreed-on contract. I find support in this finding in the fact that there is no credible evidence that in the 7½ months between the recognition and the execution of the contract, employees were made aware of the recognition, or that any meaningful negotiations occurred. No effort was undertaken to negotiate or conclude a contract until SEIU 1199 solicited employees shortly before the contract was signed. If the negotiation process was as long as Gross and Robinson imply, Robinson, an experienced union president, would have obtained basic, rudimentary information as to the benefits the employees were receiving so that the January 19 modifications to the contract would not have been necessary, and Gross would not have taken the "very unusual" step of having to "run out" of his house to sign the contract at a diner at 10:45 p.m.

This is not to say that a contract cannot be entered into after intense, speedy bargaining, but the impression sought to be given by the parties is that negotiations were lengthy, involving much deliberation and negotiation. Indeed, Gross said the bargaining was "hard", and Robinson said negotiations took a long time. But if the negotiations had begun in July, as testified by Robinson, it is odd that he would not have become aware of the employees' current terms of employment in the ensuing 5 months of bargaining.

[11] Robinson did not testify that it was his practice to destroy the cards 6 months after recognition. In *Sprain Brook Manor*, above at 812 fn. 14, the union's policy was to discard the cards after recognition and a contract were achieved.

Based on all of the above, particularly the facts that not one of the 81 employees who testified stated that he or she signed a card for Local 300s, and that 74 employees out of the 117 members of the unit affirmatively stated that they did not sign a card authorizing that union to represent them before it was recognized, I find that the General Counsel has made a prima facie showing that Local 300s did not represent a majority of the unit employees when it was recognized by the Respondent on May 22, 2003. "The General Counsel's evidence, by itself, proved the charged violations." *American Service Corp.*, 227 NLRB 13, fn. 1. I further find that the Respondent has not met its burden of proving the majority status of Local 300s. *Sprain Brook Manor*; *Windsor Castle*, above.

The contract contains a union-security clause requiring the employees to become and remain members of Local 300s as a condition of employment. I accordingly find that by executing and maintaining that clause at a time when Local 300s did not represent a majority of the Respondent's unit employees, the Respondent violated Section 8(a)(3) of the Act. *Duane Reade*, above.

II. THE 10(B) DEFENSES

A. The Fraudulent Concealment

The Respondent argues that the charges were untimely filed and barred by Section 10(b) of the Act. Section 10(b) states that "[n]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." "The Board recognizes that the 6-month limitations period of Section 10(b) does not begin to run until the charging party has 'knowledge of the facts necessary to support a ripe unfair labor practice.'" *Alternative Services, Inc.*, 344 NLRB No. 99, slip op. at 2 (2005), citing *St. Barnabas Medical Center*, 343 NLRB No. 119, slip op. at 3 (2004). "The Board has consistently held that the 10(b) period does not commence until the charging party has 'clear and unequivocal notice' of the violation." *Vallow Floor Coverings*, 335 NLRB 20 (2001). The burden of showing such notice is on the party raising the affirmative defense of Section 10(b). *Leach Corp*., 312 NLRB 990, 991 (1993).

I have found, above, that the evidence establishes that the Respondent unlawfully recognized Local 300s, and executed a contract with it at a time when it did not represent a majority of the Respondent's unit employees.

However, the recognition occurred on May 22, 2003, more than 6 months before the original charge was filed on February 19, 2004. The Respondent correctly argues that, under a strict application of Section 10(b), all the charges should be dismissed. *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960). The General Counsel argues that the evidence also establishes that the Respondent deliberately concealed the material facts from SEIU 1199, the charging party, which was ignorant of those facts without any fault or want of due diligence on its part. The General Counsel argues accordingly that Section 10(b) should be tolled.

In *Browne & Sharpe Mfg. Co*., 321 NLRB 924 (1996), the Board stated that it considers the following elements in deciding whether to toll the limitations period for this reason: "(1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part." It has been held that "while the running of the limitation period may also be tolled by acts of fraudulent concealment on the part of the perpetrator of the alleged unfair labor conduct, fraud does not appear to be a prerequisite to the rule that the 10(b) period does not begin to run until notice is given to the adversely affected party." *UPF Corp*., 309 NLRB 832, 839 (1992).

The question is thus whether the Charging Party, SEIU 1199, and not the employees, had notice of the facts concerning the unfair labor practice. Even if the employees' knowledge could be attributed to SEIU 1199, there is limited, credible evidence that employees were aware that Local 300s was organizing. However, there is affirmative evidence that the material facts constituting the unfair labor practice—the recognition of that union by the Respondent—was deliberately concealed from the employees. Further, even if SEIU 1199 knew that Local 300s was organizing the employees, it had no reason to know of the existence of the recognition, which was deliberately withheld from the workers.

Thus, although there was evidence that employees were aware of organizing taking place in the period in which Robinson claimed to be soliciting workers, in many cases there was no clear identification of the union which was organizing. As to the evidence that certain workers requested raises and were told that the Respondent was negotiating a contract with a union, or that union activity was taking place, there was no identification of the union involved. I do not believe that this evidence is sufficient to charge SEIU 1199 with knowledge that Local 300s had been unlawfully recognized by the Respondent. Indeed, 38 employees stated that they were unaware of the presence of Local 300s prior to the contract being signed in January 2004.

I cannot find that Robinson even "discretely" told certain employees immediately after the arbitrator concluded the card count, that his union had been recognized. He could not name any of those employees, and none of the 81 employees who testified stated that they were so told. As set forth above, Robinson agreed to Gross' request that he keep everything "quiet," and he did so, not notifying any employees in writing that Local 300s had been recognized, and he conceded that employees were kept "uninformed" about the fact that negotiations were taking place and the progress of the negotiations. Certainly, if the employees became aware of the recognition, word would have spread quickly through the "grapevine." Nevertheless, the record as a whole supports a finding that the recognition of Local 300s was deliberately withheld from employees, and that they were not aware of such recognition.

The Board's finding in *UPF Corp*., above, applies well to the facts established here. The "record on the whole indicates that the employees were kept completely in the dark concerning [the union's] newly acquired status as their recognized representative until [the contract was executed]. In fact, prior to that date, there is no evidence that IUPIW even made known to the affected employees that it possessed the intention to represent them. Clearly, Respondent's maintenance and production employees received neither actual nor constructive notice of the alleged unfair labor conduct."

I accordingly find that the 10(b) 6-month statute of limitations did not run until January 9, 2004, when SEIU 1199 had "knowledge of the facts necessary to support a ripe unfair labor practice." *Alternative Services*, above; *Avne Systems, Inc*., 331 NLRB 1352, 1352–1354 (2000). At that time, SEIU 1199 learned of the Respondent's January 9 execution of the contract and its prior recognition of Local 300s. I also find that SEIU 1199 was ignorant of those facts without any fault or want of due diligence on its part. I accordingly find that the original charge was timely filed on February 19, 2004, as it was within 6 months of the time that SEIU 1199 learned the above facts.

I further find that the Respondent has not met its burden of showing that SEIU 1199 possessed such knowledge within the 6-month period following recognition by the Respondent of Local 300s.

B. The Addition to the Complaint of Closely Related Charges

Inasmuch as I have found, above, that the 10(b) statute of limitations was tolled because of the deliberate concealment from SEIU 1199 and the employees of the facts relating to the unfair labor practice, and that the charge filed on February 19, 2004 was timely, the question therefore becomes whether the additional charges filed thereafter were timely filed.

The original charge filed on February 19, 2004, alleges that since on about January 9, 2004, the Respondent recognized Local 300s at a time when it had not obtained authorization cards from a noncoerced majority of employees. The first amended charge filed on September 30, 2004, repeats the above allegation, and further asserts that since about January 9, 2004, the Respondent entered into a contract with Local 300s that contained a union-security clause at a time when Local 300s did not represent a majority of the Respondent's employees. The second amended charge, filed during the hearing on January 14, 2005, repeats the two allegations set forth above, and further asserts, to the extent relevant here, that on various occasions in January 2004, the Respondent conditioned its employees' receipt of wages and bonuses on employees' signing forms in support of Local 300s.

In *Redd-I, Inc*., 290 NLRB 1115 (1988), the Board held that in deciding whether complaint amendments are closely related to charge allegations, it would apply the closely related test, as follows. First, the Board looks at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. It is not necessary that the same section of the Act be invoked. *Citywide Service Corp.*, 317 NLRB 861, 862 (1995). Second, the Board looks at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board examines whether a respondent would raise similar defenses to all the allegations.

The original charge, which I find was timely filed on February 19, 2004, alleges that the Respondent recognized Local 300s at a time when it had not obtained authorization cards from a noncoerced majority of employees. The subsequent first and second amended charges, alleging, respectively, that the Respondent executed a contract containing a union-security clause when Local 300s did not represent a majority of the Respondent's employees, and that the Respondent conditioned its employees' receipt of wages on its employees' signing forms in support of Local 300s, clearly arise from the same factual circumstances as the original charge. Thus, the original, timely filed charge alleges the initial unlawful action engaged in by the Respondent, the recognition of Local 300s. The subsequent charges alleging the illegal contract and the failure to pay wage increases to nonmembers flowed from that action—the contract followed the recognition, and the failure to pay the wage increases was the consequence of the contractual provision requiring such payments. All the alleged conduct by the Respondent interfered with the employees' freedom of choice in selecting their own bargaining representative.

Accordingly, the first and second amended charges arose from the same factual circumstances or sequence of events as the pending timely charge. *Whitewood Maintenance Co*., 292 NLRB 1159, 1170 (1989). It is also reasonable to expect that the Respondent would raise the same defense to all the charges—that Local 300s is not a minority union. Its defense thus relates to its initial alleged unlawful recognition of Local 300s, and the subsequent consequences of such recognition. I accordingly find that all the charges herein were timely filed.

III. THE FAILURE TO GRANT THE CONTRACTUAL WAGE RAISE TO NONMEMBERS OF LOCAL 300S

The complaint alleges that since on about April, 2004, the Respondent failed to grant a 3-percent wage increase required by the collective-bargaining agreement to employees who had not signed membership and dues-checkoff authorizations on behalf of Local 300s.

A contractual 3-percent wage raise was payable to all unit employees on April 1, 2004.

As set forth above, employees Harvey, Kaur and Walling did not receive the raise in April, and had not, by then, signed a dues-checkoff form or authorization card for Local 300s. All three workers were entitled to the raise but did not receive it on April 1, 2004. Robinson testified that the Respondent did not grant the raise to certain employees because they had not signed a form indicating that they joined the union, and the Respondent required the union to certify that those workers were union members before it would give them the raise.

I accordingly find, as alleged in the complaint, that the Respondent unlawfully failed to grant the wage increase to the three employees because they had not joined Local 300s. By providing greater remuneration to employees who were union members than to those who were not, the Respondent discriminated against the nonmembers, which would tend to encourage membership in Local 300s in violation of Section 8(a)(1) and (3) of the Act. *Kaufman Dedell Printing, Inc*., 251 NLRB 78, 79–80 (1980); *Prestige Bedding Co., Inc*., 212 NLRB 690, 691 (1974).

CONCLUSIONS OF LAW

1. By recognizing Local 300s as the exclusive collective-bargaining representative of its employees, and by entering into, maintaining, and enforcing a collective-bargaining agreement containing union-security and dues-checkoff provisions with Local 300s on January 8, 2004, covering its employees in the following unit, at a time when Local 300s did not represent

a majority of the employees in such unit, the Respondent violated Section 8(a)(1), (2), and (3) of the Act:

> All full time and regular part time service employees, maintenance employees and LPNs employed by Respondent at its Dover, New Jersey facility, but excluding all officers, managerial and professional employees, confidential employees, temporary employees, all other employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

2. By failing to grant a 3-percent wage increase required by the collective-bargaining agreement to employees who had not signed membership and dues-checkoff authorizations on behalf of Local 300s, the Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, 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.

Having found that the Respondent violated Section 8(a)(1), (2), and (3) of the Act by recognizing and contracting with Local 300s at a time when Local 300s did not represent a majority of the unit employees, I shall recommend that the Respondent withdraw and withhold recognition from Local 300s as the exclusive collective-bargaining representative of its employees in the above unit, and cease maintaining or giving effect to any collective-bargaining agreement between them, or any modifications, renewals, or extensions thereof, concerning the employees in the above unit, unless and until such time as Local 300s shall have been certified by the Board, provided, however, that nothing in the remedial order shall require the Respondent to withdraw or eliminate any wage increase or other benefit, terms, and conditions of employment which may have been established pursuant to any such agreement.

Since the Respondent has given effect to a union-security provision requiring payment of union dues as a condition of employment or continued employment, and since the collective-bargaining agreement also contains a clause authorizing the checkoff of union dues from the pay of unit employees, I will also recommend that the Respondent be required to reimburse all of its former and present unit employees for fees and moneys deducted from their pay pursuant to those clauses, with interest added to such reimbursements in the manner prescribed in *Florida Steel Corp*., 231 NLRB 651 (1977), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Respondent reimburse employees Norma Harvey, Amarjeed Kaur, and Belinda Walling, to the extent that it has not already reimbursed them, for its failure to grant them a contractual 3-percent wage increase because they were not members of Local 300s. Interest shall be added to such reimbursements as set forth above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Regency Grande Nursing & Rehabilitation Center, Dover, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing Local 300s, Production Service & Sales District Council a/w United Food and Commercial Workers International Union, AFL–CIO, as the exclusive collective-bargaining representative of its employees and entering into, maintaining and enforcing a collective-bargaining agreement containing union-security and dues-checkoff provisions with Local 300s when Local 300s does not represent a majority of the employees in the following unit, unless and until such time as Local 300s shall have been certified by the Board:

> All full time and regular part time service employees, maintenance employees and LPNs employed by Respondent at its Dover, New Jersey facility, but excluding all officers, managerial and professional employees, confidential employees, temporary employees, all other employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

(b) Failing to grant wage increases required by a collective-bargaining agreement to employees who had not signed membership and dues-checkoff authorizations on behalf of Local 300s.

(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 recognition from Local 300s as the exclusive collective-bargaining representative of its employees in the above unit, and cease maintaining or giving effect to any collective-bargaining agreement between them, or any modifications, renewals, or extensions thereof, concerning the employees in the above unit, unless and until such time as Local 300s shall have been certified by the Board, provided, however, that nothing herein shall require the Respondent to withdraw, or eliminate any wage increase or other benefit, terms, and conditions of employment which may have been established pursuant to any such agreement.

(b) Reimburse, with interest, all of its former and present unit employees for fees and moneys deducted from their pay pursuant to the union-security and dues-checkoff clauses of the contract dated January 8, 2004.

(c) Reimburse employees Norma Harvey, Amarjeed Kaur, and Belinda Walling, to the extent that it has not already reimbursed them, for its failure to grant them a contractual 3-percent wage increase because they were not members of Local 300s.

(d) 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 re-

[12] 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.

cords, 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.

(e) Within 14 days after service by the Region, post at its facility in Dover, New Jersey, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 22, 2003.

(f) 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.

[13] 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."