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Southern Ocean Medical Center, Jersey Shore University Medical Center, Palisades Medical Center, and The Harborage, A Division of HMH Hospital Corp. *and* Health Professionals and Allied Employees. Cases 22–CA–223734 and 22–CA–223942

September 26, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND PROUTY

On April 24, 2020, Administrative Law Judge Benjamin W. Green issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

The issue in this case is whether the Respondents violated Section 8(a)(5) and (1) of the National Labor Relations Act by dealing directly with represented employees about its Growing Together plan–a plan that sought to standardize benefits among its large workforce, which included employees represented by Health Professionals and Allied Employees (Union or HPAE) and unrepresented employees. We agree with the judge, as explained below, that the Respondents violated the Act as alleged.

I.

Hackensack University Medical Center and Meridian Health merged on July 1, 2016. The newly created entity was called Hackensack Meridian Health (HMH) and had a total workforce of about 33,000 employees at numerous health care facilities. Approximately 3000 of those employees are represented by the Union in six bargaining units across four facilities: (1) a unit of about 1300 Registered Nurses (RNs) at the Jersey Shore facility; (2) a unit of about 250 RNs at the Southern Ocean facility; (3) a unit of about 140 Service and Maintenance employees at The Harborage; (4) a unit of about 900 RNs at the Palisades facility; (5) a unit of about 230 Licensed Practical Nurses (LPNs)/Techs at the Palisades facility; and (6) a unit of about 200 Service and Maintenance employees at the Palisades facility.

Prior to 2017, the Respondents[2] and the Union were party to a series of 3-year collective-bargaining agreements (CBAs). Following the merger, however, in 2017 the Respondents sought, and ultimately obtained, 1-year contract renewals, rather than new 3-year contracts.[3] The judge found that the Respondents sought 1-year contracts specifically because HMH wanted to "'harmonize' its operation and employee benefits throughout its various facilities, but had not yet developed a comprehensive plan or proposals for doing so."

In 2018,[4] HMH was nearing the end of its harmonization process and the existing CBAs were nearing expiration. On March 29, the Respondents and the Union held an initial joint bargaining session for all four facilities. The Respondents' lead negotiator was Joe Ragaglia, who was outside labor counsel for the Respondents. Union Staff Representative Richard Halfacre was the Union's lead negotiator for the bargaining unit at The Harborage and the three bargaining units at Palisades, and Union Staff Representative Djar Horn was the Union's lead negotiator for the Southern Ocean and Jersey Shore bargaining units. Halfacre and Horn report to Union Director of Member Representation Fred DeLuca, who attended a number of bargaining sessions and corresponded with Ragaglia about certain matters. The judge found that the Union's understanding of the purpose of the March 29 joint bargaining session was to discuss ground rules for negotiations and the Respondents' desire to standardize certain benefits throughout the facilities. As the judge notes, the Union generally opposed the idea of standardization to the extent it would result in less favorable terms than in the 2017 contracts. At the March 29 meeting, the parties discussed topics including health insurance, staffing, contract expirations dates, and a fair election process. However, the parties did not exchange specific proposals, and judge found that the Respondents did not specifically address "Growing Together," HMH's plan to harmonize operations and employee benefits throughout its various facilities.

In early April, Horn emailed Ragaglia with offers of dates for further bargaining, however Ragaglia did not respond, and the parties did not meet again until May.[5] On

[1] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022). We have substituted new notices to conform to the Order as modified.

[2] The Respondents are Southern Ocean Medical Center, Jersey Shore University Medical Center, Palisades Medical Center, and The Harborage. Hackensack Meridian Health, the parent company following the merger in 2016, is not a named respondent.

[3] The Jersey Shore and Southern Ocean contracts were effective from July 1, 2017, to July 31, 2018, and the three Palisades contracts were effective from June 1, 2017, to May 31, 2018. The Harborage contract was effective from May 18, 2015, to May 17, 2018, and did not have to be renegotiated in 2017.

[4] All dates are in 2018 unless otherwise noted.

[5] The parties held bargaining sessions for The Harborage unit on May 9, 17, and 21 and for the Palisades units on May 10, 15, and 22. At the beginning of bargaining, the Union was prepared to offer full contract

May 19, Ragaglia emailed DeLuca and stated that, beginning on May 22, the Respondents would be "sharing updated information on the harmonization with all of [their] 35,000 team members," including employees represented by the Union. Ragaglia's email stated that "[i]t is impossible, and counter to the HMH ONE culture, to segregate out your members from receiving this information, some of which concerns mandatory subjects of bargaining." However, Ragaglia's email also said that the website "will have the appropriate disclaimers and acknowledgement that for all union represented team members 'HMH is legally required to bargain with the union regarding mandatory subjects and it will continue to do so.'" Ragaglia further told DeLuca that he was in the process of arranging a "preview" of the information for the Union on May 21. Ragaglia concluded by noting that "[o]nce this process and negotiations are complete, HMH hopes that all team members will enjoy the same benefits, but obviously the negotiations process may result in variations in certain areas compared to the benefits enjoyed by other team members."

On May 21, the parties held a bargaining session for The Harborage. That afternoon, Ragaglia invited Halfacre to a sidebar and said he wanted to make a presentation to the Union on the information that would be on the harmonization website the next day. Halfacre refused to "negotiate over a website" and demanded that the Respondents present proposals instead, but Ragaglia ultimately made the presentation. Since the actual website that would be provided to employees was not yet available, Ragaglia presented a slideshow which included screen shots of certain pages of the Growing Together website. Halfacre requested a printed hard copy of the presentation, but Ragaglia refused.

Ragaglia's May 21 presentation contained information on a range of terms and conditions of employment, from paid leave and health insurance to pay periods and pay dates. As noted by the judge, if applied to unit employees, the Growing Together harmonization plan would modify certain contractual provisions on mandatory subjects of bargaining. Ragaglia's presentation also included a "disclaimer" in large, bolded font: "We are required by law to deal with the unions on behalf of unionized team members, and we will continue to do so. We will only negotiate with the unions, not with individual unionized team members." The next day, May 22, when the website went live, it included a footer with the same language, but in a much smaller font size.[6]

On May 22, at 9:15 a.m., the Union posted on its Facebook page regarding Ragaglia's presentation at the Harborage bargaining session the prior day, stating "management gave us a preview of changes that they intend on making across the health system to standardize their benefits" and noting that the Respondents would be announcing the plan that day in many of the facilities. Among other things, the post asserted that

> Management can NOT simply implement these changes in HPAE locals without negotiating with us first. So these announced changes[] may or may not affect our members at all. Our bargaining team will be examining all proposed changes and determine whether they are in all of our interest or whether there are better alternatives. The final outcome will be voted on by all the HPAE members.

The post also asserted that "[m]anagement wants to make this seem to our members like a done deal to strip the fight out of them so let's make sure not to let them do that!"

On May 22, at 9:41 a.m., an HMH HR representative emailed Horn and the presidents of the Southern Ocean and Jersey Shore locals a link to the Growing Together website.[17] Shortly thereafter, Ragaglia emailed a link to the website to Halfacre (10 a.m.) and DeLuca (10:27 a.m.).[8]

At 11:06 a.m., the Respondents emailed all employees a flyer about the harmonization program, with a link to the live website and a video of a conversation between HMH senior leaders where they discussed, among other things, anticipated changes to employee benefits. A hard-copy flyer was also distributed to employees. The flyer cover letter tells employees, among other things, to "[p]lease keep in mind that many of the details are still in progress, and subject to regulatory and operational considerations, which may result in some modifications." It also states that "[t]hese changes will bring us closer to operating as one team," "[t]hey will affect all of us," and "hundreds of

proposals. However, the judge notes that Ragaglia indicated that the Respondents were still preparing economic proposals and requested that the parties begin with noneconomic subjects. He also requested that the Respondents be permitted to present economic proposals first and Halfacre agreed. The Respondents did not make any economic proposals for any of the units until late July or early August.

[6] As the judge notes, the witnesses disagreed about exactly what was included in Ragaglia's presentation, but the Union does not deny that the Growing Together website, once launched, contained the small font disclaimer language in a footer at the bottom of each page. The Respondents argue that the website also contained another, lengthier, disclaimer on the "Tomorrow" page. As discussed below, although the judge admitted evidence regarding the lengthier disclaimer at the hearing, in his decision he determined that it should not have been admitted.

[7] The Growing Together website password was lifted, and the site was largely visible to the public around the same time.

At 1:30 p.m., Horn replied to the HR representative's email stating, in relevant part, "[n]either I nor the Local Union Presidents from 5138 and 5058, Barbara Bosch and Kendra McCann, were invited to the presentation you gave yesterday. If you intended to present important information about bargaining proposals, we would have appreciated dates well in advance." Horn concluded, "[w]e expect the harmonization program to be rolled out to the [Jersey Shore] and [Southern Ocean] leadership as soon as possible so that we can accurately represent the employer's position to our members and fully consider the proposals for bargaining."

[8] Ragaglia testified that, at the May 22 bargaining session for the Palisades units, he gave a harmonization presentation similar to his May 21 presentation, but this time using the live website, which had been made public earlier that morning.

your colleagues" worked through a "collaborative process . . . to make sure each and every team member was represented fairly." Additionally, it notes that employees will have the opportunity to submit questions on the website and that "your leaders and HR representatives are always available to help." The disclaimer language is included at the end of the flyer in small type.

II.

The Act "requires an employer to meet and bargain exclusively with the bargaining representative of its employees," thus an employer "who deals directly with its unionized employees" violates Section 8(a)(5) and (1) of the Act. *Armored Transport, Inc.*, 339 NLRB 374, 376 (2003). "[D]irect dealing will be found where the employer has chosen 'to deal with the Union through the employees, rather than with the employees through the Union.'" Id. (quoting *NLRB v. General Electric Co.*, 418 F.2d 736, 759 (2d Cir. 1969)). Unlawful direct dealing occurs when: (1) an employer communicates directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000) (citing *Southern California Gas Co.*, 316 NLRB 979 (1995)); see also *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, slip op. at 8, 16–17 (2019).

A.

The judge, relying on a number of cases that predate *Permanente Medical Group*, found the Respondents violated the Act by dealing directly with represented employees. Specifically, the judge found *Detroit Edison Co.*, 310 NLRB 564 (1993), to be controlling, based on its analogous facts. The judge noted that, here, the Respondents did not disclose the Growing Together harmonization plan to the Union during the initial joint bargaining session in late March, which was arranged, in part, for just such a purpose. Instead, in mid-May, the Respondents gave a rushed presentation to the Union regarding harmonization and refused to give the Union a hardcopy of the presentation as Halfacre requested. The Respondents then rolled out harmonization to all employees—represented and unrepresented—the next day. The Respondents, however, did not prepare and present economic contract proposals to the Union for another 2 months. Accordingly, as the judge explained, unit employees were made aware of the Respondents' anticipated changes long before the Union had an opportunity to review actual proposals, to discuss them with employees, and to engage in bargaining. The judge found that this approach could only serve to undermine the Union as the bargaining representative of unit employees and that, as in *Detroit Edison*, this was enough to establish a prima facie case of unlawful direct dealing.

B.

The Respondents contend, and we agree, that the Board's three-part test in *Permanente Medical Group* governs the direct dealing allegation at issue in this case. As referenced above, that test holds that unlawful direct dealing occurs when: (1) an employer communicates directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. Although the judge did not apply *Permanente*, many of his factual findings are relevant to and consistent with a *Permanente* analysis. Accordingly, the record here is sufficient to allow the Board to conduct the necessary three-part analysis. Doing so, we find, for the reasons set forth below, and contrary to the Respondents' and our dissenting colleague's arguments, that the Respondents engaged in unlawful direct dealing by its communications with the union-represented employees about the Growing Together harmonization plan.

Before we address the individual *Permanente* elements, the Respondents' actions regarding its harmonization plan, up to and including the May 22 communications regarding the Growing Together plan, warrant a brief review. Since at least 2017, the Respondents have been engaged in an effort to standardize and harmonize employee benefits throughout its various facilities – facilities that were staffed, at least in part, by union-represented employees. Vice President of Human Resources Operations Barbara Powderly testified that development of the Growing Together plan was an 18-month process and involved internal teams and outside consultants. The judge found that the Respondents approved content for the harmonization plan during this time period, but did not disclose that content to the Union. Instead, the Respondents kept the Growing Together plan confidential until its completion in May. Around this same time, in late March, the Respondents and the Union began bargaining for successor agreements and, despite the fact that the parties had a bargaining session scheduled for March 29 intended to cover, among other things, the Respondents desire to standardize benefits throughout their facilities, the Respondents did not address the Growing Together harmonization plan with the Union. The parties met again for bargaining several times in May and, at the Respondents' request, began by exchanging noneconomic bargaining proposals, but there is no indication in the record that the Respondents addressed the specifics its harmonization plan at these sessions. On May 19, Ragaglia emailed DeLuca to explain that the Respondents were nearing completion of the harmonization plan and intended to communicate it to all employees on May 22, and Ragaglia offered to provide DeLuca a preview of the plan on May 21. Ragaglia's May 19 communication provided no specifics regarding the details of the harmonization plan. At the May 21 bargaining

session, Ragaglia pulled Halfacre aside and, as the judge found, provided Halfacre a "rushed" presentation of the Growing Together plan and website. Halfacre objected to the manner in which Ragaglia presented the Growing Together plan and requested a hard copy of the presentation, which Ragaglia refused to provide. The next morning, the Union received access to the full Growing Together website shortly before the Respondents' employees and, at 11:06 a.m., the Respondents emailed all employees to announce the Growing Together plan and provided them a link to the Growing Together website.

Part 1 of the Permanente test

The first *Permanente* element is met because the Respondents communicated directly with union-represented employees through the Growing Together harmonization plan materials. As the judge found, on May 22 at 11:06 a.m., the Respondents emailed all employees—represented and unrepresented alike—a flyer with links to the Growing Together website. Usage of the website spiked on May 22. The Respondents included represented employees in that communication, even though that communication concerned mandatory subjects of bargaining, because, as Ragaglia told Union Director of Member Representation DeLuca, "[i]t is impossible, and counter to the HMH ONE culture, to segregate out your members from receiving this information."[9]

The Respondents' suggestion that it is impossible to communicate only with segments of its large employee population is unsupported and not worthy of belief.[10] Nor can the Respondents evade the Act by claiming their company culture would be undermined by compliance with the Act. The Act is federal law.

Part 2 of the Permanente test

The second *Permanente* element—which requires that the communication was for the purpose of establishing or changing wages, hours, and terms and conditions of employment *or* undercutting the union's role in bargaining—is also met. As the judge found, "[t]he harmonization plan included a specific statement of benefits which were different than certain contractual benefits enjoyed by unit employees" and the "rollout affirmatively advised employees, including unit employees, in largely unqualified language, that their benefits would change." Additionally, as the judge noted, rather than bargain with the Union prior to—or even contemporaneously with—the Growing Together harmonization rollout, the Respondents informed represented employees of impending changes to their terms and conditions of employment and did not engage in bargaining with the Union over these matters until two months later. In these circumstances, we agree with the judge that, by making unit employees aware of the Respondents' anticipated changes long before the Union had an opportunity to review actual proposals regarding changes to their terms and conditions of employment pursuant to the Growing Together plan, discuss them with employees, and engage in bargaining, the Respondents' communications to unit employees about the Growing Together plan had the foreseeable consequence of undermining the Union as the bargaining representative of the unit employees. See, e.g., *Detroit Edison Co.*, 310 NLRB 564, 564-565 (1993) (finding a violation where union was not afforded any meaningful opportunity to consider a "sweetened proposal" before it was communicated directly to employees); see also *Armored Transport, Inc.*, supra, 339 NLRB at 376.

In arguing that the second *Permanente* element is not met here, the Respondents and our dissenting colleague primarily contend that the Growing Together communications were designed to inform *unrepresented* employees of changes to their terms and conditions of employment. They additionally assert that the disclaimers included in the Growing Together materials establish that the Respondents did not seek to change the terms and conditions of employment for bargaining unit members or undercut the Union. We disagree.

As an initial matter, the second element of the Board's *Permanente* test can be satisfied through a showing that the employer's communication was *either* for the purpose of establishing or changing wages, hours and terms and conditions of employment *or* for the purpose of undercutting the Union's role in bargaining. As explained above, the judge effectively found that the purpose of Respondents' communications regarding the Growing Together plan was to undercut the Union's role as the unit employees' exclusive bargaining representative. That determination is enough to support the finding of a direct dealing violation here.

In any event, as indicated above and explained further below, the Respondents' communications regarding the Growing Together plan advised unit employees of proposed changes to their terms and conditions of employment *and* undercut Union's role in bargaining, and the arguments advanced by the Respondents and our dissenting colleague do not warrant a different conclusion. As the judge pointed out, other than the disclaimers (discussed below), the Growing Together website and related materials "affirmatively advised employees, including unit employees, in largely unqualified language, that their benefits would change." Moreover, despite insistence from the Respondents and our dissenting colleague that the harmonization plan materials were applicable only to unrepresented employees, the Respondents acknowledge that the Growing Together communications were made to all

[9] This statement from Ragaglia, echoed by human resources representative Riveracruz, is the sole explanation the Respondents provided for communicating with all employees – represented and unrepresented—about the Growing Together plan.

[10] In asserting that the second element of the *Permanente* test is not met here, our dissenting colleague makes essentially this same argument. We address his arguments in this regard below.

employees (as Ragaglia asserted the Respondents' "culture" required) and the record establishes that the Growing Together materials informed all employees, not just unrepresented employees, of changes to their terms and conditions of employment.[11] In these circumstances, it is clear that the Respondents long-term plan to standardize the benefits of all its employees—represented and unrepresented—culminated in the May 22 Growing Together communications to employees and that the communications are properly regarded as proposing changes to unit employees' terms and conditions of employment and, as explained above, seeking to undercut the Union's bargaining role.

Pointing to the disclaimers included on the Growing Together website, the Respondents and our dissenting colleague contend that the communications regarding the Growing Together plan cannot be understood to establish or change represented employees' terms and conditions of employment or undercut the Union's role in bargaining.[12] Like the judge, however, we find that the Respondents' wording of the disclaimer was ineffective. Specifically, entirely apart from the fact that the disclaimer appeared in very small type at the bottom of the site—hardly a prominent location for such an assertedly important message, we agree that union-represented employees were not likely to understand the disclaimer as the Respondents assert. As the judge explained, the disclaimer was a "brief and broad statement of legal principle that would not necessarily convey to a layperson employee the Respondents' intent to withhold the implementation of benefit changes unless and until it negotiated with the Union in good-faith to agreement or impasse." Rather, "the language seems to read more as a notice to individual unit employees that the Respondent[s] would not deal with them about any concerns they might have regarding changes in their benefits." Moreover, the disclaimer's statement that "[w]e are required by law to deal with the unions on behalf of unionized team members, and *we will continue to do so*" (emphasis added) suggests that the Respondents had already bargained or worked with the Union in some measure in

[11] In this regard, the judge found that, on May 22, the Respondent emailed all employees ("union and non-union alike") the harmonization program flyer, which informed the employees of a series of forthcoming "policy and benefit changes" that were designed to bring them "closer to operating as one team[.]" The flyer provided all employees with a link to the Growing Together website and directed them to the website for additional details about the proposed changes to their terms and conditions of employment. As stated above, the judge found that the harmonization plan "included a specific statement of benefits which were different than certain contractual benefits enjoyed by unit employees" and the "rollout affirmatively advised employees, including unit employees, in largely unqualified language, that their benefits would change."

Our dissenting colleague notes the Respondents' assertion that it would have been impossible to "segregate out" union-represented employees from receiving the Growing Together email and finds this assertion credible, especially given the size of the Respondents' workforce and the overwhelming percentage of unrepresented employees employed by the Respondents. As we have explained above, however, this bald assertion by the Respondents is unsupported. Moreover, it misses the point that nothing prevented the Respondents' from avoiding undermining of the Union by bargaining with the Union over the harmonization proposals in advance of presenting the Growing Together plan to all employees. That most of the Respondents' employees are not represented by the Union in no way privileges the Respondents' approach here, which, as explained above, aimed to evade the Respondents' statutory bargaining obligations with respect to their union-represented workforce. Nothing here prevented the Respondents from dealing exclusively with the Union, as they were required to do.

In addition, our dissenting colleague insists that the Respondents' intent to change represented employees' terms and conditions of employment must be demonstrated to prove the second element of *Permanente* and he criticizes our decision as failing to establish the Respondents' intent to deal directly with represented employees. The Board, however, has previously rejected assertions that direct dealing violations are dependent on specific proof of an employer's intent, when the circumstances demonstrate the purpose of the employer's communication. See *YP Advertising & Publishing LLC*, 366 NLRB No. 89, slip op. at 1, 5, 7 (2018). As set forth above, the second factor of the *Permanente* test looks at whether the employer's communication was for the purpose of establishing or changing represented employees' wages, hours, and terms and conditions of employment or undercutting the union. Insofar as this factor might be understood as incorporating an intent requirement, we find it was satisfied in this case. It is well-established under the Act that an employer is held to intend the foreseeable consequences of its actions. See, e.g. *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 228 (1963), citing *Radio Officers' Union of Commercial Telegraphers Union v. National Labor Relations Board*, 347 U.S. 17, 45 (1954). In the circumstances here, already described, it was foreseeable that the Respondents' communications to represented employees about the Growing Together plan would be understood by those employees to have the purpose of changing their terms and conditions of employment or undermining the Union. Thus, we deem the Respondents to have intended those consequences. Moreover, on these facts, it would be difficult *not* to conclude that the Respondents *intended* this communication to serve its ultimate goal of changing the represented employees' terms and conditions of employment. Harmonization was indisputably the Respondents' objective, and that objective was clearly served by the Respondents' actions here – putting revised terms and conditions of employment in front of the union-represented employees with an explicit statement that the terms "would affect all of us" while bypassing their designated representative. This aimed to create a sense of inevitability about the looming changes that clearly served the Respondents' ultimate goal of harmonization.

[12] The Respondents also assert that since the harmonization materials were not a bargaining proposal, they could not appropriately be construed as proposing changes to the unit employees' terms and conditions of employment. But an employer does not need to present proposals to, or seek to bargain with, represented employees for the Board to find a direct dealing violation. See, e.g., *Ingredion, Inc. d/b/a Penford Products Co*., 366 NLRB No. 74, slip op. at 1 fn.1 and 6–9 (2018) (in a context where no bargaining proposals were presented, Board found a direct dealing violation where a manager asked employees what they wanted to obtain in upcoming contract negotiations), enfd. 930 F.3d 509 (D.C. Cir. 2019). Moreover, *Central Management Co.*, 314 NLRB 763, 767 (1994), cited by the Respondents, is not to the contrary. There, in finding that the Respondents dealt directly with employees in an attempt to undermine the union, the Board specifically noted that "[i]t is not necessary that the employer actually bargain with the employees" to find the employer's conduct unlawful.

Our dissenting colleague asserts that *Ingredion* and *Detroit Edison*, cited above, are inapposite here since, in both of those cases, the intent of the respondent's communications was to change represented employees' terms and conditions of employment; whereas here the Respondents' communications here regarding the Growing Together plan only addressed the terms and conditions of employment of the unrepresented employees. As we have explained, however, the Respondents' communications here were sent to all employees, including unrepresented employees, and advised employees, in largely unqualified terms, of changes to their benefits.

arriving at the Growing Together benefits package when, in fact, they had not.[13]

Further, as the judge pointed out, in their cover letter the Respondents specifically highlighted that benefits might change as a result of "regulatory and operational considerations," but made no mention of the fact that anticipated changes might not apply, in whole or in part, to represented employees after bargaining. Also significant is the fact that the cover letter asserts that the changes "will bring us closer to operating as one team," "will affect all of us," and that the people who developed the harmonization plan "work[ed] hard to make sure each and every team member was represented fairly"—reinforcing the message that the changes would apply to all employees, including union-represented employees.[14]

For the foregoing reasons, then, we find that the Respondents' communications with unit employees regarding the Growing Together plan both informed unit employees of proposed changes to their terms and conditions of employment and independently undercut the Union's role as the exclusive representative of the bargaining unit employees.

Part 3 of the Permanente test

The Respondents' May 22 communication regarding the harmonization plan also meets the third *Permanente* element because it was made to the exclusion of the Union. As detailed above, since at least 2017, the Respondents had been seeking to harmonize the benefits among its workforce and working to finalize the Growing Together plan. The Respondents kept the specifics of the plan confidential and, despite the fact that the parties were actively engaged in bargaining in the weeks before the Growing Together plan was announced to all employees, the Respondents did not share any specific information regarding the plan with the Union until the day before the plan was presented to all employees. Even then, the Respondents provided the Union with only a rushed presentation and refused the Union's request for a copy of the presentation. The next day, the Respondents gave the Union access to the Growing Together website, but only a short time before the Growing Together plan and website were presented to all employees.[15] In these circumstances, we find that the Growing Together plan was presented to unit employees to the exclusion of the Union.

The Respondents and our dissenting colleague assert that the Union was not, in fact, excluded, arguing that the Union had been on notice for more than a year that harmonization was underway, that the Respondents told the Union when the final harmonization materials were going to be released to employees, that Ragaglia made a presentation on harmonization to the Union the day before it was released to employees, and that the Respondents gave the Union access to the harmonization website shortly before it was opened to employees. We are not persuaded by these arguments. Instead, we find that the facts set forth above demonstrate that the Respondents communicated with unit employees about changes to their terms and conditions of employment to the exclusion of the Union. Even in cases where the facts have been arguably more favorable to an employer—for example, where an employer has made a formal proposal to the union and subsequently presented the same information to employees, but without enough time for the union to consider or respond to it, the Board has found that the communication

[13] As noted in the facts section, the Respondents argue that the website also contained a different, lengthier, disclaimer on the "Tomorrow" page of the website. At the hearing, the General Counsel objected to the admission of the "Tomorrow" page of the website, on the grounds that it was not previously produced in response to the General Counsel's subpoena. The judge admitted it, subject to additional argument in the briefs. In his decision, the judge ultimately determined that evidence regarding the lengthier disclaimer on the "Tomorrow" page should *not* have been admitted. We agree, for the reasons explained by the judge, and so find no abuse of discretion in his rejection of the evidence.

In challenging the judge's decision to exclude the "Tomorrow" page, the Respondents first argue that, even if the "Tomorrow" page is excluded, Ragaglia testified "compellingly" regarding the disclaimer and that his testimony "establishes as a factual matter that the Team-HMH.com website included the fulsome disclaimer on May 22." The judge correctly stated, however, that "the Respondent[s'] evidence of this alleged language should not have been admitted into evidence under the best evidence rule," and that "testimony regarding the disclaimer should not have been admitted." The Respondents next argue that the judge erred in excluding the "Tomorrow" page under the best evidence rule because "HMH did not act in bad [faith] in not preserving an image of the website on May 22." The judge, however, found that the unavailability of the lengthier disclaimer on the "Tomorrow" page was the Respondents' fault since they failed to preserve the disclaimer as it existed when the Growing Together website was released to employees. Moreover, the judge pointed out that the "Respondent[s'] failure to keep a hard copy is particularly surprising because, according to Ragaglia, the language was added for the specific purpose of defeating a legal challenge of direct dealing." The judge additionally found that, even if he were to consider the "Tomorrow" page disclaimer, it would not constitute a legally sufficient disclaimer, "as it offers more of an explanation why unionized employees might not share in improved benefits under the harmonization plan than an indication that unfavorable changes might not be implemented following good-faith negotiations," and that the Respondents failed to establish that any represented employee even saw it, as the "[t]he language allegedly appeared on only a single footnote on a single webpage."

[14] Cf. *United Technologies Corp.*, 274 NLRB 609, 610–611, 616–617 (1985) (finding no direct dealing where, inter alia, employer communication stated "[t]he three-year proposal can be considered by employees only if the union negotiating committee choses to bring it before the membership" and urged employees to "express your views to union negotiators," subsequent letter added "[a]s this is written, of course, we do not know what course your union negotiating committee will take" and "[w]e have, of course, indicated to the union our willingness to discuss rearrangement of the terms so long as this is within the total economic cost of our offer. We would expect negotiations to continue along these lines"), enfd. sub nom. *NLRB v. Pratt & Whitney Air Craft Division*, 789 F.2d 121 (2d Cir. 1986).

[15] As the General Counsel points out, Ragaglia's presentation directs employees to submit their questions to HMH and does not mention the Union or its role as the exclusive collective-bargaining representative of the represented employees.

was made to the exclusion of the Union.[16] We reach the same conclusion here.

The Respondent's 8(c) defense

Lastly, the Respondents argue that the publication of harmonization materials was privileged by Section 8(c) of the Act. The Respondents concede that employer communication is not protected by 8(c) if it constitutes direct dealing in violation of the Act. Instead, the Respondents argue that the communications here were intended to inform unrepresented employees of changes to their terms and conditions of employment and do not constitute direct dealing with represented employees. We reject this argument, having found that the Respondents did, indeed, engage in direct dealing. To be sure, the Respondents have a right to communicate with their unrepresented employees. The complaint, however, does not allege that any communications the Respondents made to their unrepresented employees are unlawful. Rather, the complaint alleges, and we find, that the Respondents' communications with represented employees constituted direct dealing.[17]

ORDER

The National Labor Relations Board orders that the Respondents, Southern Ocean Medical Center of Manahawkin, New Jersey; Jersey Shore University Medical Center of Neptune, New Jersey; Palisades Medical Center of North Bergen, New Jersey; and The Harborage of North Bergen, New Jersey, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the Union and dealing directly with unit employees regarding their terms and conditions of employment.

(b) In any like or related manner interfering, 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) Post in Respondent Southern Ocean's facility located at 1140 Route 72 West, Manahawkin, New Jersey, Respondent Jersey Shore's facility located at 1945 Route 33, Neptune, New Jersey, Respondent Palisades' facility located at 7600 River Road, North Bergen, New Jersey, and Respondent The Harborage's facility located at 7600 River Road, North Bergen, New Jersey, copies of the attached notices marked "Appendix A," "Appendix B," Appendix C," and "Appendix D," respectively.[18] Copies of the notices, on forms provided by the Regional Director for Region 22, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If one or more of the Respondents have gone out of business or closed a facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the relevant notice to all current and former employees employed by the Respondents at that facility any time since May 21, 2018.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

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[16] See, e.g., *Overnite Transportation Co.*, 329 NLRB 990, 993, 1047 (1999) (employer sent agreement to the union, waited one day, and then made presentation directly to employees, two days before bargaining was to resume), enf. denied in pertinent part 280 F.3d 417 (4th Cir. 2002). In denying enforcement, the Fourth Circuit stated that "[t]here is [] no 'rule requiring employers to delay informing [their] employees of a proposal until the union has some period of time to consider it.'" 280 F. 3d at 433, quoting *American Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F.3d 867, 876-877 (4th Cir. 1999). We apply no such rule here in finding that the Respondents' communication excluded the Union. The Fourth Circuit emphasized that "[t]he employer's [Sec. 8(a)(5)] duty is to present proposals to the union before communicating them to employees." Id. Here, the Respondents did not present proposals to the Union before communicating the Growing Together plan to represented employees.

[17] *United Technologies Corp.*, 274 NLRB 1069 (1985), enfd. sub nom. *NLRB v. Pratt & Whitney Air Craft Division*, 789 F.2d 121 (2d Cir. 1986), cited by the Respondents, in fact illustrates why Sec. 8(c) has no application here. In finding that the respondent in that case had *not* engaged in direct dealing, the Board pointed out that "[i]n no instance did the [respondent's] material contain proposals or ideas which were not first submitted to the Union at the bargaining table." Id. at 1074. In turn, the Board observed that "an employer has a fundamental right, protected by Section 8(c) of the Act, *to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations*." Id. (emphasis added). The contrast with this case is clear. Here, the Respondents' harmonization materials were unquestionably rolled out to represented employees long before the Respondents presented economic proposals at the bargaining table.

[18] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staff by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notices must also be posted by such electronic means within 14 days after service by the region. If the notices to be physically posted were posted electronically more than 60 days before physical posting of the notice, the notices shall state at the bottom that "This is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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."

Dated, Washington, D.C. September 26, 2022

Lauren McFerran, Chairman

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN dissenting.

At issue in this case is the question whether an employer's notification to all its employees regarding new terms and conditions of employment being implemented for its non-represented employees constitutes unlawful direct dealing with represented employees under the Act. As my colleagues correctly note, the Board analyzes direct dealing allegations by applying the standard set forth in *Permanente Medical Group*, 332 NLRB 1143 (2000). Under that standard, the General Counsel must prove all three of the following elements: (1) an employer communicates directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. Id. 1144. My colleagues find that the General Counsel satisfied his burden.[1] In so doing, however, they appear to read the operative word "purpose" out of the second element of the *Permanente* test. It is beyond dispute that the *Permanente* test centers on an employer's *intent*, and that this factor must be established in order to find a violation under *Permanente*. Although my colleagues seem to find intent here because it was possible that employees could have misunderstood the corporate-wide communications from HHM, that is simply not what the standard requires. Because the evidence establishes that the Respondent lacked either the intent to establish or change unit employees terms and conditions or employment or the intent to undercut the Union's role in bargaining, it is clear that the announcements sent to HMH's entire workforce do not satisfy the second element of *Permanente*, and, therefore, the communications did not constitute unlawful direct dealing. In addition, although it is not necessary to reach the third element of *Permanente* given that the second element was not met, I would find that the record evidence fails to establish that the communications were made to the exclusion of the Union. For these reasons, I would find that the General Counsel failed to establish that the communications were unlawful under *Permanente*, and I would dismiss the complaint.

In 2016, Hackensack University Medical and Meridian Health merged to form Hackensack Meridian Health (HMH). Following the merger, HMH became the parent company of numerous health care facilities, including the four facilities named as Respondents in this matter.[2] As a result of being the parent company of these numerous facilities, HMH's workforce following the merger rose to at least 33,000 employees across numerous facilities. Of those employees, approximately 3000—fewer than 10 percent—were represented by the Union in the four facilities named as Respondents in this matter.[3]

Following the merger, HMH sought to standardize benefits, policies, systems, and operations across its numerous facilities. To that end, it spent approximately 18 months developing a "harmonization" plan. The Respondents did not keep the Union in the dark about the development of this plan. To the contrary, when three of the parties' collective-bargaining agreements were nearing their scheduled expiration dates in 2017, the Respondents requested that the parties enter into 1-year contracts (as opposed to the typical 3-year contracts) expressly because HMH was working on a harmonization plan. The Union agreed to the 1-year contracts. In March 2018, the parties commenced bargaining on successor collective-bargaining agreements for the bargaining units at the Respondents' facilities.

Thereafter, on May 19, the Respondents informed the Union that aspects of the HMH harmonization plan had been completed and that, as the next phase of the launching process, HMH intended to inform its entire workforce of changes planned for its non-represented employees. To that end, HMH planned to send an email to its entire workforce providing information regarding the harmonization plan.[4] In sharing this information, Respondents' counsel indicated that he understood that any substantive information provided addressing terms and conditions of employment were to apply only to non-represented

[1] All references to "the General Counsel" are to former General Counsel Robb.

[2] These facilities are Southern Ocean Medical Center ("Southern Ocean"), Jersey Shore University Medical Center (Jersey Shore), Palisades Medical Center (Palisades), and The Harborage ("Harborage").

[3] This point requires emphasis. In their discussion of the salient issues, my colleagues merely state that "a majority" of HMH's employees were unrepresented, ignoring the inconvenient fact that the *vast* majority of HMH's tens of thousands of employees were not represented by a union. Both the significant size of the workforce and the overwhelming percentage of unrepresented employees is critical in analyzing the Respondent's actions here.

[4] The Respondents' counsel specifically stated that *HMH* would be sending the emails and posting the relevant information on the website, and no party argues otherwise. (This certainly tracks, given that the emails and postings were sent to the entire HMH workforce.) The Complaint in this case, however, does not allege that HMH committed any violations of the Act. Nor does it allege that the Respondents, as subsidiaries, should be held accountable for the actions of their parent company. Nevertheless, because the Respondents litigated this case as if it were brought against HMH—with their counsel signing papers with "counsel for [HMH]"—I will apply that presumption here.

employees, but noted that it would be "impossible"[5] to segregate the 3,000 employees out of an email that was being sent company-wide to over 33,000 employees. He further stated:

> Consequently we will have the appropriate disclaimers and acknowledgement that for all union represented team members "HMH is legally required to bargain with the union regarding mandatory subjects and it will continue to do so." To that end we would like to share this information with HPAE before Tuesday.
>
> [. . .]
>
> [W]e are in the process of arranging a preview of the information regarding harmonization for you and your team for Monday afternoon sometime after 4 pm. We believe that it is important that HPAE has a chance to review the information before it is accessible by your members and be prepared for any questions your members may have. Once this process and negotiations are complete, HMH hopes that all team members will enjoy the same benefits, but obviously the negotiations process may result in variations in certain areas compared to the benefits enjoyed by other team members.

On May 21, consistent with the information above, the Respondents asked to give the Union a presentation of the information to be provided by HMH to its workforce. Although the Union objected, the Respondents went forward, thus providing the information to the Union prior to the information being sent to the workforce and being made available on the public website. During the presentation, the Respondents informed the Union that the materials being sent out company-wide would include a disclaimer, indicating that "[w]e are required by law to deal with the union on behalf of unionized team members, and we will continue to do so. We will only negotiate with the unions, not with individual unionized team members."

As a result of the Respondents' advance presentation to the Union, the Union was able to communicate with its bargaining-unit members about the pending communications early the following morning, May 22, before the company-wide emails went out and the information was made available on the public website.[6] And, consistent with the assurances made by Respondents' counsel, the company-wide emails sent out, as well as the information posted on the website, included disclaimers indicating that HMH would continue to bargain with unions over terms and conditions of employment,[7] as it had in entering into the 1-year contracts following the merger and in commencing bargaining over the successor contracts. In fact, the disclaimer was included on every page of the website.[8]

A. HMH's May 22 Communications Did Not Satisfy the Second Element of the Permanente test.

1. The Respondent's announcement did not have the purpose of changing represented employees' terms and conditions of employment.

The record clearly establishes that the General Counsel failed to establish that HMH's communications on May 22 were made with the purpose of changing represented employees' terms and conditions of employment. As detailed above, the Respondents informed the Union of their intent to inform non-represented employees about aspects of the new harmonization plan. They also informed the Union that the communications would *not* be changing the represented employees' terms and conditions of employment, but that the email would be sent to all employees because it was logistically impossible to individually remove the represented employees from the email. The Respondents confirmed their intent to bargain with the Union over represented employees' terms and conditions of employment. And finally, HMH included disclaimers consistent with what the Respondents had told the Union; both the company-wide email and the public website indicated that HMH would continue to bargain with employees'

[5] Without deciding whether it was literally "impossible" for the 3000 employees to be individually removed from company-wide communications—and the General Counsel did not establish that it was in fact possible--the Respondents' assertions that the represented employees were included in the company-wide email for logistical reasons ring true, especially given the size of the workforce. Unlike my colleagues, I would not infer that the Respondents harbored the *intent* to engage in direct dealing simply because, for logistical reasons, HMH chose to communicate with its overwhelmingly non-represented workforce through a company-wide email.

[6] The fact that the Union decided to use this first communication to its members to misrepresent the intention (and ignore the substance) of the email and website hardly establishes what the email and website posting were meant to accomplish. As repeatedly communicated by the Respondents to the Union, the intent was to inform HMH's non-represented employees, the overwhelming majority of its workforce, of the harmonization plan while including disclaimers for its represented employees to indicate that the substance of the plan would be subject to collective bargaining.

[7] My colleagues' assert that the disclaimer was misleading because the reader would assume that the Respondents had bargained with the Union in developing the harmonization plan. I find this to be a strained reading of that language. Rather, it seems more likely that a reader would understand the language to refer to the fact that the parties were commencing bargaining on successor contracts and that Respondents had previously successfully bargained with the Union in agreeing to enter into 1-year contracts.

[8] My colleagues also believe that the Respondent should have included a lengthier disclaimer. During the hearing, the judge admitted an exhibit showing that the website included just such a disclaimer at the time of the hearing, and a Respondent witness testified that he included it on the website when it was originally published. The judge then concluded in his decision that both the exhibit and testimony regarding this lengthier disclaimer were inadmissible because the "best evidence rule" requires an "original writing." I find it unnecessary to reach the issue because I find that the disclaimers included in the announcement are sufficient to establish that the communications did not have the *purpose* of changing represented employees' terms and conditions of employment or, as discussed infra, the *purpose* of undercutting the Union's role in bargaining.

bargaining representative for that small segment of the HMH's workforce (again, fewer than 10% of 33,000 employees) that was represented by a union. Although my colleagues may question whether represented employees reading the disclaimers would have understood that the harmonization plan terms did not apply to them, that does not change the fact that the Respondents' *intent* that the new terms would not apply to them was expressed in the communications themselves. Finally, there is no evidence whatsoever that the Respondents did, in fact, apply the new terms and conditions of the harmonization plan set forth in the communications to its represented employees.

My colleagues conveniently ignore these contemporaneous assertions by the Respondents, including their explanation why the represented employees could not be removed from the company-wide email and their express assertion that they understood that represented employees' terms and conditions of employment would have to be negotiated with the Union. Instead, they find that HMH's mere act of sending the communications company-wide is sufficient to establish intent. Specifically, my colleagues state that "[t]he Respondents . . . rolled out harmonization to all employees—represented and unrepresented" on May 22. Similarly, my colleagues represent that the Respondents "acknowledge [that the communications at issue] "informed all employees, not just unrepresented employees, of changes to their terms and conditions of employment." The first statement is misleading; the second statement is simply wrong. The plan was only "rolled out" to represented employees insofar as the company-wide communications informed them of upcoming changes to *unrepresented* employees' terms and conditions of employment, which is not unlawful under the Act. Furthermore, contrary to my colleagues' representation, the Respondents have not acknowledged that the announcements informed represented employees about any changes to *their* terms and conditions of employment. (Emphasis added). To the contrary: Consistent with their contemporaneous actions, statements, and the inclusion of disclaimers in the communications, the Respondents assert that the communications did not include any information affecting represented employees' terms and conditions of employment. I agree with that assertion.

My colleagues also look to an inapposite line of cases where an employer presented its unionized employees with a "proposal" to change their employment terms. See, e.g., *Detroit Edison Co.*, 310 NLRB 564, 564-565 (1993) (finding direct dealing violation where employer sent "sweetened" *proposal* directly to employees rather than offering it to union during negotiations). Under such circumstances, however, it is clear that the proposals are being made with the intention to change represented employees' terms and conditions of employment. However, as my colleagues acknowledge, HMH's communications were limited to setting forth planned changes to the employment terms of the *non-represented* employees. My colleagues also cite *Ingredion, Inc. d/b/a Penfold Products Co.*, 366 NLRB No. 74, slip op. at 1 fn. 1 and 6-9 (2018), enfd. 930 F.3d 509 (D.C. Cir. 2019), for the proposition that direct dealing could be found under these circumstances even without a proposal being offered. In that case, however, the Board found that the employer engaged in unlawful direct dealing where a manager directly solicited input from represented employees regarding what they were seeking in the upcoming contract negotiations. In other words, it is fair to say that the employer in *Ingredion* was *directly soliciting proposals* from its employees. But even assuming that the majority is correct that the exchange of proposals is not required, this case would constitute a stunning expansion of the direct dealing theory. In the past, the Board has found that the first part of the second element of *Permanente* is met when an employer intentionally—and directly—interacts with represented employees in order to establish or change *represented employees'* terms and conditions of employment. That is simply not present here.[9]

The company-wide communications sent out on May 22 were not proposals to change the represented employees' terms and conditions of employment, nor were they sent with that purpose. Accordingly, the first prong of the second *Permanente* element has not been met.

2. The May 22 communications were not made with the purpose of undercutting the Union's role in bargaining.

The General Counsel also failed to establish that the May 22 communications were made with the purpose of undercutting the Union's role in bargaining. Again, the communications related to *unrepresented* employees' terms and conditions of employment.[10] The communications did not contain any suggestion that represented employees would end up with less favorable working conditions than those set forth in the communications. Nor did the Respondents solicit grievances or requests from the represented employees, attempt to negotiate directly with the represented employees, or make any proposal to the represented employees. Simply put, there is nothing in the record to suggest that the communications were sent with the purpose of undermining the Union in any way.

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[9] My colleagues also seem to erroneously conflate the allegation of direct dealing at issue here with Respondents' strategy in bargaining. For example, my colleagues would find that the May 22 communications constituted direct dealing because the Respondents "did not prepare and present economic contract proposals to the Union for another 2 months" after May 22. It is worth noting, however, that the General Counsel has not alleged that the Respondents engaged in bad faith bargaining.

[10] Given that HMH's workforce consisted of over 33,000 unrepresented employees, it is logical that the communications would be sent via a company-wide email, especially given the Respondents' statements that it would be logistically impossible to remove the individual represented employees from the mail list. Again, choosing to send a company-wide email in these circumstances is hardly evidence that the Respondents had any unlawful intent in doing so.

The cases upon which my colleagues rely in suggesting that the General Counsel met his burden are not applicable. See *Armored Transport*, 339 NLRB 374 (2003) (finding direct dealing where employer sent proposal directly to its represented employees along with "Don't Blame Us" letter *suggesting that the union was at fault* for drawn-out bargaining). Nor is this a case where the employer was withholding unilateral changes and directly dealing with employees as part of a campaign to sow employee dissatisfaction with the union. See *Overnite Transportation Co.*, 329 NLRB 990, 993, 1047 (1999), enf. denied in pertinent part 280 F.3d 417 (4th Cir. 2002).[11]

Furthermore, the communications expressly contained notifications that the Respondents intended to continue to bargain with the Union over terms and conditions of employment. My colleagues note that the Respondent used broadly applicable language in its announcement and the accompanying materials, but, again, this is unremarkable given that the information contained therein applied to the overwhelming majority of the workforce. Further, it is undisputed that HMH included the following disclaimer in the materials it published to the entire workforce: "We are required by law to deal with unions on behalf of unionized employees, and we will continue to do so. We will only negotiate with the unions, not with individual unionized team members." Although my colleagues may quibble with this language, it is clear that the Respondent was attempting to notify its represented employees that any terms and conditions of employment addressed in the communications did not apply to them.

For the reasons discussed above, I would find that the General Counsel failed to establish the second element of the *Permanente* test. Because all three elements of that test must be satisfied in order to establish unlawful directly dealing under the Act, I would find that the Respondents did not engage in unlawful direct dealing here.

B. The May 22 Communications Were Not Made to the Exclusion of the Union.

Even assuming that the General Counsel established that the second element of *Permanente* was met, however, I would still find that the Respondents did not engage in unlawful direct dealing because the May 22 communications were not made to the exclusion of the Union.

It is undisputed that the Respondents had informed the Union of HMH's intention to "harmonize" the terms and conditions of employment across its workforce, to the extent possible. In fact, the parties agreed to 1-year contracts precisely in light of HMH's plans. Three days before HMH planned to announce its harmonization plan for its unrepresented employees, the Respondents informed the Union of the upcoming announcement, emphasizing that "obviously the negotiations process may result in variations" for the represented employees, and the Respondents offered to provide the Union a "preview" of the announcement so that it would "be prepared for any questions [its] members may have." One day before HMH's announcement, the Respondents explained that HMH would be publishing a public website detailing the plan and presented a slideshow to the Union with screenshots of a nearly finalized draft of this website. And the morning of the announcement, the Respondent emailed a link to the finalized website to various Union representatives. In turn, shortly before the Respondent announced its harmonization plan for its *unrepresented* employees, the Union was able to inform its members that the Respondent could not "simply implement" the plan with respect to represented employees and would have to bargain over "proposed changes" with the Union.

Accordingly, even if one were to find that the General Counsel met his burden to establish the second element of *Permanente*, I would dismiss the allegation because the General Counsel failed to establish the third element of *Permanente*.[12]

CONCLUSION

Nothing in the Act or Board precedent supports my colleagues' attempt to convert non-coercive, company-wide communications—made to an overwhelmingly non-represented workforce—into unlawful direct dealing. The Respondents acted exactly how one would hope in this matter. Even though the information being distributed did not apply to represented employees—and, therefore, did not trigger a duty to bargain with the Union—out of an abundance of caution, the Respondents recognized that it was possible that some might misconstrue the communications. The Respondents appropriately notified the Union, offering to provide the Union with a prior review of the material. Even though the Union initially turned this offer down, the Respondents' presentation of the pending communications enabled the Union to notify its membership ahead of time that, as indicated in the communications, the terms and conditions of employment for represented employees were still subject to bargaining.

[11] As my colleagues note, in denying enforcement, the Fourth Circuit stated that "[t]here is [] no 'rule requiring employers to delay informing [their] employees of a proposal until the union has some period of time to consider it.'" 280 F. 3d at 433, quoting *American Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F.3d 867, 876–877 (4th Cir. 1999). Although my colleagues decline to apply this aspect of the Fourth Circuit decision, it certainly supports my view that the Respondent here did not violate the Act by sending its company-wide communications—which, again, were not a proposal to the non-represented employees--after having given the Union a preview the day before.

[12] Because I would find that HMH's May 22 communications did not constitute unlawful direct dealing, I need not reach the issue of whether the communications were protected by Sec. 8(c) of the Act. But I do note that the Board has recognized that "the benefits to be derived from free, noncoercive expression" of parties' bargaining positions to employees "far outweigh" the risk that the sharing of such information "may be perceived by some as an attempt to undermine the statutory collective-bargaining representative." *United Technologies*, 274 NLRB 609, 610 (1985).

It is clear to me that the General Counsel failed to carry his burden with respect to both the "purpose" and "exclusion" elements under *Permanente*. Therefore, I would find that the Respondent did not engage in unlawful direct dealing and dismiss the complaint.

Dated, Washington, D.C. September 26, 2022

Marvin E. Kaplan, 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 bypass the Union and deal directly with you regarding your terms and conditions of employment.

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

SOUTHERN OCEAN MEDICAL CENTER

The Board's decision can be found at www.nlrb.gov/case/22-CA-223734 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT bypass the Union and deal directly with you regarding your terms and conditions of employment.

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

JERSEY SHORE UNIVERSITY MEDICAL CENTER

The Board's decision can be found at www.nlrb.gov/case/22-CA-223734 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX C

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT bypass the Union and deal directly with you regarding your terms and conditions of employment.

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

PALISADES MEDICAL CENTER

The Board's decision can be found at www.nlrb.gov/case/22-CA-223734 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX D

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT bypass the Union and deal directly with you regarding your terms and conditions of employment.

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

THE HARBORAGE

The Board's decision can be found at www.nlrb.gov/case/22-CA-223734 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Michael Silverstein, Esq., for the General Counsel.
Christopher J. Murphy, Esq. and *Michael K. Taylor, Esq. (Morgan, Lewis & Bockius, LLP),* for the Respondent.
Annmarie Pinarski, Esq. and *Charlette Matts-Brown (Weissman & Mintz, LLC),* for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. This case was tried before me in Newark, New Jersey, on January 14 and 15, 2020. The General Counsel alleges that the Respondent[1] dealt directly with bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act by announcing its desire to change their terms and conditions of employment without providing advance notice and contract proposals to the bargaining representative of those employees, Health Professionals and Allied Employees (Union or HPAE).[2] For reasons discussed below, I agree and find that the Respondent violated the Act as alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs that were filed by the General Counsel and the Respondent, I make these

FINDINGS OF FACT

JURISDICTION AND UNION STATUS

Respondents Southern Ocean, Palisades, Jersey Shore, and The Harborage admit, and I find, that that they have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and the Board has jurisdiction over this case pursuant to Section 10(a)

[1] The complaint identifies Southern Ocean Medical Center (Southern Ocean), Jersey Shore University Medical Center (Jersey Shore), Palisades Medical Center (Palisades), and The Harborage (The Harborage) as separate respondents, but they are, in the facts and analysis sections of this decision, referred to collectively as "the Respondent."

[2] The complaint also included certain allegations that the Respondent violated Sec. 8(a)(1) of the Act by refusing the Union access to the Southern Ocean cafeteria and conference room. (Comp. ¶ 11–15, 17.) These allegations were settled prior to the opening of the record and withdrawn by the General Counsel. (Tr. 6–7)

of the Act.

ALLEGED UNFAIR LABOR PRACTICE

Hackensack University Medical Center and Meridian Health merged on July 1, 2016. The newly created entity was called Hackensack Meridian Health (HMH) and had a total workforce of about 33,000 employees at numerous health care facilities. Most of those employees are not unionized, but HMH does have bargaining relationships with unions, including HPAE. After the merger, HMH's health care facilities included the four facilities involved in the instant case. Palisades and The Harborage (the northern facilities) are adjoining facilities located in North Bergen, New Jersey. Southern Ocean and Jersey Shore are located in Manahawkin and Neptune, New Jersey, respectively (the southern facilities). The Harborage is a long-term nursing home and rehabilitation center. The other three facilities are acute care hospitals. (Tr. 98, 105, 164, 176, 178)

The Union represents the following bargaining units of employees at the four facilities (Tr. 19, 97–98):[3]

Facility	**Union Local**	**Approx. # of Employees**	**Classifications**
Jersey Shore	Local 5058	1,300	Registered Nurses (RNs)
Southern Ocean	Local 5138	250	RNs
The Harborage	Local 5097	140	Service and Maintenance
Palisades	Local 5030	900	RNs
Palisades	Local 5030	230	LPN/Techs
Palisades	Local 5030	200	Service and Maintenance

[3] Par. 10 of the complaint, which was admitted by the Respondent in its answer, identified the Union as the bargaining representative of an appropriate bargaining unit at all four facilities. However, the complaint only defined the Palisades RN unit and did not define the Palisades LPN/Techs and Service/Maintenance units. Nevertheless, all three Palisades units are defined in the collective-bargaining agreements entered into evidence as GC Exhs. 13, 14, and 15. The Respondent has not, during this proceeding, asserted a defense upon the grounds that any or all of the Palisades units are not appropriate. Accordingly, my decision and order shall apply to all three Palisades bargaining units.

Prior to 2017, the Respondent and Union were party to a series of 3-year contracts. (Tr. 220.) In 2017, however, the parties negotiated 1-year contracts covering the units at Southern Ocean, Jersey Shore, and Palisades. The Jersey Shore and Southern Ocean contracts were effective from July 31, 2017 to July 31, 2018, and the three Palisades contracts were effective from June 1, 2017, to May 31, 2018.[4] The Harborage contract was effective from May 18, 2015, to May 17, 2018, and did not have to be renegotiated in 2017. The Respondent sought 1-year contracts because HMH wanted to standardize or "harmonize" its operation and employee benefits throughout its various facilities, but had not yet developed a comprehensive plan or proposals for doing so. The Respondent expected to be prepared with such a harmonization plan by the time the 1-year contracts expired. (Tr. 45–46, 163–165, 179–180, 220–221.)

HMH referred to its campaign to harmonize its benefits, policies, systems, and operations as "Growing Together" and "One Mission, One Vision, One Culture." HMH Vice President of Human Resource Operations Barbara Powderly testified that the development of this harmonization plan was a lengthy process that took about 18 months and involved both internal teams and outside consultants. According to Powderly, certain content was approved over the course of this time period, but not disclosed to the Union. Rather, the Growing Together plan was kept confidential until it was completed in May. The harmonization plan included the development of a public website which employees would be able to access once the plan was complete. Before the website went public on May 22, it was password protected and only certain individuals had access to it. The Union and unit employees did not have access to the website as the harmonization plan was being developed. As noted in the Respondent's posthearing brief, the Union and the Respondent had entered into, or were preparing to enter into, negotiations at a time that was "contemporaneous with the rollout of the harmonization initiative." (R. Brief p. 5) (Tr. 178, 190, 212, 214).

HMH expected the vast majority of its harmonization plan to go into effect on January 1, 2019. Employees were expected to make their elections for 2019 benefit programs during an open enrollment period beginning in October. Powderly characterized this election as an "active enrollment" (as opposed to a passive enrollment) because members had to affirmatively choose benefit plans and did not have the option of allowing plans to roll over from the previous year. According to Powderly, "to hit that October date we needed to start all the communications and socializing all these changes so that team members were able to make informed decisions about their plans . . .." (Tr. 214–215.)

The Respondent's lead negotiator for all four facilities was attorney Joe Ragaglia of the law firm Morgan, Lewis & Bockius, LLP. The Union's lead negotiators were HPAE Staff Representative III Richard Halfacre for the northern facilities and HPAE Staff Representative Djar Horn for the southern facilities. Halfacre and Horn reported to HPAE Director of Member Representation Fred Deluca. DeLuca attended a number of bargaining sessions and corresponded with Ragaglia about certain matters. (Tr. 21–22, 41, 103, 152, 221–222, 226–228.)

On March 29, the Respondent and Union held an initial joint bargaining session for all four facilities. The Union understood that the purpose of this joint session was to discuss ground rules for negotiations and the Respondent's desire to standardize certain benefits throughout its facilities. The Union generally opposed the idea of standardization to the extent it would require the acceptance of less favorable terms than in the 2017 contracts. The parties discussed topics including health insurance, staffing, contract expiration date, and a fair election process. However, the parties did not exchange specific proposals and the Respondent did not specifically mention its Growing Together harmonization plan. (Tr. 24–26, 103–105.)

In early April, Horn emailed Ragaglia with offers of bargaining dates, including April 18, 30 (joint bargaining for all units), April 17, 19 (for The Harborage), April 30 (for Palisades), and April 27, 30 (for Southern Ocean). However, Ragaglia did not respond and the parties did not meet again until May.

In May, the parties held bargaining sessions for The Harborage unit on May 9, 17, and 21 and the Palisades units on May 10, 15, and 22.[5] The Union was prepared at the start of bargaining to offer full contract proposals on all economic and noneconomic terms. However, Ragaglia indicated that the Respondent was still preparing its economic proposals and requested that the parties begin with noneconomic subjects. Ragaglia also requested that the Respondent, ultimately, be allowed to present its economic proposals first. Halfacre agreed to the Respondent's requests. The parties exchanged noneconomic proposals in May. The Respondent did not make any economic proposals for any of the units until late-July or August. (Tr. 33, 107–113, 153.)

On May 19, at 1:14 p.m., Ragaglia sent DeLuca the following email (GC Exh. 26):

> Missed you at negotiations this week and wanted to catch up. As you know HMH officially launched the "One Mission, One Vision, One Culture" harmonization program last month by highlighting work already completed in this area and foreshadowing the harmonization program over the next few months.
>
> As part of the next step in this program HMH will be sharing updated information on the harmonization with all of its 35,000 team members starting Tuesday May 22nd. This information will include a number of topics some of which include the harmonization of a number of areas that touch on terms and conditions of employment. Let me be clear, and it will be made clear to Team Members, these changes will not go into effect until January 1, 2019 or later. It is impossible, and counter to the HMH ONE culture, to segregate out your members from receiving this information, some of which concerns mandatory subjects of bargaining. Consequently we will have the appropriate disclaimers and acknowledgement that for all union represented team members "HMH is legally required to bargain with the union regarding mandatory subjects and it will continue to do so." To that end we would like to share this

[4] All dates refer to 2018 unless stated otherwise.

[5] The parties bargained over the three Palisades units together. (Tr. 121.)

information with HPAE before Tuesday.

We are in negotiations with the Harborage and HPAE on Monday May 21st. Given the lack of negotiation dates for the Harborage we do not want to disrupt the day of negotiations but we are in the process of arranging a preview of the information regarding harmonization for you and your team for Monday afternoon sometime after 4 pm. We believe that it is important that HPAE has a chance to
review the information before it is accessible by your members and be prepared for any questions your members may have. Once this process and negotiations are complete, HMH hopes that all team members will enjoy the same benefits, but obviously the negotiations process may result in variations in certain
areas compared to the benefits enjoyed by other team members. I will call you so we may coordinate

On May 19 at 1:18 p.m., DeLuca replied to Ragaglia by email as follows (GC Exh. 26):

Joe thanks for the update

All the topics are mandatory subjects of bargaining the employers managers have been dealing directly with our members telling them what proposals will be out there before any presentation to the bargaining team-

On May 19 at 1:27 p.m., Ragaglia responded to DeLuca's replay as follows (GC Exh. 26):

We will certainly investigate if you give us details, and remedy if necessary, but two initial thoughts: 1. Managers have not been briefed on any proposals or terms and conditions that could apply to HPAE members; and 2. The information that will be presented by HMH to team members on Tuesday has not been finalized. In fact it is my understanding that it was made clear to leaders what was subject to negotiations.

On May 20, Respondent consultant Megan Mitchell circulated an internal email which stated, in part, as follows (R. Exh. 5):

Apologies for the (very) late Sunday email, but as you know, we're on a bit of a tight timeline with the launch of Growing Together happening on Tuesday, and wanted you to have this to review first thing tomorrow morning. Below is a link to
the dev site for the new TeamHMH.com. Please do not forward this email /link to anyone. . . .

In order to be ready for the launch on Tuesday, we need to have all edits to the site made by 3PM tomorrow so we can begin the testing and QA process. Please let us know if you have any edits /questions /concerns by 12PM tomorrow so we have time to address them before we finalize and move to migration. Again, I know it's a very tight turnaround and I'm sorry about that. Due to several last minute changes, this was the absolute earliest we were able to get everything
drafted and uploaded.

On May 21, the parties held a bargaining session for The Harborage. Halfacre was the Union's lead negotiator, but DeLuca was present as well. In the afternoon, Ragaglia invited Halfacre to a sidebar and said he wanted to make a presentation on harmonization because the program was about to be finalized. Ragaglia indicated that the program would be made available to all HMH employees through a public website which was expected to go live on the morning the following day (May 22). Halfacre refused to "negotiate over a website" and demanded that the Respondent present proposals instead. However, Ragaglia insisted and Halfacre did not press his objection. Halfacre requested a printed hard copy of the presentation, but Ragaglia refused. Since the website was not yet available, Ragaglia used his computer to project a slide show on the wall, which had been prepared by someone and given to him that morning. This slide show included screen shots of certain website pages, but did not reflect the entirety of the Growing Together website. According to Ragaglia, he wanted to present the material at 4 p.m., but could not do so because Halfacre said the Union had to leave at that time. Ragaglia testified that, as a result, he had to "kind of scramble to do the presentation at 3 p.m. instead." (Tr. 113-115, 120, 138, 142, 146–150, 226–228.)

Ragaglia's May 21 harmonization presentation included the following language in large bolded black font (GC Exh. 8 p. 4):

We are required by law to deal with the unions on behalf of unionized team members, and we will continue to do so. We will only negotiate with the unions, not with individual unionized team members.

According to Ragaglia, this is standard disclaimer language he uses whenever a client wants to communicate directly with unionized employees. Ragaglia testified that the disclaimer is "shorthand" for saying that the Respondent is not direct dealing. The Respondent admits that the Growing Together website, once launched, did not contain the disclaimer in such large and bolded font. However, according to Ragaglia, each page of the website included a footer with the same language in much smaller font (also reflected on p. 4 of the slide show). Ragaglia testified that it was important to include such disclaimer language on the website for two reasons: First, the law requires an employer to communicate with a union before communicating with employees. Second, the Respondent wanted to be transparent so the Union would feel comfortable that the Respondent intended to negotiate a contract and was not trying to do an "end run" around the bargaining process. (Tr. 225–235.)

Ragaglia testified that, in addition to the small disclaimer on each page of the website, the website contained a different footnote disclaimer on one page of the website in the section titled "Tomorrow" (Tr. 233-239) (R. Exh. 9):[6]

[6] Ragaglia testified that this language is currently on the Respondent's website, but in a different section (as the "Tomorrow" section no longer exists). The General Counsel objected to the introduction of Respondent exhibit 9 on the grounds that it was not previously produced in response to paragraphs 8 and 10 of a government subpoena issued to HMH. (GC Exh. 27.) I admitted the exhibit into evidence subject to additional argument over the same in posthearing briefs. Subpoena paragraph 8 sought "[d]ocuments showing all information maintained on the TeamHMH.com website on May 22, 2018, including . . . information included in the 'today' and 'tomorrow' tabs . . .." Subpoena paragraph 10 sought "[d]ocuments maintained by Respondent HMH referencing or including any content published on TeamHMH.com in April or May 2018. . .." At

> We have designed a Total Rewards compensation program that we hope
> Hackensack Meridian Health team members will appreciate and value. Our
> offerings are intended to help Hackensack Meridian Health recruit and retain team members committed to providing safe, quality patient care and our culture of caring.*
>
> [footnote]*We are required by law to negotiate about mandatory subjects of bargaining with the unions that represent a small number of Hackensack Meridian *Health* team members. Some of the labor contracts between Hackensack Meridian *Health* allow respective represented team members to automatically receive the benefits non-union team members receive; Others do not. We currently are in negotiations with some unions that represent team members, and are negotiating about of the [sic] benefits referenced on this website. We are committed to negotiating in good faith as required by law, and we will not engage in any direct dealing with union-represented team members. Union-represented team members should contact their respective union about any questions they have.[7]

Ragaglia testified that he drafted this language on the morning of May 21 because "he wanted to be crystal clear" and "didn't want confusion." (Tr. 235-236) This language did not appear in the slide show Ragaglia presented to the Union on May 21. (GC Exh. 8)

Halfacre testified that Ragaglia's May 21 presentation did not include the large bolded disclaimer as reflected on page 4 of General Counsel exhibit 8. In fact, although Halfacre could not rule out the possibility that the presentation included the smaller disclaimer on the same page, he did not recall Ragaglia talking about any disclaimer at all. Rather, according to Halfacre, following the presentation, he told Ragaglia that the website needed to include a disclaimer indicating that the Respondent would negotiate with the Union over mandatory subjects of bargaining which were covered by the harmonization program. Halfacre recalled that Ragaglia agreed to add such a disclaimer. Ragaglia denied that such a conversation occurred. Rather, according to Ragaglia, the Union requested that the font of the disclaimer footnote be enlarged, and he agreed to do so. The Union does not deny that the website, once launched, contained the small font disclaimer language in a footer at the bottom of each page. (Tr. 158, 161–162, 236.)

Other than disclaimer language, Ragaglia's May 21 presentation included sections on Health & Wellbeing, Pay Practice, Professional Growth, and Retirement. The Health and Wellbeing section included information regarding medical insurance options, the method for calculating employee monthly medical premiums, dental insurance options, a vision insurance option, a life insurance plan, prescription & pharmacy options, and certain medical incentives and discounts. This section contained charts with specific dollar figures for employee out-of-pocket expenses under different plans and circumstances. For example, under the question, "What are my options in 2019?" a chart of the medical plan options describes "Tier 1: Inner circle, Domestic" with a network of "Physicians Within Our Hackensack Meridian *Health* Partners, Employed by HMH") and a deductible of $0 for "Premium Plus," $0 for "Premium," $1500 for single "Basic/High Deductible," and $3000 for family "Basic/High Deductible." The same chart included the option of one of four tiers and three plans within each tier. For each tier and plan, the chart reflected the deductibles, service costs above the deductible, copayments for medical visits, and the maximum annual cost. The presentation included similar charts for dental insurance options, a vision insurance option, life insurance, and pharmacy options. Further, under the new medical plan, a $15 surcharge was to be added per paycheck for tobacco users. (GC Exh. 8 pp. 7–14.)

The Pay Practice section of the presentation included information regarding pay periods, pay dates, and paperless pay. Thus, the presentation indicated that employees would be paid every other Friday beginning January 4, 2019. The presentation further reflected that the Respondent would no longer issue paper checks and, instead, employees would be paid by direct deposit or pay card. (GC Exh. 8 pp. 15–18.)

The Personal Time Off (PTO) section of the presentation included information about accruing and carrying over PTO, earned sick leave (ESL), and short-term disability. Starting January 1, 2019, employees would be entitled to use PTO before it was accrued and could carry over 80 hours of PTO into a new year; earn 5 days (40 hours) of ESL each year with a maximum of 400 hours; and have short-term disability coverage for up to two-thirds of an employee's pay during a period up of 26 weeks.

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trial, Respondent's counsel indicated that he did not believe Respondent exhibit 9 was responsive to the subpoena because it was not printed from the original website. Presumably, the hardcopy entered into evidence is a printout of the current website. However, given that the Respondent intended to use the document to prove what was on the original website, it is hard to argue that the exhibit was not responsive as "content published on TeamHMH.com website." Nevertheless, rather than simply exclude the document as an evidentiary sanction, I consider the Respondent's failure to produce Respondent exhibit 9 before attempting to enter it into evidence an aggravating factor in precluding the document under the best evidence rule (see fn. 7 below). In any event, as noted below, the Respondent did not rely, in its posthearing brief, on this disclaimer language as a defense.

[7] The best evidence rule requires that in proving the contents of a writing, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent. *Harrington v. United States*, 504 F.2d 1306, 1313 (1st Cir. 1974). I allowed Ragaglia's testimony over the General Counsel's objection because the website was no longer available in its original form. However, in retrospect, the original webpage was no longer available because the Respondent modified it and failed to keep a hard copy (or electronic equivalent) of the disclaimer language. The Respondent's failure to keep a hard copy is particularly surprising because, according to Ragaglia, the language was added for the specific purpose of defeating a legal challenge of direct dealing. Compounding the problem, the Respondent failed to produce Respondent exhibit 9 in response to the General Counsel's subpoena before attempting to enter it into evidence. (See fn. 6 above.) Under these circumstances, the unavailability of the disclaimer was the fault of the proponent and testimony regarding the disclaimer should not have been admitted. However, even if it were admitted, I would not find this particular disclaimer to be significantly exculpatory for reasons discussed below in my analysis.

(GC Exh. pp. 19–22.)

The Retirement section of the presentation described the new defined plan as follows (GC Exh. 8 p. 26):

> The New Defined Contribution Plan: By the Numbers*
> 1.5% Automatic HMH Core Contribution
> Next 2% 100% HMH match of the first 2% you contribute
> Next 3% 50% HMH match of the next 3% you contribute
> One more number to remember...
> 3% Year 1 Auto Enrollment Contribution
> *Percentages relate to a ream member's gross annual salary. Applies to eligible team members only.

The Policies and FAQ section of the presentation indicated that the website would contain a number of drop-down menus with additional information, but that information was not included in Ragaglia's May 21 presentation. (GC Exh. 8.)

The Respondent has not denied that the Growing Together harmonization plan it presented to the Union on May 21, if applied to unit employees, would modify certain contractual provisions on mandatory subjects of bargaining. Sick leave is an example. The Harborage contract provided for the crediting of 4 sick days each 6 months. The South Ocean and Jersey Shore contracts provided for the accrual of sick leave at 0.026923 hours for each hour paid up to 56 hours annually. The Palisades contracts provided for sick leave accrual of 1 or 0.75 sick days per month depending upon date of hire. Meanwhile, the harmonization plan provided for 5 days (40 hours) of sick leave. In addition to differences in paid time off, the harmonization package differed from certain contracts in their respective retirement, medical, dental, and prescription plans. (GC Exh. 8, 2–3, 12-15) (R. Exh. 7).

On May 22 at 9:15 a.m., the Union posted the following notice on its Facebook page (R. Exh. 1):

> In Harborage Negotiations yesterday, management gave us a preview of
> changes that they intend on making across the health system to standardize
> their benefits. They will be announcing this plan today in many of their
> facilities and possible ours These areas included:
>
> -Health insurance plan design changes
> -PTO system Changes
> -Extended sick and short term disability changes
> -Defined contribution plan changes
>
> Management can NOT simply implement these changes in HPAE locals
> without announced not affect our members at all. Our bargaining team will be examining all proposed changes and determine whether they are in all of our interest or whether there are better alternatives. The final outcome will be voted on by all the HPAE members.
>
> Be prepared to communicate with your colleagues from your floor to spread
> the above message. Management wants to make this seem to our members
> like a done deal to strip the fight out of them so let's make sure not to let
> them do that!
>
> We can answer questions about this in our meeting tonight at 5.30 pm and
> 7.45 pm for Local 5058, or by phone any time at (732) 774 - 9440 ext. 215.
> We will work on a flyer to explain all of this for members and ask that you be prepared to help distribute them on your floor.

On May 22 at 9:41 a.m., HMH human resources representative Victoria Riveracruz sent the following email to Horn, Local 5138 Union President Barbara Bosch, and Local 5058 Union President Kendra McCann (GC Exh. 6):

> As you may know, HMH officially launched the "One Mission, One Vision, One Culture" harmonization program last month by highlighting work already completed in this area and foreshadowing the harmonization program over the next few months. As part of the next step in this program, HMH will be sharing updated information on the harmonization with all of its 35,000 team members starting sometime later today. This information will include a number of topics, some of which include the proposed harmonization of a number of areas that touch on terms and conditions of employment. Let me be clear, and it will be made clear to Team Members, it is anticipated these changes will not go into effect until January 1, 2019 or later. It is logistically impossible, and counter to the HMH ONE culture, to segregate out your members from receiving this information, some of which concerns mandatory subjects of bargaining. Consequently we will have the appropriate disclaimers and acknowledgement for all union represented team members. To that end I would like to share the link to this information with you before it goes out to all team members.
>
> I understand that you were unable to attend the meeting with HPAE leadership yesterday but we presented a preview of this information to HPAE representatives Fred DeLuca, Rich Halfacre and Phil Denniston as well as the Local 5097 bargaining committee. We will be discussing it with the bargaining committee for Local 5030 today. The website is now live and you can view the information first hand at www.Team-HMH.com. A letter will go out electronically later today that will outline the harmonization areas. Again, we believe that it was important that HPAE has a chance to review the information before it is accessible by your members and

On May 22 at 9:47 a.m., Mitchell circulated an internal email indicating that the website password had been lifted and it was largely visible to the public. Attached to the email was the website FAQs section. (R. Exh. 7.) According to Mitchell, these FAQs were to be posted in a password-protected "Leaders Only" section and not available to the broader employee population. The FAQs indicated that most changes would go into effect January 1, 2019, and the "earliest you will need to take any action [on enrollment] will be in October." The FAQs also indicated

that employees would receive 6 paid holidays. The 2017–2018 Palisades and The Harborage contracts provided for 8 holidays. (GC Exh. 12–15) (R. Exh. 7).

On May 22 at 11:06 a.m., the Respondent emailed all employees the following flyer regarding the harmonization program, which included a link to the website (GC Exh. 10).

> Growing Together: Aligning & Enhancing Our Total Rewards, Policies & Systems
> Two years ago, we embarked on a journey to become One Hackensack Meridian Health. We recognized that our communities were stronger together than apart, and so we joined forces in pursuit of one mission: To become a leader of positive change by implementing innovative models of care, advancing education and research, and re- imagining health care to meet the rapidly
> evolving needs of our communities.
>
> Today, we're starting to see that vision come to life across the network, thanks in part to our shared culture and beliefs: Creativity, Courage, Compassion and Collaboration. These beliefs inform everything we do and are driven by a mindset that maximizes innovation and sets excellence as the standard.
>
> But this Culture of Transformation is not limited to our patients. It applies to you, your families and your loved ones: The backbone of Hackensack Meridian Health. We are committed to creating the very best environment and experience for you, as well as our patients.
>
> As part of that commitment, we are previewing a series of policy and benefit changes. While most of these changes will not go into effect until January 1, 2019, we felt it was important to share the information as soon as we were able. Please keep in mind that many of the details are still in progress, and subject to regulatory and operational considerations, which may result in some modifications - we'll continue to provide updates throughout the year.
>
> Some of you might be asking: Why do we need to change our policies and benefits at all?
>
> Because we know we can do better. Today, we have overlapping programs, policies and systems. For the past two years, we have taken inventory and pulled together many of the strongest components of each entity to align and enhance our offerings.
>
> These changes will bring us closer to operating as one team, while also presenting new benefits and opportunities for growth across the network. They will affect all of us, and there is some give-and-take from everyone. This was a collaborative process, with hundreds of your colleagues from across the network working hard to make sure each and every team member was represented fairly.
>
> While this is a major milestone, it is not the last. Our journey to One Hackensack Meridian Health continues, and there are additional enhancements in phases to come. We promise to communicate as many details about these and future changes as early and often as we are able.
>
> In the meantime, please visit the new and improved www.TeamHMH.com, where you'll find additional details about these enhancements and have the opportunity to submit questions. Of course, your leaders and HR representatives are always available to help, as well. Please remember, most of these changes don't take effect for more than six months, on January 1, 2019.
>
> I am consistently in awe of - but never surprised by - your continued dedication and pursuit of excellence. It's what makes us One Hackensack Meridian Health, today and for generations to come. Thank you for being a part of this amazing journey.

Page 6 of the flyer included, in extremely small font, the disclaimer language, "We are required by law to deal with unions on behalf of unionized employees, and we will continue to do so. We will only negotiate with the unions, not with individual unionized employees[.]" The font of this disclaimer was even smaller than the disclaimer footnote language in General Counsel exhibit 8, notwithstanding Ragaglia's agreement, at the Union's request, to enlarge it. The Respondent subsequently handed out a similar flyer to employees at its various facilities with the same disclaimer language. (Tr. 87, 191–192) (GC Exh. 7, 10).

In addition to the flyer, the May 22, 11:06 a.m. email attached a video conversation in which HMH Co-CEO Bob Garrett, HMH Co-CEO John Lloyd, and Chief Experience and Human Resources Officer Nancy Cocoran-Davidoff discussed, among other things, anticipated changes to employees benefits. (GC Exh. 11) In this video, Cocoran-Daidoff stated, in part, as follows:

> [M]any things that are going to change. One example would be our health plan.
> We are going to be giving 3 options in our health plan- and multiple tiers within our health plan. So people will have greater flexibility and choice in the health plan. Our dental, our vision- there will be changes in all of those things. In addition, we'll be changing our PTO plans. We want to harmonize PTO across the organization so that everyone is operating under the same PTO
> policies and procedures.

On May 22 at 1:30 p.m., Horn replied as follows to the email sent by Riveracruz earlier that morning:

> Neither I nor the Local Union Presidents from 5138 and 5058, Barbara Bosch and Kendra McCann, were invited to the presentation you gave yesterday. If you intended to present important Information about bargaining proposals, we would have appreciated dates well in advance. To that point we have not received firm dates for joint bargaining for 5058 and 5138. We sent you the initial dates for bargaining on April 10, 2018.

> We expect the harmonization program to be rolled out to the JSUMC and SOMC leadership as soon as possible so that we can accurately represent the employer's position to our members and fully consider the proposals for bargaining.

Ragaglia testified that, at a May 22 bargaining session for the Palisades units, he gave a presentation on harmonization similar to the one the previous day, but this time using the actual website which had gone public earlier that morning. According to Ragaglia, attendees used their individual computers to access the website. (Tr. 233–239.)

Analysis

The General Counsel contends that the Respondent dealt directly with unit employees in violation of Section 8(a)(5) and (1) of the Act by announcing its desire to change their terms and conditions of employment without providing the Union advance notice and contract proposals.

An employer may be held to have violated the Act by revealing to unit employees its intention to alter their wages, hours, and other terms and conditions of employment without giving the union adequate advance notice to discuss the prospective changes with employees or engage in meaningful bargaining. Detroit *Edison Co.*, 310 NLRB 564, 564–565, 575–576 (1993). See also *Aggregate Industries*, 359 NLRB 1419, 1424 (2013) adopted by three-member Board in 361 NLRB 879 (2014), enf. denied on other grounds in *Aggregate Industries v. NLRB*, 824 F.3d 1095 (D.C. Cir. 2016).

In *Detroit Edison*, 310 NLRB 564 (1993), the union was aware that the employer had a long desire to phase out a certain classification, but the issue was tabled during "main table" negotiations and reserved for bargaining at the unit/facility level. Ultimately, in late-August 1991, the employer gave the union representative of its Marysville facility a draft memorandum to employees regarding its phase-out plan for that facility with new sweetened job-security provisions. This memorandum was similar to one which the union representative had already received regarding the employer's phase-out plan at a different facility. The union did not consent to the distribution of the Marysville memorandum to Marysville employees, but the employer issued it anyway on September 3, 1991. The Board held that the employer violated Section 8(a)(5) and (1) of the Act by failing to give the union "any meaningful opportunity to consider the 'sweetened proposal' before it was communicated directly to employees . . .." Id.

In *Overnite Transportation Co.*, 329 NLRB 990 (1999), the judge, as affirmed by the Board, cited *Detroit Edison* in describing the employer's unlawful conduct as follows:

> What Overnite did here was to send by overnight mail its productivity agreement to the Union, wait 1 day, and then make its presentation to the employees directly, 2 days before negotiations were to or did resume. That bypasses the Union in the same way as if Respondent never made any proposal at all to the Union, and Respondent certainly gave the Union no adequate opportunity to digest the proposal or to respond or to begin discussion. *Detroit Edison Co.*, 310 NLRB 564 (1993).

In Roll & Hold Warehouse and Distribution Corp., 325 NLRB 41, 42 (1997), the Board cited Detroit Edison in stating:

> One of the purposes of initial notice to a bargaining representative of a proposed change in terms and conditions of employment is to allow the representative to consult with unit employees to decide whether to acquiesce in the change, oppose it, or propose modifications.

In *American Pine Lodge Nursing*, 325 NLRB 98 (1997), enf. denied in relevant part 164 F.3d 867 (4th Cir. 1999), the Board found that an employer unlawfully sent employees and their union bargaining representative a letter offering a wage increase since the employer did not first afford the union an opportunity to consider the proposal before setting it before the employees. According to the Board, such conduct is unlawful because it "erodes or undermines the bargaining representatives role in the bargaining process." *American Pine Lodge Nursing*, 325 NLRB 98, 104 (1997)

In *American Pine Lodge Nursing Rehabilitation Center v. NLRB*, 164 F.3d 867 (4th Cir. 1999), the circuit court denied enforcement of 325 NLRB 98 (1997) on the grounds that nothing in the letters to employees could be construed as an invitation for direct bargaining. The court found "no support for a rule requiring employers to delay informing employees of a proposal until the union has had some period of time to consider it."[8] 164 F.3d at 876. Rather, the court found that employer's communication was protected by Section 8(c) of the Act.

The Board's decision in *American Pine Lodge Nursing*, 325 NLRB 98 (1997), remains good law as the Board has not adopted the circuit court decision.[9] However, the Board did, in *Armored Transport, Inc.*, 339 NLRB 374, 376 (2003), distinguish the circuit court decision in *American Pine Lodge Nursing*. In *Armored Transport*, the Board found that the employer dealt directly with employees by sending "Don't Blame Us" letters setting forth new bargaining proposals without affording the union "either an opportunity to consider the proposal or to bargain." These letters were sent on the same day the employer communicated these proposals to the union. In distinguishing *American Pine Lodge Nursing & Rehabilitation Center v.* NLRB, 164 F.3d 867 (4th Cir. 1999), the Board noted that the employer communicated its new proposals to employees and the union simultaneously and, in the "Don't Blame Us" letters, disparaged the union and encouraged employees to reject the union. 339 NLRB at 377. The Board noted that Section 8(c) of the Act only protects speech that is free of coercion and does not constitute direct bargaining. Id. at 376–377.

In *United Technologies Corp.*, 274 NLRB 609, 610 (1985), the Board found no violation where an employer distributed

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[8] In so finding, the court purported to distinguish *Detroit Edison* on the ground that the proposal at issue in *Detroit Edison* was distributed to employees before presenting it to the union. However, in *Detroit Edison*, the Board specifically found that the Marysville memorandum was unlawfully distributed to employees on September 3, 1991, even though it was given to a union representative in late-August 1991. 310 NLRB 564 at 565.

[9] The Board recently cited *American Pine Lodge Nursing*, 325 NLRB 98 (1997), with approval in *Professional Medical Transport, Inc.*, 362 NLRB 144, 146 (2015).

leaflets to employees which explained the final contract offer it made to the union earlier that day. The employer offered a 2-year reopener package or a new 3-year contract. In the leaflet, the employer expressed its preference for the 3-year contract. However, the Board found that the employer did not violate the Act when it publicized its bargaining position to employees in a noncoercive manner that "fully acknowledged the Union's rightful role as the employees' statutory bargaining representative." Id.

In *KEZI, Inc.*, 300 NLRB 594 (1990), the Board found that an employer did not violate the Act by announcing a new 401(k) plan with the following eligibility language:

> Some questions have arisen as to the eligibility requirements for the 401K plan. The plan will exclude the following: . . . Employees who are members of a collective bargaining unit with whom retirement benefits were the subject of good-faith bargaining.

In so holding, the Board noted that it has "not hesitated to find eligibility language lawful when, as here, it indicates that pension benefits for unionized employees are subject to negotiation but does not suggest that employees are automatically and irrevocably foreclosed from inclusion in a particular plan simply because they have a union bargaining on their behalf." Id. at 595.

The events in *Detroit Edison Co.*, 310 NLRB 564 (1993), which I find controlling, are significantly analogous to the facts of the instant case. Here, the Respondent did not disclose its Growing Together harmonization plan to the Union during the March 29 bargaining session even though it was a joint session arranged, in part, for just such a purpose. On May 19, after Ragaglia notified Deluca that Respondent to present information on the harmonization with all employees on May 22, Deluca specifically warned Ragaglia against direct dealing with unit employees on mandatory subjects of bargaining. During the bargaining session on May 21, at about 3 p.m., the Respondent gave a presentation to the Union regarding a new harmonized benefits package it desired to implement throughout its facilities. The harmonization plan included a specific statement of benefits which were different than certain contractual benefits enjoyed by unit employees. Ragaglia testified that this May 21 presentation was somewhat rushed because the Union bargaining team had to leave at 4 p.m. In addition, the Respondent refused to give the Union a hardcopy of the presentation as Halfacre requested. The Respondent made its Growing Together website public less than 24 hours later and, on May 22 at 11:06 a.m., emailed all employees - union and nonunion alike—a flyer with links to that website. Usage of the Growing Together website spiked on May 22 between 11 and 12 a.m.[10] Making matters worse, the Respondent did not prepare and present its economic contract proposals to the Union for another 2 months. Accordingly, unit employees were made aware of the Respondent's anticipated changes long before the Union had an opportunity to review actual proposals, discuss them with employees, and engage in bargaining. This could only serve to undermine the Union as the bargaining representative of unit employees. As in *Detroit Edison*, "the foregoing is sufficient to establish a prima facie case of unlawful direct dealing."[11] 310 NLRB at 565.

The Respondent has emphasized that its harmonization presentation on May 21 and 22 did not constitute bargaining proposals, which were not made until months later. However, I do not find this fact to be exculpatory. Except for certain disclaimers addressed below, the Respondent's Growing Together harmonization rollout affirmatively advised employees, including unit employees, in largely unqualified language, that their benefits would change. These communications were more likely (not less) to undermine the union than if they were accompanied by actual proposals and included a clear statement that such proposals might not be implemented or might be modified as a result of collective bargaining. Accordingly, it is not surprising that Halfacre objected to bargaining over a website and demanded actual bargaining proposals instead.

Indeed, I find the Respondent's failure to present bargaining proposals before rolling out its harmonization plan to be a critical factor in distinguishing the instant case from *United Technologies Corp.*, 274 NLRB 609, 610 (1985). In *United Technologies*, an employer lawfully communicated to employees its desire that the union accept one of two final proposals it presented to the union earlier the same day. Although the employer effectively preempted and sought to impact the union's ratification meeting, the union was in possession of the employer's proposals and in a position to discuss them with unit employees if it chose to do so. Here, however, the Respondent presented the harmonization plan directly to employees at least 2 months before it made economic proposals to the Union. Thus, the Union was not in a position to address those proposals with unit employees or negotiate over harmonization at the bargaining table.

The Respondent contends that it did not, in its initial harmonization presentation to employees, disparage the Union or induce unit employees to abandon their bargaining representative. I agree, but do not find this fact to constitute a valid defense under current law. In *Armored Transport, Inc.*, 339 NLRB 374, 376 (2003), the Board distinguished *American Pine Lodge Nursing & Rehabilitation Center v.* NLRB, 164 F.3d 867 (4th Cir. 1999), by noting that the "Don't Blame us" letters at issue disparaged the union and encouraged employees to reject the union. However, the Board has found direct dealing in the absence of such disparagement or encouragement, and has not adopted the circuit court decision in *American Pine Lodge Nursing & Rehabilitation Center v.* NLRB, 164 F.3d 867 (4th Cir. 1999).

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[10] As in *Detroit Edison*, the Union was long aware of the Respondent's general bargaining position. The Respondent told the Union it wanted to harmonize employee benefits during the 2017 contract negotiations. Further, in a May 19 email to Deluca, Ragaglia stated that he wanted to give the Union advance notice of the harmonization plan before it was published to employees so the Union would "be prepared for any questions your members may have." However, the Respondent presented the Union with the details of the plan less than 24 hours before the Growing Together website went public to all employees. This was even less advanced notice than the union had in *Detroit Edison.*

[11] Since the Respondent's rollout of its harmonization plan would tend to undermine the Union and the bargaining process, it is it is not protected by Section 8(c) of the Act.

Meanwhile, *Detroit Edison* is the case most closely on point and still good law.

The Respondent relies to a great extent on disclaimers in the Growing Together website and flyers as a defense to the General Counsel's case. In my opinion, such a defense would have merit if the Respondent made clear to unionized employees that any anticipated change in benefits would not apply to them.[12] An employer with a large unrepresented workforce must be allowed to communicate with those employees regarding changes to their terms of employment while effectively advising represented employees that such changes will not apply to them. Indeed, a disclaimer would probably provide a valid defense if it clearly communicated to unit employees that changes to their terms of employment would not be implemented unless and until the parties engaged in good-faith negotiations.[13] *KEZI, Inc.*, 300 NLRB 594 (1990). However, the Respondent failed to prove that it effectively communicated such a disclaimer to unit employees.

The Respondent relies on the following language that appeared in extremely small font at the bottom of each page of the website and in the flyers the Respondent emailed and handed out to employees:

> We are required by law to deal with the unions on behalf of unionized team members, and we will continue to do so. We will only negotiate with the unions, not with individual unionized team members.[14]

This language provides a brief and broad statement of legal principle that would not necessarily convey to a layperson employee the Respondent's intent to withhold the implementation of benefit changes unless and until it negotiated with the Union in good-faith to agreement or impasse. In fact, the language seems to read more as a notice to individual unit employees that the Respondent would not deal with them about any concerns they might have regarding changes in their benefits. Further, the small font of the disclaimer did not present the language in a prominent manner. In my opinion, the Respondent failed to establish that this disclaimer effectively rebuts the General Counsel's prima facie case.

Interestingly, the Respondent's May 22 flyer announced to employees, in part, "Please keep in mind that many of the details are still in progress, and subject to regulatory and operational considerations, which may result in some modifications - we'll continue to provide updates throughout the year." This would have been a natural place to include a reminder that the anticipated changes might not apply, in whole or in part, to unionized employees after bargaining. Although the Respondent indicated that it might decide to modify its benefits plan as a result of regulatory and operational considerations, the Respondent made no specific reference to its bargaining obligation.

In its posthearing brief, the Respondent did *not* refer to or rely upon the following language that, according to Ragaglia, was included as a footnote in the "Tomorrow" section of the Growing Together website when it was made public on May 22:

> We are required by law to negotiate about mandatory subjects of bargaining with the unions that represent a small number of Hackensack Meridian *Health* team members. Some of the labor contracts between Hackensack Meridian *Health* allow respective represented team members to automatically receive the benefits non-union team members receive; Others do not. We currently are in negotiations with some unions that represent team members, and are negotiating about of the benefits referenced on this website. We are committed to negotiating in good faith as required by law, and we will not engage in any direct dealing with union-represented team members. Union-represented team members should contact their respective union about any questions they have.

In hindsight, as discussed above (fn. 7), the Respondent's evidence of this alleged language should not have been admitted into evidence under the best evidence rule. Further, in my opinion, although this alleged language is more detailed and effective as a disclaimer than the shorter one actually relied upon the Respondent, it offers more of an explanation why unionized employees might not share in improved benefits under the harmonization plan than an indication that unfavorable changes might not be implemented following good-faith negotiations. Regardless, even if evidence of this language were admissible and the language constituted a legally sufficient disclaimer, the Respondent failed to establish that any or all of the unionized employees actually saw it. The language allegedly appeared on only a single footnote on a single webpage. Accordingly, this disclaimer does not defeat the General Counsel's prima facie case.

The Respondent also failed to establish that its near simultaneous presentation of the Growing Together harmonization plan to employees was the result of some exigent need. Although this is not a case that involves a unilateral change, it is useful to consider Board authority regarding exigencies that allow an employer to expedite bargaining and make certain unilateral changes in advance of overall contractual impasse. *RBE Electronics*, 320 NLRB 80, 81–82 (1995). The Board has held that this "exception is limited only to those exigencies in which time is of the essence and which demand prompt action." Id. at 82. Further, "the employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable." Id. While *RBE Electronics* does not specifically apply to direct dealing allegations, it provides helpful guidance as to when an employer's standard bargaining obligation might be altered as a result of an exigency.

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[12] The record contains some factual discrepancies as to whether the Respondent included disclaimer language in its presentations to the Union on May 21 and 22. I do not consider these discrepancies significant. In my opinion, the disclaimers are only relevant to the extent they were likely to be viewed by unit employees and how unit employees would be likely to interpret them.

[13] I do note, however, that such an assurance of good-faith negotiations does not necessarily address the rationale behind the *Detroit Edison* line of cases—e., a union should be afforded the opportunity to bargain and present employer proposals to employees at its own time and in its own way.

[14] The flyers that were emailed and handed out to employees included the same disclaimer language, but referred to "employees" instead of "team members." (GC Exh. 7, 8, 10.)

Here, the Respondent failed to establish that it was unable to present harmonization proposals to the Union earlier than it did. Powderly admitted that preparation of the harmonization plan took 18 months and that certain aspects of the plan were finalized along the way. Although the Respondent may have had some reason to keep its plan confidential, the record does not contain any evidence of the same. Thus, the Respondent presented no evidence why, for example, it could not have notified, consulted, and made proposals to the Union on a rolling basis, perhaps with some agreement as to confidentiality. The timing of events at issue here was not caused by unforeseeable external events beyond the employer's control. Rather, the Respondent made a choice to present the plan to the Union and unit employees at about the same time and in a manner that runs afoul of current Board law.

Even if the Respondent did have some reason or need to keep the union in the dark until May 21, the Respondent failed to establish that it could not withhold a broader rollout of the plan until the Union was given an opportunity to digest the information and act upon it accordingly. After the harmonization plan was finalized in May, the Respondent still had several months to discuss the plan with the Union before employees would need to begin making benefit elections in October. Thus, the Respondent did not establish that time was of the essence to such an extent that it had to publicize the harmonization plan to employees on May 21. Once again, the Respondent made a choice to present its plan at a time and in a manner that was likely to undermine the union as the bargaining representative of unit employees.

Based upon the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by dealing directly with unit employees. More specifically, the Respondent unlawfully failed to provide the Union with adequate advance notice and bargaining proposals before publicizing to unit employees its desire to change their terms of employment.

Conclusions of Law

1. The Respondents, Southern Ocean Medical Center, Jersey Shore University Medical Center, Palisades medical Center, and The Harborage, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Health Professionals and Allied Employees, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union represents employees of the Respondents in appropriate units as defined in paragraph 10 of the complaint and the collective-bargaining agreements entered into evidence as General Counsel exhibits 13 and 15.

4. The Respondents dealt directly with bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act by announcing its desire to changes their terms and conditions of employment without providing the Union adequate advanced notice and bargaining proposals.

5. The unfair labor practices committed by the Respondents affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents Southern Ocean Medical Center, Jersey Shore University Medical Center, Palisades Medical Center, and The Harborage have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents will be ordered to post appropriate notices, as described in the attached appendixes. These notices shall be posted in the Respondents' facilities or wherever notices to employees are regularly posted for 60 days without anything obscuring or defacing their contents. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondents customarily communicate with their employees in such a manner. In the event that, during the pendency of these proceedings, one or more of the Respondents have gone out of business or closed a facility involved herein, the Respondent(s) shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by them at any time since May 21, 2018.

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

ORDER

The Respondents, Southern Ocean Medical Center of Manahawkin, New Jersey, Jersey Shore University Medical Center of Neptune, New Jersey, Palisades Medical Center of North Bergen, New Jersey, and The Harborage of North Bergen, New Jersey, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the Union, Health Professionals and Allied Employees, and dealing directly with bargaining unit employees regarding mandatory subjects of bargaining without providing the Union adequate advanced notice and bargaining proposals. The appropriate bargaining units are the Southern Ocean RN unit, Jersey Shore RN unit, Palisades RN unit, and The Harborage service/maintenance unit as defined in paragraph 10 of the complaint, as well as the Palisades LPN/Techs and Service/Maintenance units as defined in the collective-bargaining agreements entered into evidence as General Counsel exhibits 13 and 15.

(b) In any like or related manner interfering, 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) Within 14 days after service by the Region, post in Respondent Southern Ocean's facility located at 1140 Route 72 West, Manahawkin, New Jersey, Respondent Jersey Shore's facility located at 1945 Route 33, Neptune, New Jersey, Respondent Palisades' facility located at 7600 River Road, North Bergen,

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

New Jersey, and Respondent The Harborage's facility located at 7600 River Road, North Bergen, New Jersey, copies of the attached notices marked "Appendix A," "Appendix B," Appendix C," and "Appendix D," respectively.[16] Copies of the notices, on forms provided by the Regional Director for Region 22, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If one or more of the Respondents have gone out of business or closed a facility involved in these proceedings, the Respondent(s) shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent(s) at any time since May 21, 2018.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 22 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.

Dated: Washington, D.C., April 24, 2020

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 bypass your Union, Health Professionals and Allied Employees, and deal directly with you regarding changes we would like to make to your wages, hours, and other terms and conditions of employment without giving the Union adequate advanced notice and bargaining proposals.

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.

SOUTHERN OCEAN MEDICAL CENTER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-223734 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT bypass your Union, Health Professionals and Allied Employees, and deal directly with you regarding changes we would like to make to your wages, hours, and other terms and conditions of employment without giving the Union adequate advanced notice and bargaining proposals.

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.

JERSEY SHORE UNIERSITY MEDICAL CENTER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-223734 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX C

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT bypass your Union, Health Professionals and Allied Employees, and deal directly with you regarding changes we would like to make to your wages, hours, and other terms and conditions of employment without giving the Union adequate advanced notice and bargaining proposals.

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.

PALISADES MEDICAL CENTER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-223734 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

APPENDIX D

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT bypass your Union, Health Professionals and Allied Employees, and deal directly with you regarding changes we would like to make to your wages, hours, and other terms and conditions of employment without giving the Union adequate advanced notice and bargaining proposals.

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.

THE HARBORAGE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-223734 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.