**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MARRIOTT HARTFORD DOWNTOWN HOTEL,

Employer/Petitioner,

v.

UNITE HERE LOCAL 217,

Union.

Case No. 34-RM-88

# BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER


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## <u>BRIEF OF *AMICUS CURIAE*</u><br><u>THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA</u>

## <u>INTRODUCTION</u>

It is the position of the undersigned *amicus*, the Chamber of Commerce of the United States of America ("the Chamber"), that the RM petition should be processed and an election held because there is "reasonable cause to believe that a question concerning representation affecting commerce exists…." 29 U.S.C. §159(c)(1). The bare fact that UNITE HERE Local 217 ("Union"), the labor organization involved, does not presently claim to *already have* majority status should *not* be the exclusive controlling consideration. The statutory language simply does not require that result. This case provides compelling reasons for the National Labor Relations Board ("NLRB" or "Board") to construe the National Labor Relations Act ("Act") concerning RM petitions in line with present realities. Here, a specific labor organization has targeted strategically a specific group of employees for exclusive representation. Having selected the target, the Union has subjected the group's employer, the Marriot Hartford Downtown Hotel ("Marriott" or "Hotel"), to pervasive economic, political and

public relations pressure to accede to the Union's demand for favored and exclusive treatment. It is obvious that the Union wants this exclusive treatment in order for it to represent the employees, and it has even invoked the local "living wage" ordinance to compel recognition by the Hotel.

The Union itself chose the sequence of its pressure tactics and the timing of its demand for the Hotel to sign a binding and judicially enforceable "card check" or "labor peace" agreement. If signed, the Hotel would immediately waive the statutory right to file an RM petition. More importantly, the employees would be shut out from access to a NLRB-supervised secret ballot election. The employees would be deprived of their Section 7 rights to bargain collectively "through representatives *of their own choosing* ..." 29 U.S.C. §157 (emphasis added).

In summary, the Union's own actions are sufficient to create a question concerning representation and a claim to be recognized as the majority representative. The Union clearly demanded that the Hotel immediately waive the right to file a petition with the NLRB. The Union clearly demanded that the targeted employees forego access to a secret ballot election. And the Union has for months been asserting economic, political and public relations leverage to support its demands. Under these circumstances, which are all designed to establish majority status for the Union, the Hotel should have the right to file its RM petition and have it processed to election. Given that a secret ballot election is the hallmark of our democratic system, a cornerstone of the Act, and the preferred method for determining representation questions, the Board should reverse the Regional Director's dismissal of the petition.

## INTEREST OF THE AMICUS

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents and has an underlying membership of more than 3 million businesses and organizations of many sizes, in every sector and region of our Nation. An important function of the Chamber is to represent the interests of its members in significant cases that address issues of fundamental and widespread concern to the business community. The Chamber has participated as *amicus curiae* in dozens of prior cases before the National Labor Relations Board. The business community has a deep interest in preserving the integrity of the NLRB supervised procedures through which employees choose for themselves whether they will or will not be represented by labor organizations for purposes of collective bargaining.

## STATEMENT OF THE CASE

In its August 4, 2006 Order, the National Labor Relations Board ("Board" or "NLRB") stated that this case presented two key questions:

1. Did the Union's actions in the instant matter provide sufficient basis for the employer to file and the NLRB to process the instant RM petition?

2. Is an election the better way to ascertain employee free choice?

It is the Chamber's position that both those questions must be answered in the affirmative. The impetus for the NLRA was to reduce the disruption to commerce and to minimize the resort to self-help tactics in the determination of employees' choice of representation. *See* 29 U.S.C. §151. Further, the Act limits the duration of the disruption to interstate commerce in recognitional picketing campaigns to 30 days or less. *See* 29 U.S.C. §158(b)(7)(C). These principles and timelines provide key guidance to assist the Board in construing the RM petition provision, 29 U.S.C. §159(c)(1)(B), in line with the Act as a whole and in consideration of its basic premise, that employees have the right to choose – to choose not

only *whether* to be represented but also to choose the *identity* of that representative. Selecting the *identity* of their union representative is part and parcel of the rights guaranteed by Section 7 of the Act. *See* 29 U.S.C. §157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives *of their own choosing* ..."). *See also North American Aviation, Inc.*, 115 NLRB 1090, 1095 (1956) (directing an election per a petition by the Operating Engineers to represent a group of employees in a larger unit already represented by the Auto Workers in order to, without making a "final unit determination at this time, ... first ascertain the desires of these employees as expressed in the election"; and further rejecting the Auto Workers' request to defer any election pending operation of the "no-raiding" provisions of the AFL-CIO).[1]

When the NLRB adopted card check as a valid means of extending recognition to unions, it was based on an entirely different model than is present today. Under the prior model, employees were free to select the identity of the specific union they wanted as their exclusive representative. The employees then signed authorization cards and the union approached the employer, seeking recognition via card check as "confirmation" of the union's claim of majority support. This was, and remains, a lawful option.

Today, the use of a coerced card check by a union is before the Board. This model radically differs from the card check model that existed during the genesis of Board law in this area. Today, unions seek to usurp the right of employees to choose, in the first instance, the identity of their representative. Instead of first being selected by the employees before the union approaches the employer, the union now pre-selects or targets a group of employees. The union

[1] Board law is clear that it will not defer the resolution of a question concerning representation to a private dispute resolution mechanism such as a no-raid tribunal set up by labor organizations. *See, e.g., Cadmium & Nickle Plating*, 124 NLRB 353 (1959); *Jackson Engineering Co.*, 265 NLRB 1688, 1701 (1982).

then goes directly to the employer and demands "neutrality and card check" recognition, i.e., an effective waiver of there ever being a NLRB supervised secret ballot election. A coerced card check cancels the normal interplay of market forces from which particular unions are selected or not on their merits *by the employees.*

The coerced check card model also leads to new abuses that now are plaguing some unions, including the abuse of "sweetheart deals" that some unions have cut with more vulnerable employers. *See, e.g.*, "Union Disunity," copy attached at Tab A, published April 11, 2007 in San Francisco Weekly, (available at www.sfweekly.com/2007-04-11/news/union-disunity) which describes the internal conflicts within SEIU Healthcare West that stem from sweetheart deals arising out of card check agreements. In order to grant the employees their full range of rights granted by Section 7, the Board should cut through the tension between employee free choice and union self-preservation. The former is protected by the Act.

The demand by UNITE HERE Local 217 that the Marriott Hartford Downtown Hotel enter into a binding and enforceable labor agreement, when accompanied by coercive tactics extending for more than 30 days, creates a clear basis for the filing of a RM petition. The facts in the record demonstrate that the Hotel is not seeking to "file early" to stave off an incipient organizing drive. Rather, the petition is being filed as the only way to allow employees the right to choose the identity of their representative via the Act's preferred method, a secret ballot election.[2]

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[2] *See Shaw's Supermarkets*, 343 NLRB 963, 964 (2004) ("the Board's election machinery is the preferred way to resolve the question of whether employees desire union representation.") (*citing NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

## STATEMENT OF FACTS

The Marriott Hartford Downtown Hotel ("Marriott" or "Hotel") opened in August 2005. Soon thereafter, UNITE HERE Local 217 ("Union") sought a meeting with the Hotel to negotiate a "labor peace" agreement. The Union reiterated its demand to meet with the Hotel regarding the "labor peace" agreement numerous times and also sought a card-check recognition provision. The Union and its supporters base their request for a "labor peace" agreement on the City of Hartford's Living Wage Ordinance ("LWO"), arguing that the LWO requires the Hotel to enter into a labor peace agreement. The Hotel maintains that the LWO is not applicable to its operations. The LWO mandates that covered employers and unions seeking to represent its employees reach written agreements regarding processes to determine union recognition in exchange for a waiver of the right to engage in a recognitional strike by the unions.[3] A card check agreement pursuant to the LWO mandate eliminates the right of employees to choose the identity of their representative and the possibility of employees utilizing the Board's long-standing procedure of a secret ballot election.

The Union has utilized coercive tactics in an effort to force the Hotel to sign a card check agreement. The Hotel flatly has refused to sign the agreement offered. Nonplussed, the Union has attempted to coerce the Hotel into signing the card check agreement through the following tactics: engaging in representational picketing in front of the Hotel; soliciting the cooperation

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[3] Sec. 2-766 of the LWO states:

> All development project managers are required to sign a written agreement with the labor organization seeking to represent employees at the development project which agreement provides a procedure for determining employee preference on the subject of whether to be represented by a labor organization for collective bargaining and further provides that the labor organization will not strike the development project in relation to the organizing campaign.

and assistance of Hartford city officials, state legislators and other interest groups; soliciting the Hotel's customers to cease doing business with the Hotel in order to support the Union in its dispute with the Hotel; and communicating with the Hotel's employees at their homes. These tactics affect and interfere with commerce. Importantly, the Union's objectives in using these economic tactics are to force the Hotel to grant it the exclusive right to represent the employees and to forgo a Board conducted secret ballot election.

The Union has attacked the Hotel on multiple fronts in an effort to achieve exclusive representative status. Specifically, the Union sought to have the City of Hartford terminate tax benefits received by the Hotel. The Union "persuaded" State government officials to support an economic boycott of the Hotel. Additionally, the Union sought the support of potential customers of the Hotel to encourage the Hotel to sign a labor peace agreement. For example, the Hotel received communication from the Christian Activities Council stating that it had decided not to patronize the Hotel and hold its awards dinner there because of the Hotel's refusal to negotiate a labor peace agreement.

The Hotel rightly and reasonably contends that the Union has made a demand for recognition. On April 18, 2006, nearly *six months after* the onset of the interference with commerce began, the Hotel filed its RM petition requesting the Regional Director to direct an election among the Hotel's employees in the bargaining unit. The Regional Director dismissed the petition, relying on *The New Otani Hotel & Garden,* 331 NLRB 1078 (2000) (2-1 decision; Members Fox and Liebman in majority with Member Hurtgen dissenting). On August 4, 2006, the Board granted review of the Regional Director's decision, emphasizing that its purpose in granting review was to determine the best method for ascertaining employee choice.

## ARGUMENT

### I. It is the Board's Statutory Responsibility to Minimize the Use of Self-Help Tactics, And It is Most Consistent with this Responsibility to Process the RM Petition under the Facts Presented

Since the inception of the Act, the Board has been responsible for minimizing the use of destructive self-help tactics by parties regarding the issue of the employee choice of representation and for providing orderly processes to determine employee sentiment. It also placed a limit on the duration of the interference with commerce occasioned by recognitional conflicts. *See* 29 U.S.C. § 158(b)(7). Indeed, President Roosevelt, when approving the Act, stated: "By providing an orderly procedure for determining who is entitled to represent the employees, [the Act] aims to remove one of the chief causes of wasteful economic strife."[4] The Act in Section 9 provides the mechanisms for that "orderly procedure," but only in a skeletal format. It is incumbent upon the Board to amplify the Section 9 requirements in a manner consistent with the goals articulated by the drafters of the legislation.

The Taft-Hartley Act of 1947 amended the original Act in significant respects, including the addition of Section 9(c)(1)(B).[5] The amendments reinforced the underlying goal of ensuring

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[4] NLRB First Annual Report, at p. 9.

[5] Section 9(c)(1) provides in relevant part that where a petition is filed:

> (B) by an employer, alleging that one or more labor organizations have presented to him a claim to be recognized as the representative defined in Section 9(a) of this section;
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

Section 9(a) provides in relevant part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit

that parties' self-help tactics do not interfere with employee free choice and the processes to determine employee sentiment. It also placed a limit on the duration of interference with Commerce occasioned by recognitional conflicts. *See* U.S.C. §158(b)(7)(C). Indeed, Section 9(c)(1)(B) was intended to further achieve the Act's primary goal of ensuring employee free choice by use of the Board's process. Prior to the 1947 amendments, coercive tactics by unions forced employers and employees to concede to union organizational demands without the benefit of a Board-conducted secret ballot election. As Senator Taft stated in support of the amendment:

> Today an employer is faced with this situation. A man comes into his office and says, "I represent your employees, sign this agreement, or we strike tomorrow." Such instances have occurred all over the United States. The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board under those circumstances, and say, '*I want an election*. I want to know who is the bargaining agent for my employees.' Certainly I do not think anyone can question the fairness of such a proposal.[6]

As further noted by Senator Ball, Section 9(c)(1)(B) gives an employer "the right to make sure that by a *democratic election*, a union represents his employees before he negotiates a contract with it."[7]

### A. New Economic Self-Help Tactics Facing Employers

Today, just like the situation described by Senator Taft 60 years ago, an employer such as the Hotel faces a situation wherein the union representative comes into his office and says, in effect:

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> appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rate of pay, wages, hours of employment, or other conditions of employment.

[6] Legislative History of the Labor Management Relations Act, Vol. II, p. 1013 (emphasis added).

[7] *Id.* at 1523 (emphasis added).

> My union has decided we want to represent your employees. We do not have the support of any of your employees, yet. Sign this agreement recognizing us as *the* union who will represent your employees, waiving your right and the right of your employees to a secret ballot election or we will engage in coercive economic actions against your business.

Of late, unions, rather than striking or picketing for recognition, have developed new forms of coercive self-help techniques to force recognition without the benefit of a Board supervised election. Nevertheless, it remains the purpose of the Act to minimize use of such tactics and to encourage use of the Section 9 processes (i.e., secret ballot elections). See 29 U.S.C. § 158(b)(7) (limiting the period of recognitional picketing). The Supreme Court has clearly stated as follows with respect to Board elections: "In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored."[8] The Board itself has stated, "the objectives of our statute are best served by encouraging the parties to utilize our orderly election procedures to establish a reliable majority support foundation for a bargaining relationship."[9]

Prior to the passage of the Act and the 1947 amendments, strikes and secondary activity with a recognitional objective caused much "wasteful economic strife." Corporate campaigns have replaced strikes and secondary activities as a way to apply economic pressure on employers so as to force employers to waive their right and the right of the employees to a secret ballot election and to deal with unions directly. The tactics of corporate campaigns, such as those used

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[8] *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301, 307 (1974) (holding that employer did not violate duty to bargain under the Act by refusing to accept evidence of union's majority status other than results of Board election; unions that were refused recognition despite cards and other evidence purporting to show that they represented the majority of the employees had burden of taking next step in invoking Board's election procedure).

[9] *Wilder Manufacturing Co., Inc.*, 198 NLRB 998, 999 (1972), *reversed*, 487 F.2d 1099 (D.C. Cir. 1973), *vacated sub. nom, Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974).

by the union in this matter (e.g., political pressures and attempts to influence Hotel customers), are no less economically wasteful.[10] Unions have made clear that the intent and purpose of corporate campaigns is to cause economic harm to employers who refuse to enter into "labor peace" type agreements. UNITE HERE President, Bruce Raynor, in support of corporate campaign tactics, has stated: "We're not businessmen, and in the end of the day they are. If we're willing to cost them enough, they'll give in."[11]

The Board cannot turn a blind eye toward the labor relations tactics of today. Rather, the Board must interpret and enforce the Act based on these new economic tactics. As stated by two of the current members of the Board: "As an administrative agency responsible for enforcing Congressional policy, the Board has a fundamental duty – 'to adapt [its] rules and practices to the Nation's needs in a volatile, changing economy. Indeed, the primary function and responsibility of the Board ... is that of applying the general provisions of the Act to the complexities of industrial life.'" (internal citations omitted).[12] The issues presented in this case provide the Board with an opportunity to do just this. Indeed, it is the Board's responsibility to do so.

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[10] *See* J. Manheim, *"The Death of a Thousand Cuts: Corporate Campaigns and the Attack on the Corporation"* at pp. 255-269 (2001, LEA Publishers).

[11] *Id.* at 214 (quoting from speech at the annual meeting of the American Political Science Association in Atlanta, Georgia on September 3, 1999).

[12] *Oakwood Care Center*, 343 NLRB 659, 667 (2004) (Members Liebman and Walsh, dissenting).

## B. The Board's Decision in *New Otani Hotel* Should Be Limited to Its Own Facts or, Alternatively, Overruled

The Board's decision in *New Otani Hotel* flies in the face of the Act's underlying purpose of discouraging economically destructive self-help tactics that interfere with commerce.[13] Rather than permitting orderly election processes that protect employee free choice, the Board's two-member majority opinion in *New Otani Hotel,* carried out literally without any grounding in today's card check model, encourages economic waste and destructive self-help tactics.

The Board has been less than enthusiastic in adhering to *New Otani Hotel.* In subsequent cases on similar facts, the Board divided 2-2 in *Rapera, Inc.*, 333 NLRB 1287 (2001) (Chairman Truesdale and Member Hurtgen would have processed the petition while Members Liebman and Walsh would not, and with no majority decision the regional director's action was affirmed).[14] And in *Brylane, L.P.*, 338 NLRB 538 (2002), two Members, Liebman and Bartlett, denied the request for review, with Member Bartlett expressing "no view on the correctness of the decision in *New Otani.*" 338 NLRB at n. 1. Member Cowen vigorously dissented. Given this reception,

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[13] *The New Otani Hotel & Garden*, 331 NLRB 1078 (2000) (Members Fox and Liebman hold that union picketing, boycott and request for neutrality and card check agreement did not demonstrate a "present demand for recognition as the majority representative" as the majority construes Section 9(c)(1)(B) to require, and therefore affirmed the regional director's dismissal of the RM petitions filed). Dissenting, Member Hurtgen keenly observed that:

> My colleagues apparently distinguish between a present demand for recognition and an ultimate demand for recognition. However, *Section 9(c)(1)(B) contains no such distinction.* And, even if it did, it is as least arguable that ... the Union is presently seeking recognition in these cases.".

331 NLRB at 1083 (emphasis added).

[14] Chairman Truesdale would have reinstated the petition due to a contemporaneous court affidavit filed by a union agent asserting majority support existed; Member Hurtgen agreed, but also referenced his prior dissent in *New Otani Hotel.*

the current Board should consider carefully these comments regarding Section 9(c)(1)(B), in one of the cases that were treated by the Supreme Court in *Linden Lumber*:

> We are dealing here with a phenomenon which continues to occur with some frequency in our society – a union determined upon an organizational effort and an impatient work force, eager to secure immediate bargaining, encountering an employer who is not willing voluntarily to enter into a collective-bargaining relationship. The seemingly irresistible force has encountered the seemingly immovable object.
>
> Is it wise, in such cases, to encourage conflict, strikes, and contested litigation before this Board as a means of establishing a shaky foundation for future bargaining?
>
> We think not.
>
> We think it far better, by making clear. . . .that the proper course [is] to invoke our election processes.[15]

Contrary to this view, the Board's decision in *New Otani Hotel* encourages "conflict," "contested litigation" and "wasteful economic" skirmishes. All of these issues are driven by a union's attempt to force an employer to "deal with" it and to foreclose the employer and the affected employees from seeking access to the Board's election processes to resolve the representation question. Such a result clearly runs contrary to the intent and purposes of the Act.

It is respectfully submitted that the majority opinion in *New Otani Hotel* was wrongly decided and should be limited or overruled on at least the following grounds:

- Although the majority acknowledges the union's use of economic weapons to force a card check agreement, it ignores the economic and coercive impact of the union's tactics in its analysis.
- The majority decision does not address the fact that the union, without achieving majority status, sought to force the employer to deal with it regarding a mandatory subject of bargaining.

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[15] *Wilder Manufacturing Co., Inc.,* 198 NLRB 998, 999 (1972), *reversed,* 487 F.2d 1099 (D.C. Cir. 1973), *vacated sub. nom, Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974).

- The majority opined that allowing employers to file RM petitions in such situations would allow employers to preemptively undercut the union's organizing drive. This argument is surely without merit. The union still controls the timing by deciding when to demand that the employer agree to an enforceable card check/neutrality agreement.

- The majority suggests that all union organizing activities "including such common activities as soliciting authorization cards, meeting employees and appointing in plant committees" might be the basis of petition by an employer if the Board allowed. No party in *New Otani Hotel,* however, argued that such traditional union organizing techniques would be a valid basis for a RM petition and we do not do so here.

### C. Board and Court Deferral to Non-Board Recognition Agreements

In the seminal card check case, *Snow and Sons,*[16] the union had first obtained majority support of the employees the union sought and the employer entered into a card check agreement which was truly voluntarily. The union then demonstrated its majority status that very same day. *After* the union had demonstrated its majority status, the employer demanded an election. The Board held that the employer was bound by the card check results. The Board's holding in *Snow* was based on an estoppel theory, that an employer cannot renege on an agreement to recognize the union once the union actually had demonstrated its majority status.[17]

Although the Board has enforced voluntary recognition agreements, including provisions for card checks, which were part of a collective bargaining agreement between an employer and a labor organization having Section 9(a) status,[18] the Board has not enforced agreements to

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[16] 134 NLRB 709 (1961) (finding that union had obtained majority status through signed applications for membership), *enforced,* 308 F.2d 687 (9th Cir. 1962).

[17] *See Sprain Block Manor*, 219 NLRB 809, 815 (1975) (finding that employer violated the Act by recognizing union and executing a collective-bargaining agreement containing union-security provision at time when union did not represent majority of employees).

[18] *See Verizon Information Systems*, 335 NLRB 558 (2001) (dismissing union's representation petition holding because employer and union had agreed to a card-check and voluntary recognition procedure that barred the petition).

conduct a card check *at some future time* when such agreement was initially made with a labor organization that had not yet established a Section 9(a) relationship with the employer.[19] However, the courts have found such agreements to be fully enforceable as labor agreements under Section 301 of the Act. Significantly, the courts have not addressed the issue of whether employers are entitled to file a RM petition before entering into such agreements.[20] Thus, the Board's current position, while denying the Hotel's use of the Board processes, would force the Hotel to enter into an agreement which the Board may not enforce but the courts historically have enforced.

If a union demands that an employer "deal with" it and the employer refuses, the union "has the burden of taking the next step in invoking the Board's election procedures."[21] The *New Otani Hotel* decision allows a union to avoid the "burden" imposed by the Court by simply failing to intone certain magic words regarding its majority status. A union with a majority of signed authorization cards could merely refuse to so acknowledge, and continue to harass an employer until the employer agrees to a card check. This is clearly inconsistent with the Court's holding that the Board's election procedures may be invoked if the employer refuses to agree to recognize the union based on a card check.

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[19] *See John P. Serpa, Inc.*, 155 NLRB 99 (1965); *United Buckingham Freight Lines*, 168 NLRB 684 (1967); *Aaron Brothers Company of California*, 158 NLRB 1077 (1966).

[20] *See Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1961); *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 565 (2d Cir. 1993); *Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1469 (9th Cir. 1992).

[21] *Linden Lumber,* 419 U.S. at 310.

### D. The Board's Dismissal of the RM Petition Would Result in a Hobson's Choice for Employers

If the Board does not allow the filing of a RM petition in this case – where the union engages in a campaign to force the Hotel to "deal with it" and enter into an enforceable "labor peace" agreement – the Hotel will face a *Hobson's* choice. Specifically, the Hotel will have two untenable options: (1) continue to endure the "thousand cuts" of a corporate campaign; or (2) enter into an agreement which favors one union over all others that employees might prefer (and arguably is in violation of Section 8(a)(2)) *and* which prevents its employees from having access to the "preferred method" for resolving representation questions.

By attempting to force the Hotel to enter into a labor peace agreement without demonstrating majority status, the Union attempts an impermissible backdoor method to involve mandatory subjects of bargaining – thereby attempting to force the Hotel into a violation of Section 8(a)(2). In *Pall-Biomedical*,[22] the Board stated and reaffirmed the implicit holding of *Kroger Co.*[23] – that card checks are a mandatory subject of bargaining. Employers and statutory employee representatives are bound to bargain in good faith about any subject that falls within the definition of a mandatory subject of bargaining. However, bargaining regarding mandatory subjects of bargaining is a concept only applicable if there is a Section 8(f) or Section 9(a) labor organization. A mandatory subject of bargaining requires the participation of "the representative of [the employer's] employees."[24]

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[22] *Pall Biomedical Prods. Corp.*, 331 NLRB 1674 (2000), *enf. denied*, 275 F.3d 116 (D.C. Cir. 2002).

[23] *Kroger Co.*, 219 NLRB 388 (1975).

[24] *NLRB* v.*Borg Warner Corp.* 356 U.S. 342, 349 (1958).

The Board and the courts have not drawn distinctions among the multiple matters which may constitute a mandatory subject of bargaining. For example, wages are not given any greater weight or level of importance than seniority provisions. Clearly, outside of the construction industry, it would be a violation of Section 8(a)(2) for an employer to deal with a union which has not established its majority status and to enter into a binding agreement with that union to increase the wages of employees.

Here, despite at least claiming to have not yet achieved majority status, the Union demands that the Hotel discuss and agree to a "labor peace agreement." The terms of the agreement will encompass a mandatory subject of bargaining as defined by the Board. The Union seeks an agreement in which it will forgo its right to strike, a mandatory subject of bargaining,[25] in exchange for a card check agreement, another mandatory subject of bargaining. By "dealing with" the Union, which has not demonstrated its majority status, regarding mandatory subjects of bargaining, the Hotel would violate Section 8(a)(2).[26]

Moreover, as the Supreme Court stated, an agreement with a minority union affords the union "a deceptive cloak of authority with which to persuasively elicit additional employee support."[27] Thus, a union that obtains a binding, enforceable agreement regarding a mandatory subject of bargaining (e.g. wages, grievance procedures or card check/neutrality agreements) illegally enhances its status in the eyes of the employees. An employer may not legally enter into such an agreement.

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[25] *See Reichold Chemicals, Inc.*, 288 NLRB 69 (1988).

[26] *See American Bakeries Company*, 280 NLRB 1373 (1986).

[27] *International Ladies' Garment Workers' Union, AFL-CIO (Bernhard-Altman Texas Corp.) v. NLRB*, 366 U.S. 731, 737 (1961).

This situation is not to be confused with a conditional labor agreement which only becomes enforceable if the union meets certain future condition, (i.e., establishing majority status).[28] In the instant situation, there is no condition subsequent that the union must meet.[29] The labor agreement the union is seeking is enforceable regardless of any subsequent conditions regarding the union and majority status.

To be sure, an employer is free to recognize a union based on a voluntary card check and to be bound by those results. That is not the issue in the instant situation. In those situations, the employer is faced with a demand that the union currently represents a majority of its employees; the employer is still free to seek a Board election, and most importantly, the employer has not negotiated a binding, enforceable agreement with a minority union.

## II. Superiority of the Secret Ballot Election

On the second question presented by the Board, it is the Chamber's view that secret ballot elections are the preferred method for resolving questions concerning representation. The Supreme Court has encouraged use of the Board's election procedures because they possess an "acknowledged superiority" over other methods of measuring employee free choice on selecting bargaining representatives,[30] due to the Board's established expertise in ensuring that secret ballot elections are untainted.[31] And the Board itself, citing Supreme Court precedent, has acknowledged that "the Board's election machinery is the preferred way to resolve the question

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[28] *See Majestic Weaving Co. of New York,* 147 NLRB 859 (1964).

[29] The issue of a labor agreement becoming enforceable based on a condition subsequent is not present in this case and, accordingly, the Chamber does not address that issue in this Brief.

[30] *Linden Lumber*, 419 U.S. at 304.

[31] *See NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946); *General Shoe Corp.*, 77 NLRB 124 (1948).

of whether employees desire union representation."[32] The Board's insistence on laboratory conditions have resulted in well-established procedures for protecting employee free choice. The Board's election procedures and policies discourage improper activities by both employers and unions.[33] It is inconsistent with the basic premise of the Act to allow unions to engage in the type of "coercive activities" the Act was designed to prevent rather than to utilize the Board's processes – processes which have been carefully honed to protect employee rights and interests. The Board's recent experience with card check recognition agreements involving the SEIU also underscores the wisdom of using a secret ballot election supervised by the NLRB. *See* The Oregonian, "Labor Officials Tell Union To Hold Off Organizing Efforts," (April 25, 2007), plus copy of notices posted per settlement agreements, attached at Tab B.

## III. Conclusion

The Chamber does not suggest that traditional union organizing tactics, standing alone, are sufficient to justify the filing of a RM petition. Rather, it is the position of the Chamber that a demand by a union that an employer enter into a binding enforceable labor agreement when coupled with coercive tactics by the union provides a clear basis for the filing of a RM petition. It certainly would not be difficult for the Board to articulate an appropriate standard which would not impact traditional union organizing tactics, but would provide employers access to the Board's processes in situations similar to the instant situation involving the Marriot Hartford Downtown Hotel.

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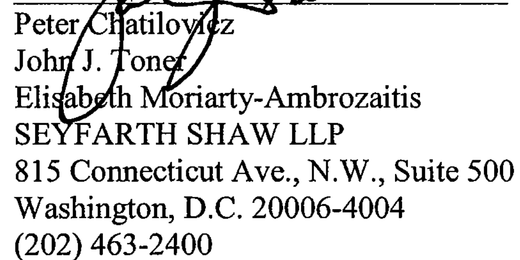
[32] *Shaw's Supermarkets*, 343 NLRB 963, 964 (2004), *citing NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

[33] *See Sewell Mfg. Co*, 138 NLRB 66 (1962) (the prohibition of racially inflammatory campaign material); *Sunrise Rehab. Hospital*, 320 NLRB 312 (1996) ( the prohibition of gifts or monetary awards to influence election results).

For all of the above reasons, the Chamber respectfully requests that the Board overrule *New Otani Hotel* and direct the processing of the Hotel's petition in the instant matter. This will permit the holding of a Board-supervised secret ballot election, which Supreme Court and Board precedent, as well as Agency experience, clearly establish as the preferred method for determining the employees' free choice as guaranteed by the Act.

Dated: July 17, 2007



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**CERTIFICATE OF SERVICE**

This is to certify that I have this 17th day of July, 2007 served a true and exact copy of the foregoing *AMICUS CURIAE* BRIEF properly addressed as follows:

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# Attachment A

# Union Disunity

## The secret deal worked out between SEIU bosses and nursing home owners denies union members the right to speak out, strike, or protect patients

**By Matt Smith**

Published: April 11, 2007

*"With time, my loss of Cassie began to transform the way I approached life."*

Sal Rosselli, leader of United Healthcare Workers West, has taken a stand for union members' rights, to the apparent dismay of the SEIU leadership.

SEIU president Andy Stern photographed with civil rights leader Jesse Jackson.

**—Andy Stern, *Getting America Back on Track: A Country That Works*, Simon & Schuster, 2006**

*"It is as if he cant help conflating the fate of workers with the fate of his daughter."*

**—Matt Bai, *New York Times Magazine*, Jan. 30, 2005**

*"When she died it broke my heart," he says. "It just gave me the strength to say, 'Speak out; dont be afraid.'"*

*"One brave thing he's done is pursue a partnership with corporate America."*

**—Leslie Stahl, CBS News, May 14, 2006**

In the above excerpted narrative, repeated ad nauseam in Service Employees International Union (SEIU) press materials, union president Andy Stern emerged from a personal catastrophe differently than others who face crisis in middle age.

Stern did not turn to sports cars, young girlfriends, adventure athletics, or otherwise immerse himself in narcissism after his 13-year-old daughter died from surgery complications, his wife later divorced him, and he took to dining alone in bars.

Instead, Stern has said in his book and to newspaper and magazine writers, the 2002 personal tragedy caused him to become something of a combined Steve Jobs and Martin Luther King, a futuristic innovator applying his genius to empowering disenfranchised workers in his 1.8-million-member SEIU, where Stern became president in 1996.

The union left the umbrella of the AFL-CIO in 2005, based on the idea that the old trades federation was a stodgy, backward-looking organization not focused enough on growth.

Key to Stern's characterization of himself as a new, different type of labor leader is his assertion that the SEIU is leaving behind the old class-struggle-style unionism pitting employees against bosses. In its place is a modern template where workers and employers seek to advance interests they hold in common.

"Employees and employers need organizations that solve problems, not create them," Stern wrote in *A Country That Works*. "Nursing home owners and SEIU leaders are formulating a new national labor-management committee and new state-based relationships to promote quality and employer economic stability. In California, the industry and union worked with the legislature on a plan to enhance quality in nursing homes, stabilize the work force, and provide more resources for direct patient care."

However, there's another trove of literature describing the recent history of Stern's SEIU, one that's quite different than the Cassie-focused genre popular in newsstands and on bookshelves. It's contained in secret for-top-union-officials-eyes-only contracts, memos, lobbying agreements, and analysis reports obtained from various sources by *SF Weekly*. They illustrate the details of a sweetheart deal between the SEIU and California nursing home companies that impair, rather than empower, workers and patients, while inflating dues-paying union ranks.

These documents suggest Stern's post-Cassie leadership of the SEIU shares little in common with Martin Luther King, and doesn't involve much real innovation. Instead, it's merely a re-hash of the sort of sweetheart company-union labor deals that have marred the reputation of trade unionism throughout history. It has involved trading away workers' free-speech rights, selling out their ability to improve working conditions, and relinquishing their capability to improve pay and benefits, in order to expand the SEIU's and Stern's own power.

As testament to how little interest Stern's SEIU has in explaining to the public, or to union workers, the inner workings of its modern, employer-friendly style of leadership, 10 requests for interviews to officials at Stern's Washington headquarters, and to union officials in Northern and Southern California, went unanswered.

In spite of the official silence, union memos obtained by *SF Weekly* also point to a serious rift between Stern and Sal Rosselli, president of SEIU United Healthcare Workers West, an Oakland-based 140,000-member local representing workers in California hospitals, nursing homes, and other health facilities. The fight is over whether the union should continue its current, Stern-backed strategy of expanding membership by giving up workers' rights, and the rights of patients they serve, through "partnerships with corporate America" such as the nursing home pact mentioned in *A Country That Works*.

Or should the union seek to expand the old-fashioned way, through recruitment, political pressure, picketing and other protests, lawsuits, alliances with advocacy groups, and pointing out corporate abuses to the press?

Officials with Sal Rosselli's UHW-West have apparently taken a strong stand saying corporate-friendly alliances aren't the panacea Stern makes them out to be.

And documents I've obtained suggest that regardless of the image crafted by his own brilliant public relations, Stern has tread a route common among men who've suffered crippling late-life personal setbacks. He's become ornery in his old age.

Sal Rosselli won't answer questions when I call him on his cellphone. And judging from the wall of silence

I've received from some other officials in his local, he's apparently instructed the rest of his staff to do the same.

Notwithstanding, secret SEIU documents I've obtained have made me come to respect Rosselli's style of union leadership. Leaked SEIU contracts, memos, and reports, as well as off-the-record interviews with some union insiders, suggest Rosselli has been engaged in a showdown with Stern over the rights of unionized health care workers, and of the patients they care for.

According to a recent report prepared by UHW-West, Stern's brand of corporate collaboration has done little for the SEIU besides inflating the membership rolls with workers who've received hardly any benefit from union membership.

At issue is a 2003 agreement between the SEIU and a group of California nursing home chains. According to this pact, its terms would be kept secret, and otherwise "be held in confidence to the full extent allowed by law." Notwithstanding, I received two copies of the misleadingly named "Agreement to Advance the Future of Nursing Home Care in California," from different sources last month. I have also obtained a copy of a similar agreement recently negotiated between the SEIU and nursing home chains in Washington state, which involves similar tradeoffs between the SEIU and nursing home chains.

The California agreement was set to expire at the end of last year; the union and the nursing homes are currently negotiating a possible extension. Whether, or how, the agreement will be extended may have been thrown in doubt thanks to complaints about the current agreement coming from Rosselli's UHW-West.

On the SEIU's side of the 2003 bargain, the union agreed to use its clout with Democratic legislators in Sacramento to accomplish three goals of interest to nursing home owners:

The SEIU pledged to use its lobbying muscle to pass a 2004 bill increasing MediCal subsidies to nursing homes by more than $2 billion over four years, according to patient advocates. The bill passed, creating a windfall for nursing home owners.

The union also agreed to attempt to pass tort reform legislation that would have limited patients' right to sue in the event they were neglected, raped, abused, or killed. (The union's tort reform lobbying efforts were put on hold, however, after a 2004 *SF Weekly* story led union members and advocacy groups to complain.)

The SEIU also pledged in the 2003 pact to staunch any efforts by patient advocates to push for legislation or regulations requiring nursing homes to provide enough staff to keep patients safe and healthy, unless the nursing home companies agree to such reforms in advance. The SEIU will "oppose any long-term-care-specific staffing and reimbursement legislation or regulation that fails to meet mutually agreed objectives," the agreement states.

According to lobbyists for nursing home patients, the union has indeed been successful in repressing efforts by nursing home advocates to pass legislation that would have tied increases in state nursing home subsidies to improvements in the quality of care.

In return, the nursing home chain owners agreed to allow the SEIU to recruit workers into their union. Under ordinary circumstances, nursing home owners vigorously resist union organizing drives by occasionally intimidating and firing union-sympathetic workers, and by attempting to convince them that union membership isn't in their interest. Under the lobbying agreement, however, the nursing home chains would refrain from these tactics in a certain number of facilities if the union helped to pass the 2004 funding

bill, and in more facilities if the union got tort reform legislation passed.

So far, workers in some 42 nursing homes have joined the SEIU in this way, according to a union report.

This membership gain has allowed the union to publicly characterize the lobbying deal as a means to improve the quality of care for nursing home patients, while improving wages, benefits, and working conditions for people who care for the aged and infirm.

This is the new era of worker-employer collaboration touted in Stern's book, and in articles that characterize him as a bold modernizer. Journalists, however, appear to have been so caught up in Stern's tactic of getting weepy about his deceased daughter during interviews that they've failed to find out exactly what it is he's talking about.

If they had, they would have discovered a monumental catch: workers who joined the union specifically as part of the 2003 agreement with nursing home chains, an agreement that is supposed to be a national model for corporate collaboration, get a severely stripped-down version of union representation. In important ways, the agreement causes workers to lose rights rather than gain them.

Under the 2003 lobbying pact, all nursing home workers entering the union under the auspices of the agreement would work under uniform, employer-friendly labor contracts called "template agreements."

These agreements specify that the union is not allowed to report health care violations to state regulators, to other public officials, or to journalists, except in cases where the employees are required by law to report egregious cases of neglect and abuse to the state. The agreements also prohibit the unionized workers from picketing, and negotiating improvements in health care or other benefits. They prohibit the workers from having a say in their job conditions.

According to the template contract, employers have the "exclusive right to manage the business."

This means the owners set pay rates, pay increases, and incentive plans. They hire, lay off, demote, discipline, and determine benefits for workers without union input. The employers may outsource work performed by union members, and speed up, reassign, or eliminate jobs at will. The employer may eliminate vacations, or any other time off, as the employer sees fit.

The agreement also guarantees that workers' wages will not put an employer at an "economic disadvantage," either through employee pay, benefits, or through staff-per-patient ratios.

To advocates for health care consumers, contract language guaranteeing the union will refrain from reporting poor nursing home conditions to state regulators is particularly appalling.

"This is a sector where caregivers are the eyes and the ears and the witnesses when there is abuse. To tie their hands and to tie their tongues is to let people die. That's immoral and a terrible thing for a nursing home worker to have to live with," says Jamie Court, president of the Foundation for Taxpayer and Consumer Rights, and author of *Corporateering: How Corporate Power Steals Your Personal Freedom*. "I've never seen a labor union except for the SEIU enter into a top-down, industry-friendly agreement that binds the hands of the workers."

The agreement doesn't merely prohibit workers from attempting to complain about their lot once they've signed a union contract. It also puts a halt on any traditional unionizing drive in other nursing homes owned

by a chain that is party to the lobbying agreement — even in cases where workers have expressed interest in joining the SEIU.

"There's a struggle going on at the SEIU, and the struggle is, what kind of unionism is being advanced? Are these agreements that lay the ground for voluntary recognition? Or are they in fact straightjackets?" said Bill Fletcher, a visiting professor at City University of New York, who formerly held the SEIU position of assistant to the president for the East and South.

It's from studying that internal SEIU struggle that I've discovered new respect for UHW-West under Rosselli's leadership.

That union local recently issued a report analyzing the 2003 lobbying pact from the workers' perspective.

The report, titled "The California Alliance Agreement: Lessons Learned in Moving Forward," suggests that the agreement resulted in subsidies that fattened nursing home profits, and handcuffed workers, while inhibiting the union's chances at ever negotiating legitimate labor contracts that truly enhanced workers' lives.

"Alliance-based template agreements do not allow workers to empower themselves," the UHW-West analysis report says. "Is it any wonder that we have often heard from these workers that 'the boss brought us the union?'"

The report can be read as a repudiation of Stern's brave new path, coming out of the biggest health care workers' union local in the western U.S.

"Clearly this is an internal polemic against the direction coming out of Washington," Fletcher notes.

Indeed, the UHW-West report comes near calling the 2003 agreement a sellout.

For one thing, the union might have been able to expand, while obtaining greater benefits for workers, without any agreement at all. "Many workers at Alliance nursing homes throughout California were precluded from organizing," the UHW-West report says.

Those workers who were assimilated into the SEIU through the lobbying deal were introduced to a paltry version of trade unionism, the report says.

"If the nature of the labor agreement defined in the current Alliance templates — which restrict members' rights and ability to be empowered — is allowed to continue, what effect will this have on the fundamental nature of a union organization? What ultimately happens if we give up the right to strike as the means for workers to level the playing field with employers when needed?" the report says. "We would argue that it would adversely affect our mission and goal to advance and defend the interests of our members, and in fact, may come close to becoming close to what have historically been called 'company' unions."

According to the "Lessons Learned" report, the UHW surveyed 1,600 members who were under these Alliance template contracts. The workers' No. 1 complaint: Short staffing at these nursing homes hampered their ability to provide quality care for patients.

Indeed, short staffing is cited in news stories, in lawsuit complaints, and by public health advocates as the primary cause behind cases of neglect where patients develop bedsores, are left covered in their own feces, or

die needlessly of festering illnesses or injuries.

Ironically, the SEIU's 2003 MediCal subsidy bill was touted as a way to help nursing homes afford to hire enough caregivers to adequately provide for patients.

Instead, the Lessons Learned report claims, the nursing home chains used an inordinate amount of the increased state subsidies to fatten profits, rather than increase staffing levels.

According to the UHW-West analysis, nursing homes organized under the agreement received $119 million in added MediCal subsidies during the '06-07 funding year thanks to the 2005 nursing home funding bill the SEIU led the effort to pass. But those same employers will only spend $21 million of that money on personnel in those facilities.

"Did we sell ourselves short?" the UHW-West study asks, leaving the answer implicit: absolutely.

In what some view as payback for UHW-West's role in speaking up for the rights of nursing home workers and patients, the union's Washington headquarters has moved to strip the local of its ability to represent nursing home workers.

During a 2006 statewide reorganization of SEIU locals, in which California union locals merged along industry lines, Stern's representatives recommended that all the state's nursing home workers be reassigned to a new bargaining unit run out of Los Angeles by a Stern ally named Tyrone Freeman.

Freeman is reportedly more amenable than Rosselli to the "collaborate-with-corporate-America" style of worker organizing alluded to in *A Country That Works*. Freeman did not return calls requesting comment.

"I would be likely to offer up my Southern California buildings first, because the Southern California union reps are simply more pleasant, more cooperative, and more pragmatic," said Greg Stapley, spokesman for California's fifth-largest nursing home chain, the Ensign Group.

Though Ensign is not currently part of the agreement with the SEIU, Stapley has been sitting in on negotiation meetings with a thought to joining.

Indeed, according to a Jan. 13 memo to UHW-West board members from the local's director for nursing home organizing, Freeman's local "literally said that the union should have *no* say on things like what shifts the workers should work."

This attitude has earned the favor of nursing home owners, the memo said.

"The operators indicated very strongly that they do not want SEIU to 'run' their facilities and that their position on any new agreement meant that the current 'template' contract would remain intact."

Rosselli's UHW, meanwhile, has said in negotiations that "the template must go, that workers as health care providers need a voice and rights on the job," the memo said.

Rosselli has so far struggled to resist efforts by the national union to dilute his power. A recent Stern memo, however, suggests the possibility exists that nursing home workers currently represented by UHW-West could eventually be moved to the Long Term Care Workers' local run by Freeman.

Stern's "corporate collaboration" rhetoric aside, the facts of the California Alliance agreement demonstrate that workers and employers don't have the same interests.

"You can get a condominium of interests that includes the union, but excludes the union member. He doesn't get self-determination, doesn't get the full market value that strong collective bargaining would give him. He doesn't get the right to be a citizen, and be able to complain about a situation where they aren't treating clients properly," says Robert Fitch, author of *Solidarity for Sale: How Corruption Destroyed the Labor Movement and Undermined America's Promise*.

Somehow, though, Stern has managed to get journalists to look past possible downsides of his new labor paradigm by offering up a compelling story line, where a labor leader is impelled by the death of his daughter to become courageous, and to make a real stamp on the world.

Though American newspapers, magazines, radio stations, and television stations don't employ labor reporters anymore, they've got plenty of business writers. And if those journalists know anything, it's that there's truth in numbers. The union's membership numbers are up every year — "1.8 million members and growing" is www.seiu.org's homepage tagline.

Making Stern's ideas even more attractive, the man is constantly doing things that are just plain *newsy*. In February he appeared with the head of Wal-Mart giving lip service to the idea of universal health care. Before that, he was meeting with leaders of China's government-controlled national labor union — the one with the reputation for worker suppression. And in 2004 he was quoted saying that his union might be better off if George Bush beat John Kerry. And then there's the intriguing underlying story line: the anti-intuitive idea that workers and the boss are actually on the same team. For story-hungry hacks, what's not to like about all that?

Stern "does things that are very provocative. Unless you dig into it, you say, hey, the guy is full of good ideas," says Fletcher, the former SEIU organizer who teaches at CUNY. "The fact is, workers and employers are going to clash. And they have contradictory interests. Andy obscures that question, and that helps explain the attraction he has for *Fortune*, for *Business Week*. "

Buoyed by a cushion of flattering press, the SEIU and nursing home owners are now in talks to extend the cynically named "Agreement to Advance the Future of Nursing Home Care in California."

If the pact is extended as a result of current negotiations, the SEIU would lobby for a new piece of California legislation adding hundreds of millions of dollars of enhanced state Medical subsidies to nursing home companies. In return, the SEIU would be allowed to gain members in additional nursing homes, according to a version of the agreement currently under discussion.

However, a Bay Area union local that's party to those negotiations has pointed out that the reality behind SEIU's policy of joining hands with corporate America is far worse than the hype.

I urge UHW-West leader Sal Rosselli, along with any other SEIU members with a conscience, to work toward the next logical step. It's time to scuttle this pact before it causes the waste of more tax dollars, diminishes the rights of more workers, and helps endanger the lives of more elderly and disabled nursing home patients.

Somehow, I believe Cassie might have wanted it that way.

To read the report from the United Healthcare Workers West on the agreement between nursing home

owners and the SEIU, click here.

# The California Alliance Agreement: Lessons Learned In Moving Forward in Organizing California's Nursing Home Industry

The California Alliance agreement between SEIU and Alliance nursing home operators is currently being renegotiated. The purpose of this paper is to provide a critique of the current agreement in order to learn how we move forward in organizing the nursing home industry in California. Attached to this paper is an addendum that provides a more detailed analysis.

It is important to begin this discussion with an understanding of the nursing home industry in California. There are approximately 1143 (OSHPD data) skilled nursing facilities (SNFs) in the state (not including assisted living facilities). The Alliance represents only 284 homes or 25% of California nursing homes. Only 83 of those homes are organized (55 UHW and 28 Local 434B). Of those 83 homes, 35 are template labor agreements and the rest traditional collective bargaining agreements. In total SEIU represents only 17% (195) of all nursing homes in California. UHW represents the largest share of the SNFs with 148 homes and Local 434B represents 47.

The California Alliance agreement was historic in many ways for operators, workers and residents. While the positive achievements of the Alliance should not be overlooked, there were, however, limitations that we need to evaluate in order to organize the entire nursing home industry in California. Out of this experience we learned that we can organize a section of the nursing home industry employers, identify a point of unity with them (rate reform - AB 1629) and forge a relationship that allowed SEIU organizing rights to 42 homes.

In exchange the nursing home employers received significant funding never before seen in California's nursing home industry. Equally important was the fact that we were able to negotiate substantial wage and benefit increases for our members whether they were from Alliance or non-Alliance homes. It is important to note that with the exception of workers covered under Alliance template contracts, there was fundamentally little difference between Alliance and non-Alliance contracts. However, the nature of this relationship was transactional - a quid pro quo arrangement. It was not based on trust or forged through a collective bargaining relationship. It was simply a business arrangement. The industry was in dire need for Medi-Cal funding reform and it was in our members' interest to lead in that effort. We leveraged our political influence in state politics to win rate reform on Medi-Cal funding, and in exchange the nursing home employers gave us rights to organize 42 homes that they selected.

The conversation that began this relationship started at the top between nursing home operators and SEIU. However it is important to note that winning rate reform involved mobilizing thousands of our members in the political process. This process included leveraging the 500,000 SEIU members in California, making nursing home reform the highest political objective at that moment. This latter point was our bargaining chip with these employers. SEIU's political capacity is based on its membership and our ability to move politics in California. Important as that was, this mobilization was primarily the extent of our members' involvement. Members had little

say in reaping the benefits of that activity. The collective bargaining agreement for newly organized Alliance workers (the template) had little, if any, member involvement, nor did having a say on the amount of money that ultimately became the 'economic deal' in negotiations for wages and benefits. In short, the template and the economic deal were cut at the top. It became part of the business transaction with the nursing home employers.

In negotiating a new agreement with the Alliance employers, it is imperative that we acknowledge the gains we made in the current agreement, but it is equally important that we address the shortcomings resulting from a transactional relationship that we've established with a limited number of employers in the industry. Again, it is important to note that in its entirety, the Alliance currently represents both union and non-union facilities, about 25% of California's nearly 1143 nursing homes[1].

If our objective is to organize the entire nursing home industry in California, then moving forward, we must ask the following questions:

1. **Did the current agreement allow us to achieve all that we could have?** In other words, given our accomplishments, did we sell ourselves short in terms of organized homes and contracts for our members? UHW projects that by the end of the current (06-07) rate year, Alliance union homes will receive approximately $119 million cumulatively in new Medi-Cal revenues while employers will spend about $21 million on improvements to SEIU's members' contracts. Further, these same homes are slated to receive more than $180 million cumulatively through June 2008, but employers only committed to spend about $46 million on members' contracts over that same time period. Meanwhile, a total of only 42 new homes came into the union as a result of our neutrality organizing agreement. In fact, one Alliance operator represented at both the national discussions and the California table shared with us their surprise at SEIU's willingness to leave money on the table, as well as not ask for more homes to organize.

   If we move forward with a similar approach in re-negotiating the Alliance agreement based on quid pro quo, what type of value do we put on the number of homes we want organized for achieving 'political benchmarks?' For example, is the renewal of AB 1629 (rate reform) worth only 75 homes over another five years, or should it have a greater value while in exchange the operators receive hundreds of millions in continued rate reimbursement? A similar assessment must be made on other political objectives, i.e., reducing turnaround time for reimbursement. (Note: A more detailed critique of the Alliance agreement/experience follows in the addendum page 8 of this paper.)

2. **Does continuing such a relationship under a similar nature with only Alliance operators achieve SEIU's objective of 100% density and winning hospital industry standards for our members and improve the quality of care for residents?** The answer is a simple no. At best, and we do not want to understate the significance of this achievement, if we are successful in reaching another agreement with Alliance operators that achieves 100% density in their universe, it still leaves close to 75% of the industry in California non-union. In pursuing this strategy of

[1] Source: OSHPD

growth with Alliance operators, how do we address the rest of the non-Alliance industry? What should be our parallel strategy for growth?

Alliance operators have not substantively addressed how they will expand their universe. Is there a strategy to grow the Alliance? At this point there is not. In fact, there is one view within their camp to 'exclude' any non-Alliance operators from any other future legislative gains we may make. Can we allow this view to prevail when in fact we represent many homes and workers that are not in the Alliance? Equally troubling is a recent point of view among some Alliance operators that says they should have the arbitrary right to exclude other nursing home operators from the Alliance.

Likewise, SEIU has not made a compelling argument to Alliance members about the 'union' difference in this process. In fact, one Alliance operator said their homes with union contracts cost them more than their non-union homes, and they question what it will mean for them if they allow us to achieve 100% density within their company. Will they be market competitive? Equally revealing, a non-Alliance operator with whom UHW has a collective bargaining relationship told us that if we want to achieve high standards in the industry, then we need to level the playing field in the market by getting rid of 'template' contracts.

Does the current Alliance arrangement deal effectively with internal contradictions among operators, e.g., market expansion, Medi-Cal funding vs. Medicare and private insurance? One non-Alliance operator with whom UHW has a relationship has stated that their future is not with Medi-Cal funding but with Medicare and private insurance, and that the Alliance agreement does not address that. Since for the moment they reap the same benefits from AB 1629 as Alliance operators, but their future is to move away from depending on Medi-Cal funding, they see no need to join the Alliance. In fact part of their future lies with the rehabilitative and acute care side of the SNF industry which relies on hospital referrals. What is our strategy dealing with operators with that world view, particularly where we have a direct relationship with that hospital industry? How do we leverage that relationship for growth?

Non-Alliance operators benefited from rate reform. That means close to 70% of California nursing homes that receive Medi-Cal funding gained from this legislation. Where we have relationships with these employers the only way we can reap the benefit of AB 1629 and win standards for our members is through traditional collective bargaining and developing an alternative organizing strategy for non-Alliance operators. We contend that any renewed agreement with the Alliance operators needs to address how we can take advantage of AB 1629 for the rest of the industry - union and non-union.

In addition to being part of the Alliance agreement, UHW has developed and is implementing a strategy that is based on organizing regional markets in the non-Alliance nursing home industry in Northern California. This strategy is not transactional in nature but relies on our strengths: market density, relations with the

hospital industry, political influence, collective bargaining relationships and member involvement, as well as AB 1629 funding. It is based on organizing an entire market at one time and getting employers to agree to union standards because a majority of the employers in that regional market will have done so. With this approach we have identified five regional markets of non-Alliance operators in Northern California. Developing an alternative strategy to organize non-alliance homes is critical to not only leveraging our relationship with Alliance operators but developing the capacity to organize the entire industry. Since many of the Alliance operators are statewide we would argue that this strategy should be adopted statewide. When negotiating a new agreement with Alliance operators we should not just bring to the table our political capacity to move state politics to affect the nursing home industry and bargain over the value of that. We should also demonstrate our ability to organize the industry with or without an Alliance agreement and bargain that value as well.

What should be the relationship of this strategy with our Alliance work given that the Alliance work does not have a regional market approach at all? It can not be simply 'one or the other." In addition, UHW will more than likely hold these non-Alliance employers to higher standards in collective bargaining; develop a workplace structure that empowers members through collective bargaining; and develop relationships with employers for future organizing that starts with a collective bargaining relationship, not a transactional one.

3. **What kind of worker organizations are Alliance based template agreements creating, and, equally important, what are they laying the groundwork for?**
Alliance based template agreements do not allow workers to empower themselves, nor are they conceived out of a process in which workers are truly part of 'winning' the union.

Essentially the Alliance agreement gave SEIU the opportunity to organize facilities (that the Alliance employers chose) in exchange for SEIU's political power to raise reimbursement rates. The quid pro quo nature of this transaction can not be understated. Traditionally, for workers to organize they engage in struggle to win that right. Under the Alliance agreement this is absent. The contract that newly organized Alliance workers will have is worked out in advance with the ultimate terms of that agreement discouraging - and in some cases, preventing - workers from independently engaging in struggle to improve their working conditions. Prior to getting to the negotiating table not only are the rules of engagement worked out but the nature of the 'deal' itself. Is it any wonder that we have often heard from these workers that "the boss brought us the union?"

Many workers who came into our union through the Alliance neutrality agreement found themselves with 'template' contracts that allowed for very little power on the shop floor with no right to strike and no clear path toward full collective bargaining rights. From UHW members' experience it is safe to state that the template arrangement created a worker organization that restricts member empowerment. Those members covered by template agreements went to the table with the

expectation that bargaining would be an opportunity to not only secure economic benefits, but to change labor relations within facilities where templates restricted their rights to do so. Our members have made it very clear to us: re-negotiation of a new Alliance agreement must involve members - it must begin from the bottom up.

If the nature of the labor agreement defined in the current Alliance templates – which restrict members' rights and ability to be empowered – is allowed to continue, what effect will this have on the fundamental nature of a union organization? What ultimately happens if we give up the right to strike as the means for workers to level the playing field with employers when needed? We would argue that it would adversely affect our mission and goal to advance and defend the interests of our members, and in fact, may come close to becoming what have historically been called 'company' unions. If this is the case, what started out as leverage and a strength, i.e. our ability to organize our members into political action, can in fact become an empty promise because the alienation our members will have from this experience will reduce our capacity to deliver the political capital.

4. **Was the quality of care for residents improved as a result of the increased funding and a new relationship with the industry?**

Winning the political fight for Medi-Cal rate reform was based on the argument that rate reform would improve the quality of care for nursing home residents. This argument was critical: we could never have succeeded if our argument simply had been that rate reform would put more money into the pockets of nursing home operators and increase wages for caregivers. Because of delays in implementing AB 1629, however, it will be at least another year before an evaluation can be made about the impact of rate reform on quality of care.

Our political capital was based on our commitment to improve the quality of care residents receive in nursing homes. Our allies in this effort - advocates for residents and organizations of seniors, as well as elected officials - will certainly be expecting quality improvements. The long term viability of the new Medi-Cal rate system will depend on ensuring that quality of care is improved.

One strategy to improve quality of care would be to mandate staffing ratios that would increase the number of hours of direct care received by residents every day, similar to improvements in nurse to patient staffing ratios that have already been accomplished in the hospital industry. Any new agreement with Alliance operators must address this in a substantive way. Failure to address in any meaningful way improved quality care for nursing home residents will not only alienate SEIU from its natural allies in the health care community but seriously compromise our political influence at the state level as legislators may become less willing to expend political capital for little or no measurable improvements.

Fighting to hold the industry to higher staffing ratios for residents' care is the road to improved resident care. Recently, UHW surveyed over 1600 members under Alliance contracts, and this was the number one complaint that our members raised with us: short staffing and how it compromises their ability to provide quality care for residents. With SEIU's mission and objective to become a national health care union

and voice for health care in this country, this issue should be number one on our list in any new Alliance agreement.

## In Summary

We contend that we did not achieve what we could have both in terms of our density and in terms of economics, particularly in relation to the increases in funding that operators received. This relationship yielded substantial rate increases for employers, but only a fraction of that windfall made its way to our members and the verdict is still out as to whether the quality of residents' care has improved.

At the same time, employers benefited from the union's agreement to having limits placed on our demands at the bargaining table as well as limits placed on our ability to organize nursing home workers. In fact, many workers at Alliance nursing homes throughout California were precluded from organizing the union or improving standards resulting from the new rates due to the prohibition on organizing included in the current agreement.

Furthermore, despite efforts to take a non-traditional approach to bargaining, employers forced the union into a traditional relationship. Generally speaking, negotiations took nearly one full year to complete, employers dragged out the process in order to try to limit their financial obligation to members, and several settlements came only as a result of strike threats. Alliance employers at a November 9, 2006 meeting - collectively and without exception - stated that the relationship was indeed traditional. (It is interesting to note that the operators' disappointment regarding the reasons why the collective bargaining experience became traditional was based on their expectations that the negotiating process would entail very limited bargaining at all.)

Equally important to point out is despite the significance of rate reform and its political impact and economic windfall for the nursing home industry in California, the Alliance as an organization of employers has in fact shrunk in size. Collectively the Alliance only represents 2 out of 10 nursing homes in California. Failure to acknowledge this fact, and more important to take advantage of AB 1629 and what it has meant for workers in increased wages and benefits as well as its potential to improve the care for residents, will result in SEIU missing an historic opportunity for new growth in the nursing home industry in California.

## In Conclusion:

To simply conclude that we must be 'better negotiators' with the Alliance operators for a renewed arrangement is at best simplistic thinking and at worst a strategic mistake. We must think out of the box and more globally. Using the California experience to help leverage a national discussion and relationship with the nursing home industry is one direction we must go in. However, the California experience is far from complete and if viewed more globally provides great opportunity for growth.

Moving forward in organizing 100% density in nursing homes in the state of California means we must critically look at the shortcoming of the first Alliance agreement and renegotiate a new agreement that not only gives us 100% density of homes among Alliance operators, but positions us to organize the rest of the nursing home industry. Critical to that is developing an alternative growth strategy for non-Alliance homes as UHW is doing. However, key to both Alliance and non-Alliance

operators is the involvement of our members. Our ability to win rate reform was based on our political capacity to mobilize our members in the industry to achieve it. Our ability to organize regional markets of non-Alliance homes will involve our members. In short, UHW contends that moving forward means involving our members throughout the entire process, including strategic planning. Member involvement is our strength and will to continue to be our strength.

In conclusion, in renegotiating a new Alliance agreement we must have the following:

- Any new agreement should not be simply based on a quid pro quo transaction that gives SEIU organizing rights to homes in exchange for achieving political benchmarks.
- Any new agreement must lead to 100% density of all Alliance homes during the term of the agreement.
- Any new agreement must improve the quality of care for nursing home residents in measurable ways.
- Any new agreement must be compatible to and contingent upon a parallel strategy to organize the rest of the nursing home industry in California by a combination of growing the Alliance and engaging in a regional market strategy to organize non-Alliance homes.
- Any new agreement must have as a principal objective establishing standards in the industry on wages and benefits for providers and quality care for residents that are comparable to the health systems industry in California.

January 4, 2007

# ADDENDUM

**The following is UHW's critique of the Alliance experience and its current agreement.**

## Did the current agreement allow us to achieve all that we could have?

### AB 1629: *Did SEIU get its "Fair Share"?*

As a result of AB 1629, SEIU estimates that upwards of $900 million in new federal matching funds will make its way into California's Medi-Cal reimbursement system between 2004 and 2008[2]. Already, Alliance employers have seen substantial amounts of new money in increased reimbursements at their unionized homes, totaling approximately $119 million cumulatively by the end of the state's 2006-07 rate year (with an additional $217 million to non-union facilities). The successful passing of this legislation and the influx of new revenue paved the way for SEIU and Alliance employers to work together to raise standards for nursing home workers while investing in increasing quality of care for residents. Despite this huge cash infusion, unionized Alliance workers will see only $21 million in increased wages and benefits through the 2006-07 rate year[3].

Basic elements of the deal with the Alliance employers include the following:

- **Wages:** $2.25 across the board, added to wage scales or starting rates whichever existed prior to this round of bargaining. Additional monies were secured for parity or "catch up" raises for select classifications already behind market standards in Bay Area facilities (up to $.75).
- **"Envelope":** Discretionary money to be used for further economic improvements allowing for additional labor cost increases of $.50 per hour in the Bay Area and $.25 per hour in all other regions.
- **Training Fund:** Established to provide educational and career opportunities for nursing home workers. Employers will contribute $.06 per bargaining unit hour to the fund in 2007 and $.07 per hour beginning January 2008 through the remainder of the agreement.
- **Health Insurance Improvements:** Employers will cover a minimum of 80% of the cost of individual coverage for facilities in the Bay Area (a standard already established at UHW homes) and a minimum of 70% of the cost of coverage for workers in all other peer groups or improve health insurance contribution for individuals a maximum of 10%- whichever was greater.
- **Single Bargaining Unit By Company:** All union homes by company are a single bargaining unit and negotiate together.
- **Common Expiration:** June 15, 2008.

If it is assumed that Medi-Cal rates increase by another 3% next year, it is possible to draw a comparison of approximate new revenue that Alliance employers will be receiving at their unionized facilities to the amount of that revenue committed to spending on raising standards for members roughly over the same time period. The

[2] According to an internal SEIU document titled *"Nursing Home Quality Care Act AB 1629: The Basics"* dated August 31, 2004, "Facilities will pay a 'quality assurance fee' to bring in new federal money to pay for the increased funding. The fee will generate more than $900 million for nursing home care over four years that can be matched by federal Medicaid funds."

[3] Source: UHW analysis of the cost of basic economic package compared to increased revenues received (less quality assurance fees) from August 1, 2004 through July 31, 2007. For all UHW costing contained herein see Appendix A: "Methodology and Assumptions."

following chart shows UHW's estimate of revenues received versus spending on members through the life of our current contracts:

| Company | Assumed Cumulative New M-Cal Revenue 2004-08 | Total Cost of Economic Package | Percent of Revenue Passed Through to Members |
|---|---|---|---|
| Avalon | $6,937,098 | $1,306,139 | 18.8% |
| Beverly | $12,070,974 | $1,959,955 | 16.2% |
| Chase | $2,213,752 | $224,992 | 10.2% |
| Country Villa | $12,800,181 | $2,976,139 | 23.3% |
| Covenant Care | $16,619,017 | $4,359,849 | 26.2% |
| Evergreen | $9,423,248 | $2,538,337 | 26.9% |
| Family Senior Care | $31,561,733 | $7,240,865 | 22.9% |
| Golden State | $1,816,210 | $399,854 | 22.0% |
| Horizon West | $14,426,361 | $3,704,102 | 25.7% |
| IQC/Foresight | $8,554,806 | $2,466,372 | 28.8% |
| Kindred | $32,113,227 | $8,977,017 | 28.0% |
| Longwood | $3,091,792 | $1,957,559 | 63.3% |
| Sava | $14,002,687 | $2,474,767 | 17.7% |
| Skilled | $5,366,629 | $2,197,795 | 41.0% |
| SunBridge | $8,699,693 | $2,550,830 | 29.3% |
| Sun Mar | $2,039,412 | $579,261 | 28.4% |
| Totals | $181,736,822 | $45,913,833 | 25.3% |

As indicated above, Alliance employers at union facilities will receive approximately $182 million cumulatively in increased Medi-Cal revenues through the expiration of these agreements (June 15, 2008). These employers have committed to spend about $46 million, or just over 25% of that new money on SEIU members currently covered under collective bargaining agreements[4].

Another way of comparing increases in Medi-Cal revenue with operators' commitments to raising standards for workers is by examining the impact of the agreed-upon economic package on hourly bargaining unit labor costs across each individual company. During the life of the current agreement, the Alliance employers listed in the following table have committed to raise bargaining unit labor costs by just over 12% overall. At the same time, this group of employers' weighted average Medi-Cal reimbursement rate will increase by more than 27%[5].

[4] Source: UHW analysis of the cost of basic economic package compared to increased revenues slated to be received between August 1, 2004 and June 15, 2008.

[5] Source: UHW analysis of increased labor costs resulting from basic economic package. Base labor cost figures were provided by employers during contract negotiations.

| Company | Percent Increase in Labor Costs | Percent Increase in Medi-Cal Rate |
|---|---|---|
| Avalon | 12.24% | 31.24% |
| Beverly | 16.32% | 29.72% |
| Chase | 23.66% | 27.30% |
| Country Villa | 17.39% | 28.80% |
| Covenant Care | 11.60% | 27.43% |
| Evergreen | 10.54% | 27.20% |
| Family Senior Care | 7.93% | 28.83% |
| Golden State | 19.54% | 26.83% |
| Horizon West | 17.86% | 21.82% |
| IQC/Foresight | 18.70% | 27.25% |
| Kindred | 7.05% | 32.05% |
| Sava | 7.83% | 30.73% |
| Skilled | 22.71% | 19.88% |
| Sun Mar | 20.43% | 18.29% |
| SunBridge | 14.02% | 21.58% |
| **Alliance Overall:** | **12.40%** | **27.46%** |

*The Template and the Collective Bargaining Experience*

It is important to consider that despite our never creating a hard deadline or bottom line for employers, we were still able to keep the majority of companies in the room and move them to a collective settlement. Collectively we made a decision that keeping these employers together would force those providing the lowest economic benefits to our members to raise standards to meet the rest of the industry. However, a side effect was that the cost of the economic package actually lowered for those companies who fared best under the new reimbursement system. Since reimbursement is driven by previous spending on labor costs, there were companies at the table that would not have been able to meet the terms of the agreement if those terms were based on a percentage increase in labor costs as defined by the top revenue getters. In other words, negotiating the economic package at the Alliance table was a delicate balancing act.

While we were conscious that we were in fact leaving money on the table, a primary problem with bargaining was that while it started as a standards-based approach that was based on workers' demands it transformed to a standardized economic settlement in terms of increased bargaining unit costs for the employers regardless of what standards were to start at each facility. For example, wage standards were only created in the Bay Area Urban C peer group, and health insurance improvements were focused only on a minimal standard – moves that aided in keeping the collective intact, but had the net effect of our achieving less for members than we might have been able to secure in a different bargaining setting. However, where we took an approach to establish a market standard as in Bay Area Urban C, our experience was that employers

fundamentally understood that need from a competitive perspective. In fact, non-Alliance operators in the same market responded in the same way. Hence, a standards-based approach not only should be our bargaining methodology objective, but we have learned that employers will respond to it.

A major problem with the collective bargaining process was a fundamental lack of member involvement, running contrary to our constitution and by-laws as well as our standard practice. While bargaining began as very participatory, democratic and member-driven, it eventually evolved into a substitute staff-driven process. In fact, recall that we started by surveying over 5,000 nursing home workers which led to a list of demands called our "Platform for Progress" adopted by rank and file leaders from both locals. We then held membership meetings with ratification votes that overwhelmingly ratified our platform with thousands of workers participating. In December 2005, UHW and Local 434B brought over 100 bargaining committee members to the bargaining table to kick off these negotiations. Subsequently, only two more bargaining sessions actually included workers' participation at the table. Thereafter, union staff and Alliance employers met repeatedly to work toward identifying a framework for an economic settlement in a half dozen face to face and phone meetings. Understandably, this lack of involvement created major frustration among members and fed third-party unionism, despite our best efforts to keep workers engaged.

For some workers, specifically those employed at Family Senior Care and Sava Senior Care, a final settlement was not reached until December 2006 - a full year after the first bargaining session was held with the Alliance employers. Ultimately, it was the threat of a strike (at non-template facilities) that moved Family Senior Care to settle with the union and give up demands that had presented significant hurdles to coming to an agreement with caregivers. This is only one example of how what was supposed to be a new approach to bargaining turned very traditional. In fact, after reaching a tentative agreement with Alliance employers and turning our attention to company-specific bargaining, it took several months to reach final agreement with a host of employers who sought to take advantage of an economic settlement largely predetermined, and the union's relative weakness based on a demobilized workforce, in order to further ratchet down settlements at their respective facilities.

The following are examples where the union was forced to deal with employers in a traditional sense:

- **Family Senior Care:** Initially, the company proposed that all "envelope" money be used to pay for the employer's increased costs related to health insurance inflation. This contradicted the terms outlined in the Alliance tentative agreement. The company was also opposed to using discretionary funds to internally standardize wages and benefits at one newly organized (non-template) facility. Only a strike threat moved the employer off this position.
- **Sava Senior Care:** The employer sought to establish their ability to unilaterally offer workers new health insurance plans without union agreement. In the interest of getting to a deal, the company moved away from this position, but not until the union moved to conduct strike petitions at non-template facilities.

- **Kindred:** This employer made it very clear that they would rather weather a strike than begin a pension plan in their San Francisco facilities, where virtually every other union nursing home has the pension. Kindred also put language on the table seeking the ability to conduct drug testing and mandatory competency testing on our members. Workers mobilized for a strike to push the employer off of this position.
- **Beverly:** The employer refused to ensure that our settlement included Fresno Care & Guidance, an IMD facility. In order to achieve an agreement that included this facility, workers were forced to move a strike petition at the building as well as build political support. Because this facility is the only non-template union Beverly home in the Alliance, workers at other facilities were not able to conduct strike petitions in their buildings to drive the best settlements.

*Bargaining for Future Power*

Partly due to the California Alliance agreement and the limits it placed on our bargaining (continuation of the template, no right to strike, etc.) from a position of strength, as well as the complicated bargaining process that ensued, SEIU was not successful in maximizing the payoff for workers relative to the amount of revenue received by employers. At the same time, it should be noted that several key items were negotiated that represent meaningful movement toward our expressed goals.

As described above, one very positive step in that direction was our ability to move forward - both conceptually and practically - the notion of establishing a minimum standard of starting wage rates by peer group. While we did not succeed in that initial demand in all peer groups, we did establish minimum start rates in Bay Area Urban C nursing homes. In addition, SEIU was successful in securing more dedicated funding for union homes located geographically where density and reimbursements were higher, and workers in these homes have seen this benefit in the form of additional parity increases and higher amounts of discretionary or "envelope" money. In short, employers bought into our concept of standardization of wages and benefits, thereby raising the floor for workers in Bay Area homes, many of whom were far behind other union facilities at nearby Urban C facilities.

Other important elements related to future power that came as a result of our bargaining include the following:

- **Common Expiration:** The common expiration of June 15, 2008 allows us the ability to create a crisis in the industry with employers, government, or both. The importance of this must be acknowledged, as AB 1629 is scheduled to sunset on July 31, 2008. However, it is important to note that this common expiration will mean little if there is a continuation of no right to strike in template agreements in approximately 25 homes and any new Alliance agreement prohibits our right to strike.
- **Single Bargaining Unit by Employer:** This represents progress in our bargaining relationship where we are now able to sit down at one table to discuss terms and conditions for workers at individual facilities within a company.

- **Training Fund:** This is very important, because it draws Alliance employers into working with the union in order to meet future needs.

***The nature of our neutrality agreement must change to ensure 100% density***

Changing our relationship with the industry and moving away from transactional dealings with these employers should include a revision of the current neutrality agreement to allow for all non-union Alliance homes to be organized into the union without employer interference and without requirements of reaching pre-defined benchmarks. This should be a principled position of any new agreement. The elimination of benchmarks and the 30% cap on organizing would signify the maturation of our relationship to a point where the parties will act together in recognition and consideration of each others' growth and success.

The current transactional relationship has generated 42 new union homes and approximately 3,000 new members between UHW and Local 434B. This does not represent an adequate payoff in relation to the union resources expended to achieve rate reform and the revenue increases described above. There still remain about 185 non-union Alliance operated facilities enjoying a prohibition on organizing and the ability to reap the full benefits of AB 1629. Belonging to the Alliance should mean that workers at all of an operator's facilities are able to join the union, not just a handful based on the discretion of the employer and whether or not benchmarks were reached.

Tort reform is a case in point. Due to a political miscalculation, more neutrality homes were pegged to achieving tort reform than were assigned to passing rate reform. Had tort reform become a reality, our two locals would have stood to receive an additional 30 homes through the current neutrality agreement. Instead, SEIU's support of a controversial tort reform package placed UHW in a precarious position with both the International Union and many of our union's allies in the advocacy community. This is a prime example of how the union dedicated resources to a project and in this case suffered – both publicly and in relation to building union strength – as a result of not being able to deliver on reaching an ethically questionable benchmark that would have satisfied the industry while leaving residents and key allies behind. This example points to the inherent problem with a transactional relationship based in delivering on benchmarks – if we aren't working in the common interest, then we are forced to work against ourselves for the sake of building union strength.

***Neutrality Home Selection***

The current system for selecting neutrality homes leaves too much of the decision making power in the hands of the employers. During the past few years of neutrality organizing, the selection of which homes joined the union was often a tedious and contentious process. In some cases, the decision making was mutual and the homes selected fit in with both the union's strategic organizing plan as well as the needs of the employers. In other cases, the union's preferred facilities were denied, leaving our locals

with homes that were not necessarily desirable as organizing targets. In at least two cases neutrality homes were either sold or closed their doors soon after coming into the union.

For UHW, desirability of a home was measured by a set of criteria used internally that included the following elements:

- **Geography:** Will the home in question help build union density and strength in a peer group, thereby shifting labor costs sufficiently to increase reimbursement? Was the home clustered near other neutrality homes where workers could build unity through a shared experience of organizing the union? Does the union infrastructure facilitate representation?
- **Potential Political Strength:** Would organizing the home in question make sense as part of a plan to build political clout in state assembly and senate districts where upping density could help strengthen our ability to gain influence with elected officials who will go to bat for the nursing home Alliance and its programs?
- **Financial Health:** Was the facility in question profitable, or is there reason to believe that the facility could be closed down or sold due to financial strain? How much new revenue is the facility slated to receive as a result of AB 1629?
- **Worker Desire:** Did the workers want to become union? Were workers willing to help organize other non-union workers into our union?

After two plus years of neutrality home selection that was often time consuming and sometime contentious, UHW proposed to the Alliance Board that a set of criteria similar to that outlined above be put in place and a process be agreed upon for selecting neutrality homes. Employers resisted, opting instead to exercise their exclusive rights under the Alliance agreement. Despite this fact, we continued working to organize neutrality homes that fit into our strategic vision with mixed results.

In renegotiating the Alliance agreement, it is in our union's best interest to work with employers in building a bridge to 100% density within these companies by agreeing to a process that allows for a more strategic selection of neutrality homes. A means to achieving this density that is free from benchmarks and employer obstruction is a basic necessity in developing a more effective and mutually beneficial partnership with the industry.

*Templates must give way to full collective bargaining agreements*

Finally, workers who have come into the union through Alliance neutrality organizing have for the most part been subject to template agreements. Currently, UHW represents members covered under template agreements at 12 of 19 neutrality organized homes, while Local 434B represents workers under the template agreement in 23 facilities. These agreements hold little economic value and rights for workers, contain no right to strike for economic or other improvements, and are devoid of many of the basic features of standard full collective bargaining agreements.

For example:

- Templates contain no provisions for arbitrating disputes with the exception of termination and economics.

- Employers have the right under the templates to unilaterally change the economic terms of the agreement and are only required to maintain a base level of expenditure and provide notice to the union if changes occur.
- Other terms and conditions of employment – such as vacation, holiday and sick leave – are not spelled out in the templates. Instead, workers must refer to individual facility employee handbooks, and employers may unilaterally make changes to these items as well as the majority of all other work rules.
- Template agreements contain no seniority rights for workers.
- Template agreements also restrict the number of allowable stewards and associated activities – hence restricting worksite member empowerment and activism in the union.

It has been and continues to be our position that the template agreement should serve as a springboard for realizing full collective bargaining rights and standard contracts for Alliance workers. As a matter of both principle and functionality, a renewed pact must spell out a clear path toward the phase out of the template agreement, and employers must be held accountable to the will of members who are covered under templates. In fact, UHW members have expressed incredible frustration and dissatisfaction with these agreements and have adopted a position that any renewed agreement should start with transitioning current templates into full contracts, and in some cases rollover into existing full contracts already in place with the same Alliance operators.

At the outset of the Alliance agreement the templates served a purpose in providing prospective employers a basic framework and idea for what could be expected in terms of minimum introductory obligations toward workers at newly organized facilities. We organized workers into the union under the templates knowing full well that these agreements would entice nursing home employers to forge ahead with us in building the kind of relationship we assumed would be required to move a legislative package around rate reform. We also organized these workers with an operating assumption that templates would eventually give way to full contracts, and that we reserved the right to have a discussion with the industry about how best we work together to phase out template agreements. Currently one school of thought suggests that the road to 'mature' labor relations is the utilization of labor management committees (LMC). LMCs while potentially viable in addressing some aspects of labor relations do not replace worker rights vis à vis full collectively bargaining rights and the fundamental right to strike as the means for workers to level the playing field with employers.

Unfortunately, despite holding up our end of the bargain by dedicating massive amounts of members' resources to fend off cuts to Medi-Cal and to pass rate reform, workers who long for more continue to be held hostage by the template agreements while employers continue in their efforts to resist any movement away from these inadequate contracts. We have enabled employers to use the template agreement as a basis for attempting to define their maximum ongoing obligation to all Alliance workers – neutrality organized or otherwise. In the interest of raising standards in cooperation with the nursing home industry, it is absolutely necessary that all Alliance workers see a path toward full master agreements by company and an elimination of templates.

APPENDIX A:

## METHODOLOGY AND ASSUMPTIONS

1. **Alliance Costing (Two sets of figures – 2004 to 6/15/08 AND 2004 to 7/31/07):**

| Element | Assumption |
|---|---|
| WAGES | $2.25 total: $.75/hr @ 1/1/06, $.75/hr @ 1/1/07, and $.75/hr @ 1/1/08 (ending 6/15/08). No crediting factored in, no roll-up costs for payroll taxes, etc. factored in. |
| PARITY | 1/3 of facility-specific parity cost at each date listed above. Source: Alliance Costing Model (SEIU). |
| ENVELOPE | $.50/hr for all Urban C facilities, $.25/hr for All Others: 1/3 of envelope cost at each date listed above. Exceptions: per agreement, Envelope for Evergreen, Sava, and FSC is full amount on 1/1/07; Envelope is reduced by $.10/hr for Sun-Mar facilities. |
| TRAINING FUND | $.06/hr effective 1/1/07, $.07/hr effective 1/1/08. |
| HEALTH | Assumes ½ the "snapshot cost" per facility at 1/1/07, remaining ½ at 1/1/08 – where data is available. Source: Alliance Costing Model (SEIU). |
| B.U. HOURS | Employer-provided annual hours used for all facilities where available. Average of Alliance annual hours used for facilities where no hours information was provided (123,804). Source: Alliance Costing Model (SEIU). |
| COMPANIES | Includes all union facilities for the following companies: Avalon, Beverly, Chase, Country Villa, Covenant Care, Evergreen, Golden State, Horizon West, Foresight/IQC, Kindred, Longwood, Sava, Family Senior Care, Skilled, SunBridge, Sun-Mar. |
| REVENUES | Medi-Cal pd rates are compared from 2003-04 to 2006-07. For 2007-08 a 3% increase in all rates is assumed. All actual Medi-Cal rates used exclude monies paid for Quality Assurance Fees and dollar approximations are arrived at by multiplying annual increase amounts by total Medi-Cal resident days as reported to OSHPD. Totals are cumulative. Source: OSHPD, SEIU Rate Analysis. |

2. **Percent labor cost increase comparison to percent Medi-Cal reimbursement increase:**

<u>**Labor Cost Calculations**</u>

Base labor costs calculated using employer-provided data from "big table" discussions. This dataset is incomplete and excludes all facilities operated by Longwood, so the analysis is done only for facilities where data was available.

Base average hourly labor costs include all regular wages paid plus paid time off wages paid, annual health insurance contribution costs, and annual retirement/pension employer costs. This number is divided by the total annual b.u. regular hours as provided by the employer.

Next, individual facility "snapshot" hourly increase costs (as calculated by SEIU and provided to employers as the total cost of the economic package) are added to the base facility average hourly labor costs in order to determine the percent increase in labor costs negotiated. This includes the following elements: new wage increase, 2005 credited wage increase amount, health benefits improvement cost, training fund, parity, and envelope.

<u>**Percent Increase in Medi-Cal Rates**</u>

This number is arrived at by comparing an assumed 07-08 weighted average Medi-Cal rate (06-07 rate minus QAF plus 3%, weighed by annual Medi-Cal resident days) to each company's weighted average 03-04 Medi-Cal rate. All rates used in this analysis exclude QAFs.

## APPENDIX B:

## FAMILY SENIOR CARE/SAVA SENIOR CARE: A CASE STUDY

An illustration of the problems resulting from a transactional relationship with the industry can be seen in the case of Family Senior Care (FSC) and Sava Senior Care (Sava). With SEIU members working in 14 facilities statewide, these employers (who entered into negotiations bound to a multi-employer master agreement) are a primary example of how those who gained the most financially through AB 1629 while exploiting the union's perceived weaknesses have enjoyed the privileges of membership in the Alliance.

FSC and Sava were among the last employers to settle contracts with the union, closing deals in early December 2006. In the case of both companies settlements were achieved only after members began to mobilize workplace actions and even threaten a strike at FSC. What's more, FSC's intransigence at the bargaining table was not based in financial concerns. At the employer's own admission, prior to ultimately bowing to the union's demands, FSC was unwilling to settle with the union for purely ideological reasons related to our proposal to spend pre-negotiated "envelope" monies on modest pension improvements. It is extremely important to consider that collectively FSC and Sava allowed SEIU to organize only three additional facilities through the neutrality agreement, representing little increase in market leverage for the union.

The following shows how FSC and Sava sought gains through their dealings with the union in the context of the current Alliance agreement and the critique presented herein.

**The companies maximized their gains from AB 1629 by working to minimize those of our members:**

As outlined above, both companies fared well under AB 1629, seeing substantial increases in their Medi-Cal reimbursement rates and large sums of increased revenues – a testament to the 'union difference' for nursing home employers in terms of maximizing reimbursement for higher past spending on labor costs as a result of a collective bargaining history influenced by our ability to drive standards in higher density areas, particularly in the Bay Area.

Between 2004 and the June 15, 2008 contract expiration date, the companies are projected to receive the following approximate cumulative increases:

- **FSC:** $31.6 million, or about a 30% overall increase in Medi-Cal rates at union facilities.
- **Sava:** $14 million, or nearly 31% overall increase in Medi-Cal rates at union facilities.

At the same time, improvements in standards for SEIU's members will cost the companies less than 30% of increased revenues at FSC and less than 20% of increased revenues at Sava. Both companies have committed to increase bargaining unit labor costs by less than 10% over the life of the current contract.

**The companies forced the union to fight for improvements while demanding takeaways at the table.**

During the course of determining the framework for an economic settlement with the Alliance, it became very clear that companies like FSC and Sava were getting a break financially. In the higher density Bay Area, these companies were the leaders in terms of wage and other benefit standards as a result of a history of struggle and building the union in those facilities. For example, standardized wage rates in the Urban C peer group were actually defined by those standards already achieved at UHW-represented facilities operated by FSC and Sava. The net effect for these companies was that workers would receive the same minimum package as others in the Urban C peer group less additional parity increases and less increases in health insurance improvements per the overall tentative agreement. Financially, these companies got a break.

When it came time to bargain alone with these companies over the use of discretionary "envelope" monies and other non-economic aspects of the contract, workers were faced with two employers who were insisting on holding the line economically and jamming the union with takeaways. This is exemplified by the following:

- **FSC:** The company originally proposed that all "envelope" monies be used to cover increased employer costs for health insurance premium inflation, then sought changes in employee health benefits that would have resulted in higher co-pays for members. Focused on health savings for the company, the employer also came to the table refusing to use discretionary funds to bring one non-template facility to benefit parity with other FSC buildings.
- **Sava:** This employer put language across the table seeking the ability to unilaterally change the terms of workers' health benefits without a discussion with the union – the same right employers have under the template agreement. They were also unwilling to make further improvements to health, pension and other benefits at their Southern California template facility that would have put those members in line with Sava's other union homes.

Ultimately, bargaining with these employers forced the union to break up the multi-employer master agreement and settle one company at a time. Settlements did not come without a struggle, and it became clear that limits placed on Sava's template facility would not allow workers there to mobilize to effectively wage a fight for the improvements they were seeking. In addition, the template workers' perspective was that the boss and the union had been responsible for the situation at the table, and third-party unionism threatened our ability to help engage and mobilize these members to act in their interests. Sava workers settled after non-template facilities moved a strike petition and the employer backed off of their health insurance flexibility in exchange for our backing off demands for health and pension improvements at the template facility.

In the case of FSC – the very last of the major Alliance employers to come to a settlement – workers voted to strike and moved forward with building a fight to ensure the SEIU pension continue to exist and improve in FSC's union homes. "Corporate is just not interested in having the pension," the employer representative said to our members at the bargaining table – a statement that captures the overall problem with a relationship of this kind. Our members, who represented decades of dedicated service to

both residents and the company responded in kind and won. In unity and in principle, the demands of the union were met because workers were prepared to strike – Alliance partnership or not.

# Attachment B

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## Labor officials tell union to hold off organizing efforts

**Oregon - A settlement over a card-check complaint at Siltronic ends in Local 49's six-month suspension**

Wednesday, April 25, 2007

**JOE ROJAS-BURKE and BRENT HUNSBERGER**
**The Oregonian**

Federal labor officials have forced the Service Employees International Union Local 49 -- one of Oregon's most active labor groups -- to suspend many of its organizing efforts for six months, as part of a legal settlement with a Portland worker who accused the union of violating labor laws.

The settlement highlights the National Labor Relations Board's efforts to exert more control over "card-check" agreements, in which employers may voluntarily recognize a union if a majority of employees sign cards authorizing representation.

With the use of card checks, unions have increasingly bypassed the traditional -- and more arduous -- federal election process that the labor board oversees. The number of petitions for NLRB elections filed by unions declined 26 percent between federal fiscal years 2005 and 2006. Experts say the drop-off largely has resulted from a surge in card-check and similar agreements.

"The board is taking a hard look at anything that seems to threaten its election-based approach," said James J. Brudney, a law professor at Ohio State University who has written articles about card checks.

Unions are lobbying hard for congressional legislation -- passed by the House in March -- to make card checks binding upon employers. But the growing use of card-check recognition has made it a target of anti-union groups, who say it allows labor organizers to coerce workers into supporting unions.

Local 49 had used a card-check agreement last fall to organize a group of 32 janitors working at silicon-wafer maker Siltronic Inc. in Portland as employees of Somers Building Maintenance. Ryan Canney, a worker for Somers, filed a complaint with the National Labor Relations Board alleging that the union relied on out-of-date cards and deceived and coerced employees into supporting unionization.

Canney gained legal support from the National Right to Work Legal Defense and Education Foundation, an anti-union nonprofit group based in Virginia that has challenged the legality of card-check agreements across the nation.

The labor board found that the union lacked a majority of workers in favor of forming a bargaining unit in October. SEIU spokeswoman Shauna Ballo said a majority signed cards in favor of the union, but in the span of several weeks before the employer signed the agreement, some workers changed their minds and tipped the balance against the union.

As part of the settlement, made public Tuesday by the National Right to Work Foundation, the union agreed to terminate the bargaining unit at Siltronic. The union also agreed to the condition that it not accept recognition as a collective bargaining representative of workers at any employer for six months unless it follows a secret ballot election conducted by the federal labor board.

Stefan Gleason, vice president of the National Right to Work Foundation, said in a written statement that

the board "recognized that SEIU union officials can't be trusted with card check."

Ballo said the union is being "made an example of" because of its outspoken criticism of the National Labor Relations Board.

"We've become a thorn in the side of the NLRB," she said. "We have been very vocal at Local 49 expressing our concerns that the NLRB is not an adequate protection for workers who want to form unions."

But Catherine Roth, acting regional director of the federal labor board in Seattle, pointed to a similar case last year involving the same SEIU local. "How we handled this case is how we've handled cases forever," she said. "We need to make sure people understand the law and follow the law."

Last July, the union agreed to dissolve a recently organized bargaining unit at Kaiser Permanente to settle a similar complaint. The labor board reached a preliminary conclusion that in the delay between the time the union began seeking cards from workers and the time the cards were checked, a significant number of the 65-member unit who had signed the cards left Kaiser to work elsewhere, leaving the union without a majority.

Joe Rojas-Burke: 503-412-7073; joerojas@news.oregonian.com

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Form NLRB-4722
(1-02)

# NOTICE TO EMPLOYEES

## POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

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

**WE WILL NOT** do anything that interferes with, restrains, or coerces employees with respect to these rights, and, more specifically:

**WE WILL NOT** assist, aid, support, recognize, or negotiate with Service Employees International Union Local 49, or any other labor organization, as the representative of our employees, for a period of one year, unless and until Local 49 or any other labor organization has been certified following a secret ballot election conducted by the National Labor Relations Board.

**WE WILL** immediately terminate, in writing, the voluntary recognition granted to Service Employees International Union, Local 49 on behalf of our non-supervisory employees at the Siltronic facility in Portland, Oregon dated October 12, 2006; and **WE WILL** inform employees at the Siltronic facility, in writing, that we have done so.

**Somers Building Maintenance**
(Employer)

Dated:________________ By:__________________________
(Representative) (Title)

36-CA-10064

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website www.nlrb.gov

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER.

Suite 1910

Form NLRB-4781
(1-02)

# NOTICE TO EMPLOYEES AND MEMBERS

## POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

**WE WILL NOT** do anything that interferes with, restrains, or coerces employees with respect to these rights, and, more specifically:

**WE WILL NOT** act as or accept recognition as the collective bargaining representative of any employers' employees, for a period of six months, unless and until we have been certified as the representative of those employees following a secret ballot election conducted by the National Labor Relations Board.

**WE HAVE** terminated, in writing, the voluntary recognition granted to us by Somers Building Maintenance (SBM) on behalf of its employees working at the Siltronic facility in Portland, Oregon dated October 12, 2006, and **WE WILL** inform SBM's employees at the Siltronic facility, in writing, that we have done so.

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 49

By______________________________
(Name and Title)

36-CB-2656

Date______________________________

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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Portland, OR 97204 Telephone 503 326 3085