JD(SF)–38–09
(Tempe, Arizona)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

PROFESSIONAL MEDICAL TRANSPORT, INC.

and

INDEPENDENT CERTIFIED EMERGENCY PROFESSIONALS OF ARIZONA, LOCAL #1

Cases 28-CA-22175
28-CA-22289
28-CA-22338
28-CA-22350
28-CA-22519

Sandra L. Lyons, Esq., for the General Counsel.

Robert J. Deeny, and *Michael C. Grubbs, Esqs.,*
(Sherman & Howard, L.L.C.) of Phoenix, Arizona,
for the Respondent.

Joshua Barkley, President, for the Union

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Phoenix, Arizona, on July 21-23, 2009. The initial charge was filed by the Independent Certified Emergency Professionals of Arizona, Local #1, (herein the Union or ICEP) on October 15, 2008 and the order further consolidating cases, third amended consolidated complaint and notice of hearing (herein the complaint) was issued July 6, 2009.

The complaint, as further amended at the hearing, alleges that Professional Medical Transport, Inc. (herein PMT) violated Section 8(a)(1) by disparaging the Union, threatening employees with unspecified reprisals, promulgating an overly-broad and discriminatory rule prohibiting employees from posting anything that "is divisive, inflammatory or derogative toward employees [or the] management of the Company," interrogating employees about their union sympathies by posting a sign up sheet for employees to sign if they did not want information about themselves to be provided to the Union, undermining the Union by telling employees that the Union never gained the confidence of a majority of the employees and that PMT doubted that the Union ever represented a majority of the employees in the unit, dealing directly with employees by telling them that negotiations have been a disaster, and inviting employees to decertify the Union, threatening employees with removal from active duty for engaging in union activities, and promulgating an overly-broad and discriminatory rule requiring Union officials to obtain prior approval for using electronic communications to employees.

The complaint alleges that PMT violated Section 8(a)(3) and (1) taking away shifts, including overtime shifts and other work hours, from five named employees and others and giving the work to part-time employees, and taking away the BlackBerry that PMT had previously supplied to the Union president because PMT's employees supported the Union.

Finally, the complaint alleges that PMT violated Section 8(a)(5) and (1) by dealing directly with employees by asking them to approve a proposed contract and posting a sign up sheet for employees to sign if they did not want information about themselves provided to the Union, presenting a collective-bargaining proposal that had to be accepted or rejected in its entirety, failing and refusing to provide requested information, unilaterally changing terms and conditions of employment by reassigning unit work to nonunit part-time employees, installing surveillance cameras, closing Station 606 and Station 607, removing the BlackBerry from the Union president, increasing health insurance costs paid by unit employees, engaging in bad faith bargaining, and withdrawing recognition from the Union.

PMT filed a timely answer that, as amended at the hearing, admitted the allegations in the complaint concerning the filing and service of the charges, jurisdiction, labor organization status, and agency and supervisory status. PMT denied the allegations in the complaint concerning appropriate unit and the Union's Section 9(a) status.

Before the hearing opened PMT filed a motion for summary judgment with the Board. The motion argued that PMT had no duty to bargain with the Union since PMT's recognition of the Union in July 2006 was invalid because, according to PMT, the Union did not represent a majority of unit employees at that time. The Board, citing *Alpha Associates,* 344 LRB 782 (2005), rejected that argument on its merits. At the trial I therefore precluded PMT (and the General Counsel) from presenting evidence concerning the Union's majority status at the time of recognition.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, PMT, and the Union I make the following.

Findings of Fact

I. Jurisdiction

PMT, a corporation, provides emergency transportation and medical care from its facilities in and around Tempe, Arizona, where it annually it annually purchases and receives goods valued in excess of $50,000 from points outside the State of Arizona. PMT admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

PMT contracts with municipalities in the Phoenix area to provide emergency ambulance services (911 services). PMT also provides general transport services to individuals traveling to and from hospitals, nursing homes, etc. (GT services). It employs registered nurses, paramedics, and emergency medical technicians. It also hires off-duty firefighters to provide general transportation services. These firefighters already have customer service skills in dealing with patients, families, and hospital personnel; they also have routing skills that are useful in determining how to get around the area efficiently. These firefighters have historically been excluded from the bargaining unit; they are generally paid at higher hourly rate than unit employees, but they do not receive the full range of benefits PMT provides to the unit

employees. The alleged increase in using firefighters instead of unit employees is an issue in this case.

PMT has grown from about 150-160 employees In July 2006 to over 400 employees at the time of the hearing in this case. PMT's employees work regular time, scheduled overtime, and unscheduled overtime. All full-time employees work scheduled overtime as they generally average 56 hours per week. In addition, they may work unscheduled overtime when vacancies in the regular schedules.

PMT has stations located throughout its service areas that house PMT's vehicles. Employees report to these stations where they await calls and rest between calls. The stations typically include bedrooms, food preparation areas, and a rest area to watch television. At the stations the employees talk to each other concerning work issues, and inspect their vehicles and complete a check-off form that is faxed to a central office upon completion. Employees are also required to clean the stations. The stations have supplies that the employees use to restock their vehicles after a call; employees also perform work-related paperwork there. Employees are paid for the time they spend at the stations.

Starwest Associates is PMT's parent company. Bob Ramsey is PMT's president; he is employed by Starwest. Joy Carpenter, also employed by Starwest, is PMT's director of human resources. Patrick Cantelme is PMT's CEO for its 911 Emergency Services; he is also part owner. James R. Roeder is PMT's vice president of clinical services. Robert J. Deeny is an attorney and represented PMT in certain dealings with the Union. Joshua Barkley works for PMT as a paramedic; he is also president of the Union. Before working for PMT Barkley worked for 13 years as a firefighter.

B. Bargaining History

On July 7, 2006, PMT recognized the Union as the bargaining representative for "full time field paramedics, EMT's, IEMT's, and registered nurses, but excluding administrative staff individuals, support services or personnel not directly operating in the field as an EMS provider." Since that time until February 2009 PMT recognized the Union as the collective-bargaining representative for the employees in the unit.

On about February 23, 2007, the Union presented PMT with a proposed comprehensive collective-bargaining agreement. In a cover letter accompanying the contract proposal Union President Barkley complained:[1]

> Over the past 4 months, we have had several meetings concerning labor mangements arrangements and relationships. However, we have made no headway on a contract for our membership. We have taken the initiative to create and propose our Inaugural Contract for PMT employees and members. . . .

About three days later Ramsey called Barkley and angrily rejected the proposal. On March 27, 2007, Barkley sent Ramsey another contract proposal Barkley called a "Temporary Compromise." Ramsey did not respond to this proposal. Actual face-to-face bargaining for a complete contract did not begin until September 2007.

[1] I do not highlight or correct any of the numerous grammatical or other errors contained in the documents quoted in this decision.

Meanwhile, on March 15, 2007, the parties reached a Memorandum of Understanding that provided:

> This MOU will serve as an interim document to recognize the labor management arrangement between the ICEP and the PMT administration. It will serve as an outline to basic labor management goals, operational objectives and organizational behavior in dealing with each other, while contract negotiations continue. Both parties recognize and adhere to the goals and objectives outlined in the Organizations mission statement and Operational behavior.
>
> 1. The administration recognizes the ICEP as the bargaining unit for the employees of PMT.
> 2. The ICEP recognizes the Adminstrations rights to make Business decisions in the best interest of the company.
> 3. The Administration recognizes the rights of the ICEP to represent the best interest of the membership.[2]
> 4. Both parties will observe and refer to all Federal labor laws when dealing with membership issues, including HIPPA, OSHA and EEOC guidelines that directly effect ICEP membership.
> 5. Both parties agree that any personnel facing discipline above the level of documented oral reprimand, will have the right to Union representation.
> 6. The Administration refers to the Organization's Discipline Process when administering discipline to ICEP members.
> 7. The union will use the Hierarchy of discipline to determine the level of representation needed for the member. Trustees to be used at initial discipline meetings and initial grievances. The business manager will handle all discipline above that level.
> 8. The administration agrees to notify the union in cases of written reprimands, or above, as noted in the disciplinary process.
> 9. The Administration agrees to a meet and confer system for all union committees to better increase communications between labor and management.
> 10. The Union may have reasonable access to all communication and electronic devices, to be limited to the Union President or his designee, and the receiver of such message, on an as needed basis. All messages must be in compliance with applicable laws governing the use of such devices.
> 11. The union may have confidential access to the courier system with the understanding that no material transferred in this system will be derogatory in nature to the Administration, executive board or The Company, (PMT), and complies with all laws governing the use of such a system.

The parties met about six times during September through December 2007 and they made some tentative agreements. The parties discussed *Weingarten* rights. PMT took the position that the right to union representation during investigatory interviews would be permitted only when PMT completed its investigation, interviewed witnesses, and was ready to mete out discipline. On December 8, 2007, Barkley sent Ramsey a message that read:

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[2] Although certain documents refer to "members" other documents make clear that this means employees in the unit.

The wages and benefit package has been significantly reduced since the inception of the PMT Deployment Program in 2005-2006.

The company had decreased Healthcare availability and increased Co-payments for their employees. The cost of living has risen 12.2% since 2004 and PMT has not offered any relief to their employees. Holiday pay is non-existent for field employees and the PTO changes made on 2006 makes PMT one of the worst in the Industry.

Further: PMT has cut the 911 workforce and it's resources while simultaneously increasing the coverage area and changing the status of units to GT/911 units, increasing the workload for all involved in the system. PMT has repeatedly refused to pull manpower from the GT sector to staff a dedicated 911 ride, further increasing the workload for the remaining units who have to cover the area of the "downed unit". The average wage in 2004 roughly equals 44500$ in 2004. After adjusted for inflation and increases in healthcare benefits, The PMT employee has lost 6540$ of expendable income while receiving less benefits at the same time.
…
Healthcare benefits, cost to employee, has risen on average $100 a month for just an individual with 1 dependent. The average wages are $10,000 dollars below regional averages, (Jems wage survey by region, Arizona is region 9) To just get back to where we started, The employee would have to get a 15% increase in the wage and benefit package, (conservative estimate) and the workload increases and resource reduction would have to stop. Demand list to be implemented immediately. December 8th 2007

1. Career Firefighters (except as described in current municipal contracts) working on starwest ambulances are to be terminated from starwest as employees.
2. 18 hour cars are to be paid 1 ½ their pay rate for any hours worked in day past 8 hours, or change the schedule back to 24 hour Kelly schedule, (4 concurrent days off).
3. Reschedule a 5 day break, without loss of income, for 18 hour cars, at least once monthly.
4. 18 hour cars are to be given a posting station with the same amenities as required by state law for 24 hour cars with opportunity to use them.
5. 2 hour exhaustion breaks when needed (paid).
6. ½ hour paid lunch and 1 hour paid dinner break for all 24 hour cars.
7. No further manipulation of union intervention in discipline or re-definitions of weingarten rights.
8. Time and half for everyone working a holiday, to include Christmas and Christmas Eve of 2007, new years eve and new years day.
9. No further decreases in work hours.
10. Any other changes in system management that negatively affects field employees will be considered as further degradation of relations between labor and management.

The same day, December 8, Barkley sent Joe Gibbons, the lead negotiator for PMT's bargaining team, a message that read:

After reading the proposal brought forth for signatures 2 weeks ago, we reject your contract proposal based on principal and presentation. We have submitted to you 2 contract proposals almost a year ago with no response. You agreed to begin negotiations in September only after it was made clear to you that we

> would be bringing in additional help. After 3 months of reviewing your articles, it appears that your chosen method of negotiations will produce no results. After agreeing to collective bargaining on July 6th, 2006, you still haven't offered us anything. Quite the contrary, you spent 3 months telling us how you were going to remove more of our rights as a union. There is nothing in your contract that benefits, improves or increases anything for our members.You are formally put on notice that we will be seeking federal mediation from the Phoenix branch of Federal mediation and conciliation services in 15 days, declaring an "Impasse", if things don't drastically change. I will not sign off on any of your proposal. It is an unheard of practice to sign off on parts of a contract prior to completion. At this late stage, I expect that our contract proposal be accepted. I will attach our last proposal.

On December 10, 2007, Ramsey advised Barkley that PMT had negotiated in good faith and had agreed on certain sections for a new contract but there appeared to be a "stumbling block" on the Union's interpretation of the law versus PMT's interpretation. Ramsey offered the use of PMT's attorney to resolve the difference. Barkley responded by attributing the failure to reach a contract on the positions PMT had taken at the bargaining table and asked for a full, written counter-proposal.

C. Section 8(a)(5) Allegations

Barkley then contacted the Federal Mediation and Conciliation Service and spoke to a mediator in January, 2008, but the mediator was unsuccessful in arranging any meeting with PMT so in May 2008 the Union filed its first unfair labor practice charge. PMT then agreed to send the Union a contract proposal and the Union agreed to withdraw the charge. However, by Friday June 13, 2006, the Union had not received any contract proposal so that day Barkley sent the following message to PMT:

> Today is the last day for PMT to send the "contract" that we have been promised for 2 ½ years but still haven't seen. As directed to [PMT's attorney] by the NLRB, we are to return to refile the complaint on Monday. Please send it to this e-mail address by 3 o clock.
> Thank you.

The complaint alleges that on June 16, 2008, PMT unlawfully presented a proposed collective-bargaining agreement that had to be accepted or rejected in its entirety and bypassed the Union and dealt directly with unit employees by asking them to approve proposed collective-bargaining agreement. That Monday, June 16, in the late afternoon under a cover letter addressed to "Independent Certified Emergency Professionals, Local 1 Josh Barkley President" and "To the Bargaining Unit of ICEP, Local 1" PMT sent the Union a proposed complete collective-bargaining agreement. In that cover letter Ramsey indicated, among other things, "PMT is submitting the attached contract for your approval." and "This contract is presented as a package deal and can only be accepted or rejected in its entirety." Notwithstanding the fact that the cover letter was addressed to the "bargaining unit" as well of Barkley, the uncontradicted evidence is that the proposed contract was only sent to Barkley and there is no evidence that the cover letter was sent to or received by any unit employee.

At the trial Ramsey testified that he made the contract proposal in that fashion because Barkley indicated "that he did not want to negotiate article by article. He wanted a full contract to be either accepted or rejected, so we held him at what he was requesting." But Barkley

credibly denied he ever asked for a contract proposal that the Union could only accept or reject in its entirety. On June 17 the Union sent PMT a message that stated in pertinent part:

> As you know, the ICEP received PMT's contract proposal yesterday. Per your cover letter, you stated that this contract must either be accepted or rejected in it's entirety. It is with much regret then the ICEP must reject your proposal based on these conditions. There are many areas that we feel must be addressed before this or any contract can be approved. There is no discussion of base pay rate for any employees, no allowance for improved PTO, and the pay differentials you offer do not even cover inflation over the last two and a half years we have been in negotiations, not to mention the economical difficulties we currently faced. Also noted was the distinct lack of allowance for the union to be involved in discipline, and certain verbiage which must be addressed. We feel that this is a distinctly pro-company contract, and offers little or no benefit to the ICEP members. This is unacceptable. However, we are willing to negotiate a contract with this document as a starting point. Please contact me at your earliest convenience to set up a meeting for negotiations to begin. I feel confident that we can reach an agreement that is fair and beneficial to all parties involved.

On June 18 Barkley sent PMT a message indicating that the Union was looking forward to further negotiations based on PMT's contract proposal but confirmed that the Union could not accept the contract as presented. The Union stated that it was looking forward to moving to a rapid conclusion. PMT responded as follows:

> Thank you for confirming your position on the contract proposal.
> As you are aware the contract was presented to accept or reject in its entirety. Your response indicates that there are probably portions of the proposal that you found acceptable. We assume that there are portions that are unacceptable and portions that may be acceptable with minor changes. Please send us an email identifying those articles in each of those categories to further clarify the ICEP position. This will help us move forward with the process.

That same day the Union answered with a detailed listing of the issues it had with PMT's contract proposal. PMT did not insist on its initial position that the contract had to be accepted or rejected in its entirety. Instead, as described above and below, the parties went through the proposal section by section.

On June 16, the same day when PMT presented its contract proposal to the Union, PMT sent a message to the unit employees informing them that it had presented the Union with the proposed contract. The message concluded:

> We want you to fully understand our proposal, so we are having focus group meetings on Thursday, June 19th and Friday, June 20th at 10:00 AM to explain our proposal and answer any questions you may have.

Barkley sent PMT a message the next day, June 17, protesting that the scheduled meetings were unlawful and were hurting his standing in the Union and at PMT.

PMT held the "focus group" meetings with the employees as announced. The centerpiece of the meetings was a power point presentation. PMT gave its version of the collective bargaining history with the Union, beginning with its recognition of the Union on July 7, 2006, and noting the Memorandum of Understanding on March 15, 2007 and the start of

formal negotiations on September 7, 2007. The presentation continued, explaining how the parties reached tentative agreements on several issues and then in November 2007 PMT "asked Josh Barkley to reconfirm" the tentative agreements by signing those articles but that he refused. Then, on December 8, 2008, Josh Barkley notified the company that the union was breaking off negotiations," the union rejected all tentative agreements and submitted a list of demands, the union leadership stated they would no longer negotiate individual articles and demanded that the company submit a new complete contract proposal. "We no longer had a sense of acceptable common ground … We had to start over!" PMT explained to the employees how it continued to award employees with annual raises, provided education and training, purchased and implemented new technologies, and secured more that 100 new jobs for its employees. PMT told employees how it and the Union agreed to create employee committees to allow input into policies and procedures only to have the Union file a "formal demand" that the committees be disbanded. The presentation then turned to PMT's June 16 contract proposal, describing how it establishes base pay, provides for raises, and creates additional pay raise opportunities. PMT highlighted how its contract proposal provides for employee participation in its decision making process through a series of committees dealing with policies and procedures, scheduling and shift bids, and employee safety. The presentation ended:

> The Executive Board of ICEP notified the company 21.5 hours after receiving the proposed contract that the leadership was rejecting the contract proposal without submitting it to the employees for their review or giving us an opportunity answer questions.
>
> Once again, the union leadership is changing directions. They have now indicated a desire to return to negotiating individual items of the contract instead of following their last demanded path of submitting a counter proposal.
> Where are we now?
> The company remains committed to negotiating a contract that is acceptable to the company and our employees. We have asked the union to identify items and Articles in the proposed contract that are:
> Acceptable, as is;
> Acceptable with modification;
> Unacceptable "We are starting over again"

As indicated, the General Counsel argues that two violations occurred on June 16. The allegation concerning direct dealing is premised on the unsupported factual assertion that either the June 16 cover letter from Ramsey or the contract proposal itself was sent directly to unit employees. I therefore dismiss that allegation. In his brief the General Counsel seems to imply that the "focus group" meetings were unlawful, but this issue was not raised by the pleadings and I therefore do not resolve it. Moreover, the Board has consistently held that an employer may communicate its contract proposals to its employees. *The Proctor & Gamble Manufacturing Co.,* 160 NLRB 334, 340 (1966). Concerning the second allegation that PMT's conduct was unlawful the General Counsel relies on *General Electric Co.,* 150 NLRB 192 (1964), enfd. 418 F.2d 736 (2d. Cir. 1969) and its progeny. But the harm identified in those cases was the employer's persistence in a "take it or leave it" attitude that is inconsistent with the statutory obligation to bargain in good faith. Here, while PMT did present it contract proposal in that fashion, after the Union rejected the contract PMT quickly resumed bargaining in a normal fashion. In other words, in a matter of days PMT abandoned any "take it or leave it" attitude that it may have initially conveyed to the Union. Under these circumstances PMT's conduct appears to be a bargaining ploy and does not, by itself, rise to the level of an unfair labor practice. I dismiss this allegation of the complaint too.

The complaint alleges that on about July 25, 2008, PMT unlawfully failed and refused to provide the Union with information concerning "call volume" and a roster and contact information for unit employees and all employee performing unit work. On July 25, 2008, the Union requested information from PMT, including "Call volume in its entirety" and "Roster for all PMT employees, including contact information." "Call volume" is understood to mean the number of calls or requests for service received by PMT for a given period of time. Barkley explained at the trial that the Union requested this information to assess the work load for unit employees; "if your call volume goes up and your available units and emergency personnel go down, then your work load increases." The Union wanted to include provisions in the contract that dealt with work load for unit employees. On July 28 Deeny responded:

> Your request for information has been reviewed. On its face, it does not obligate the client to give you anything. If you feel differently, please respond with reasons why you are entitled to the information requested.

The Union is entitled to information that is useful to it in the performance of its duties as the collective-bargaining representative of the employees. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967). The contact information for unit employees is presumptively relevant to the purpose. *Maple View Manor,* 320 NLRB 1149 (1996). Barkley's testimony establishes the relevance of the information concerning call volumes. The fact the Union's information request was overbroad does not excuse an employer from providing information that is required. Id. By refusing to provide the Union with requested information that is relevant to the performance of the Union's duties as the collective-bargaining representative of employees, PMT violated Section 8(a)(5) and (1).

The complaint alleges that in or about August 2008, PMT through Carpenter bypassed the Union and dealt directly with employees by posting a sign-up sheet for employees to sign if they did not want information about themselves to be provided to the Union.[3] Justin Lisonbee has worked as a fulltime emergency medical technician for PMT since January 2008. Lisonbee also is a trustee for the Union; as such he represented employees during disciplinary matters. About a year ago he began working periodically at Station 1, PMT's main administrative office, assisting in dispatching. Lisonbee also assisted in the scheduling office at Station 1 from February through August 2008. Lisonbee credibly testified that in around July 2008, and continuing through the end of 2008, he saw a message posted on PMT's bulletin board in Station 1 advising employees that PMT would be providing addresses and telephone numbers to the Union. The message invited employees to fill out a "Request to Withhold Personal Information" form if an employee did not want PMT to provide that information. That form, which was not posted but was kept in the scheduling office, read:

> I, _____, request that my personal information not be provided to the [Union]. I understand that this request will stay in effect until I authorize in writing that my information may be given to the [Union].
> Employee Signature _____
> Date _____

[3] The complaint also alleges that by this conduct PMT interrogated its employees about their union sympathies, thereby independently violating Section 8(a)(1). I need not resolve that matter because I find a violation under Section 8(a)(5) and the remedy I provide for that violation subsumes any remedy I might provide under Section 8(a)(1).

As pointed out both above and below, the Union is entitled to the addresses and telephone numbers of the unit employees; PMT may not fail to provide this information for objecting employees. The Union's right to this information stems from it role as the representative of the employees and PMT must deal solely with the Union as such. PMT admits to the posting, but claims the Union agreed to it. According to Carpenter, at a bargaining session PMT raised its concern about giving out the contact information so it proposed a notice to employees that would allow the employees to opt out if they objected and the Union agreed. Later when I questioned Carpenter about this matter she testified that what PMT suggested was the employees be given notice that PMT would be giving employee contact information to the Union and the Union agreed. No other member of PMT's bargaining team corroborated this testimony. I do not credit Carpenter's testimony; her demeanor was unconvincing and her testimony shifting. Moreover, I describe below more difficulties I have with Carpenter's testimony. Barkley, on the other hand, credibly testified that he never agreed to permit PMT to allow employees to opt out of having their contact information provided to the Union. Based on this credibility resolution, I reject the notion that the Union agreed to allow PMT to permit employees to opt out of having their contact information provided. Next, PMT argues that any violation is barred by Section 10(b). But I have credited testimony that PMT continued to have the message posted on its bulletin board through the end of 2008, well within the Section 10(b) period. The message thus operated as a continued effort by PMT to deal directly with employees rather than the Union. Continuing, PMT argues that its conduct in this regard created "no harm." This argument might be worthy of consideration if this was the only violation alleged to have occurred. Here, this unlawful conduct is part of a much bigger picture that therefore must be addressed and remedied. In *The Permanente Medical Group, Inc.,* 332 NLRB 1143, (2000), the Board identified the criteria for finding a direct-dealing violation as follows:

> They are: (1) that the Respondent was communicating directly with union-represented employees; (2) the discussion was for the purpose of . . . undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union.

Id. at 1144. The facts described satisfy each standard. By dealing directly with employees instead of with the Union as the collective-bargaining representative of the employees, PMT violated Section 8(a)(5) and (1).

On September 10, 2008, PMT sent the unit employees a contract progress report that indicated that PMT and the Union were going to resume negotiations with the help of a federal mediator. The report also outlined PMT's version of the history of dealing with the Union. The Union and PMT met with a federal mediator in late September; not much was accomplished at this meeting. At the next bargaining session PMT agreed on language on fairly uncontroversial matters such as nondiscrimination and Union rights.

The complaint alleges that since on about mid-September 2008, PMT has unilaterally taken away shifts, including overtime shifts, from full-time unit employees and given them to nonunit firefighters and reduced the number of hours assigned to full-time unit employees.[4] I now review the conflicting evidence on this allegation and determine what evidence is credible.[5] Barkley testified the when he started with PMT 3½ years ago there were about 100-150 unit employees and about 10-20 firefighters that filled in on a day-to-day basis as vacancies occurred in the regular schedule due to sick leave, family emergencies, and the like; bargaining unit employees also worked additional overtime to fill those vacancies. Barkley testified that PMT began to use more firefighters and created a firefighter general transportation sector and vehicles assigned to that sector were only staffed by firefighters; PMT excluded unit employees from working on these vehicles. Also, firefighters began to work more unscheduled overtime, thereby depriving unit employees from this work. According to Barkley, this process began in late 2007. Then, according to Barkley on September 13, 2008, another company, Medcare, ceased operations. Medcare was staffed exclusively by firefighters. Later that month Barkley was at PMT's main facility when he noticed about 20 former Medcare employees in PMT's training room; he knew some of them from his years working as a firefighter. These former Medcare employees were undergoing new employee training. After that, according to Barkley, unscheduled overtime opportunities for unit employees began to diminish. Justin Lisonbee has worked as a fulltime emergency medical technician for PMT since January 2008. As indicated above, about a year ago he began working periodically at Station 1, the main administrative office, assisting in dispatching. Lisonbee also assisted in the scheduling office from February through August 2008. Lisonbee worked unscheduled overtime before September 2008 and was also familiar with PMT's scheduling procedures; he testified that his unscheduled overtime decreased after that time period. Jason Wayne Seyferth works for PMT as a paramedic after having first been hired as an emergency medical technician. Seyferth is also a trustee for the Union for the general transport portion of PMT's employees. He testified that for a period of time he was able to work unscheduled overtime almost as frequently as he wanted, but that around the time PMT hired a large number of firefighters from Medcare the unscheduled overtime opportunities for him diminished. Todd Robert Wais has worked as an emergency medical technician for PMT for about two years. Wais testified that he regularly requested and received unscheduled overtime work until around September 2008.[6] After that time he rarely received unscheduled overtime work. Ryan Joseph Nolan works as a paramedic for PMT; he is

[4] The complaint also alleges that PMT violated Section 8(a)(3) and (1) by engaging in this conduct because employees supported the Union. Because, as described below, I find a violation based on Section 8(a)(5) I need not resolve the Section 8(a)(3) allegation. It follows that I also do not resolve PMT's argument that the Section 8(a)(3) allegation is barred by Section 10(b).

[5] In his brief the General Counsel complains that I improperly failed to receive into evidence GC Ex. 8. Barkley testified that that exhibit was an attachment to an email message he sent to PMT. The actual email message showing GC Ex. 8 as an attachment was not offered by the General Counsel. Barkley, moreover, was unable to identify specifically who at PMT he sent the email message or the email address of the person he sent it to. I ruled that the General Counsel had failed to meet his burden of showing that the message was properly sent so as to create a presumption that it was received. I adhere to that ruling. The General Counsel cites FRE 1001(1) and FRE 901(a) to argue that the message has been authenticated. That is entirely correct but completely misses the point. Instead, the issue is whether the message was sent, and that is where I conclude the evidence is lacking.

[6] In September and October 2008, Wais did not seek unscheduled overtime due to family related matters; he resumed requesting that overtime in late November.

also an employee representative for the Union. He too testified that he was able to easily work unscheduled overtime until around September 2008, after which time there was a big decline in that overtime. The payroll records he retained from PMT support his testimony. I find the testimony of these witnesses to be credible. Their demeanor convinced me that they were doing the best they could to accurately relate the facts. Their testimony was generally mutually corroborative. I note that they are current employees of PMT testifying against their employer's interest. Importantly, as explained below, given the fact that PMT admits to hiring a large number of firefighters during this time frame and absent some other plausible explanation, it seems likely that this would have an effect on the amount of work available to unit employees.

PMT offered the testimony of several witnesses on this issue. As indicated, Bob Ramsey is PMT's president. Ramsey testified that in around September 2008 PMT won some new contracts and consequently hired a large contingent of full-time bargaining unit employees, "as many as we could get," to fill positions on those contracts and that PMT also hired full-time firefighters to work on some of those positions while some 50-60 of the newly hired employees were undergoing training. Ramsey asserted that no one lost a position as a result of using the firefighters. Yet he also testified that these firefighters were not hired as temporary employees to be employed only until the completion of the training period. He explained that because PMT was a growing organization it could continue to employ those firefighters as part-time employees who were excluded from the bargaining unit. Ramsey was asked to "please explain the relationship with the hiring of added firefighters in September 2008 and the reason for doing that?" Ramsey replied:

> Well during that summertime is, we had contractual – a new contract that had recently come in, so what happens when a contract comes in it displaces, you move certain employees to that contract and displaces positions that we need to take care of, so we would have hired at that time basically because we increased staffing of the bargaining unit.
> …
> And, excuse me. The secondary is that September is the time in which inherent in the valley we have a curve of need that starts around September and ends the end of May, and that has to do with our winter visitors coming in. It's a natural curve of – if any volume figures were ever figured about every area, it's during that period of time that the need for ambulance service is higher . . . and so you have to reorganize what, for that seasonality that comes up.

In his brief the General Counsel describes Ramsey's testimony as "confused and rambling." I agree. I find Ramsey's testimony to be wholly incredible; he appeared to fabricating it as he testified. James R. Roeder is PMT's vice president of clinical services; his duties included the approval of unscheduled overtime. He explained PMT's policy for selecting employees to work unscheduled overtime. Roeder admitted that in September 2008 PMT may have hired up to 25 firefighters from Medcare, but he denied that this had any impact on the amount of unscheduled overtime worked by unit employees. He explained that the newly hired firefighters would have been undergoing training and therefore would not be taking away work from unit employees. He also explained that some of the unit employees might have worked less hours during this time period because they were attending medic school for training during their off duty hours. I note Roeder's explanation concerning why the additional firefighters would not have taken away unit work is unique, uncorroborated, and not credible. Joy Carpenter, PMT's director of human resources, testified that she was unaware of a large group of firefighters being hired in September 2008. Kellie J. O'Connor works for PMT as director of quality assurance and staffing. As such she manages the scheduling department, among other things. When asked at the hearing on July 23, 2009, whether it was true that in around September 2008 PMT hired a

large contingent of firefighters O'Connor answered: "That's a long time ago. You'll have to build on that a little bit. I hire everyday. I hire people – I do the hiring, so --. I find the testimony of Carpenter and O'Connor so incredible that I am reluctant to credit anything they said without credible corroboration. To summarize, PMT's evidence on this issue was contradictory and generally not credible. I conclude that PMT reduced the unscheduled overtime hours for unit employees by assigning that work to nonunit firefighters.

I now assess whether PMT's conduct in this regard was unlawful. It is well settled that an employer violates Section 8(a)(5) and (1) by unilaterally assigning unit work to nonunit employees. *Summa Health Systems, Inc.,* 330 NLRB 1379. 1388 (2000). Citing *The Post-Tribune Co.,* 337 NLRB 1279 (2002), PMT argues that it did not change conditions because it has historically used firefighters to perform unit work. While in fact PMT has used firefighters in the past to perform unit, PMT has failed to show that such use in the past was similar to the size and scope of what occurred in around September 2008, when it hired so many firefighters after Medcare went out of business. In other words, the amount of unit work assigned to firefighters during that period of time was significantly higher that in the past and therefore required prior notice to the Union. *Summa Health,* supra at 1387. By unilaterally assigning unit work to nonunit firefighters, PMT violated Section 8(a)(5) and (1).

The complaint alleges that on about January 15, 2009, PMT unlawfully failed to provide the Union with certain information it had requested. On January 15, 2009, the Union again requested that PMT provide it with certain information. Among the items requested were:

> An up to date accounting of all ambulance and transportation vehicle runs in 2008, to include total run numbers and Pt transported runs.
>
> …
>
> Also: we need and are officially requesting a "roster" of ALL PMT employees, to include full time and part time: to include all that you allowed to sign the "do not release personal information to the Union" document that you created. Please include in with the roster the following:
>
> Name and address of the employee.
> Phone number of the employee. email address of the employee
> Any and all ways of contacting the employees that were provided to you

At trial Barkley explained that he needed the contact information because the number of unit employees had dramatically increases and the Union needed to be able to contact these new employees. PMT replied "Your request for information dated January 15, 2009, is denied."

For reasons described above in the earlier information request issue, PMT again violated Section 8(a)(5) and (1) by refusing to give the Union the information concerning the vehicle runs and the contact information as it relates to unit employees

The complaint alleges that in about January 2009, PMT unilaterally installed surveillance cameras in the living quarters of several stations. In January and February 2009, PMT installed new security cameras at several of its facilities. The scope of the area to be surveilled by the cameras appeared to include the areas where the employees rested and watched television. Apparently these cameras were never operational. Ryan Brockhaus works as an emergency medical technician for PMT; he too is a trustee with the Union. Brockhaus had occasion to work at Station 605, one the stations with new security cameras. He saw a camera in the living area where the employees rested and watched television and another situated in the hallway by the front door. Several weeks later the camera directed at the living area was removed. Todd Robert Wais has worked as an emergency medical technician for PMT for about two years. He

worked out of Station 275, also one of the stations that had the new security cameras. One of the cameras was placed so as to observe the living room area of the facility and a second camera was placed near the room that stored the cleaning supplies. After several weeks the cameras were repositioned so that one observed the hallway leading to the front entrance and the second toward the rear entrance.

Ramsey testified that he informed the Union that PMT was going to be installing the security cameras, but when asked to identify with specificity when this was done, Ramsey spent several pages in the transcript attempting to evade answering. I do not credit Ramsey's testimony; he again seemed to be creating the answer as he was testifying rather than relating historical facts. Roeder testified that in February 2009, after the security cameras were installed in the two stations, PMT held meetings with certain employees and explained that the security cameras at certain stations had been improperly installed and were not operational and that the cameras were to be focused on the doors only and that shields on the cameras would ensure that they would not screen any living areas. On February 11, 2009, PMT sent its employees a message concerning its efforts to update information technology. The message described some new equipment and stated "For the protection of this equipment and your personal protection, we will place security cameras at the front and rear entrances (if applicable) of our stations."

I now assess whether the placement of the security cameras violated Section 8(a)(5). In *Colgate-Palmolive Co.,* 323 NLRB 515 (1997), the Board held that the installation of security cameras is a mandatory subject of bargaining because security cameras are an investigative tool or method used to ascertain whether employees engage in misconduct. The Board also held that the cameras aimed at restrooms and at a fitness center raised issues of privacy that deserve to addressed in the bargaining process. PMT argues that it never turned on the cameras, but the short response to this is that it never told the employees or the Union that the cameras would not be operational. PMT also argues that it relocated the cameras. While this negates the need for an order to remove the cameras,[7] it does not negate the fact the cameras were initially installed without giving the Union a chance to bargain. By unilaterally placing security cameras in the living quarters of employees at several stations, PMT violated Section 8(a)(5) and (1).

The complaint alleges that in about January 2009, PMT closed Stations 606 and 607 without giving the Union an opportunity to bargain about the closure or its effects. The leases PMT had for Stations 606 and 607, both located in Scottsdale, expired in January 2009. PMT decided not to renew the leases and, after months of searching, found new locations and moved the operations and employees from those stations to the new locations. The transitions occurred after the employees were housed at temporary locations for a period of about three months. The temporary location for Station 606 was located about 10 miles from the old station. The new permanent location for Station 606 is about one-half mile from the old location. The first temporary location for Station 607 was existing Station 604. For about two weeks the intermingling of employees and furniture from Station 607 at Station 604 caused crowded conditions at Station 604. Then, for the remainder of the three month period, the Station 607 employees were temporarily housed at another location about eight to ten miles from old Station

[7] In his brief the General Counsel argues the relocation of the cameras weeks later also violated the Act. But the complaint does not cover this allegation and the General Counsel has not moved to amend the complaint. A properly drawn complaint assures that a respondent is provided due process and the General Counsel has failed to provide PMT with due process on this assertion.

607. The new Station 607 is about three-quarters mile from the old location; the new facility included a shower available to employees that the old facility did not have. PMT did not give the Union a meaningful opportunity to bargain about the effects of this series of relocations on unit employees.

In his brief the General Counsel does not argue that PMT had an obligation to bargain over the decision to relocate Stations 606 and 607; rather, the General Counsel argues that PMT failed to give the Union a meaningful opportunity to bargain over the effects of the relocation on unit employees. I agree. As described above, the relocation clearly had an impact on the working conditions of unit employees. The Union was entitled to sufficient notice of the relocations to allow meaningful bargaining over that impact. *First National Maintenance Corp., v. NLRB,* 452 U.S. 666, 681 (1981). By failing to give the Union an opportunity to bargain over the effects of the relocation of Stations 606 and 607 on the working conditions of unit employees, PMT violated Section 8(a)(5) and (1).

The complaint alleges that on about February 11, 2009, PMT unlawfully withdrew recognition from the Union. At the February 11, 2009, bargaining session with the federal mediator, Robert Deeny, PMT's attorney and a member of its bargaining team, began questioning the Union committee about the Union formation. Because unfair labor practice charges had already been filed, Barkley replied that he was there to bargain for a contract. Deeny then said that PMT did not believe that the Union represented a majority of the unit employees. PMT admits that it withdrew recognition from the Union. On February 12, 2009, PMT filed an RM petition with Region 28. The unit of employees described in that petition is:

> Included:
> All full-time Arizona Certified Medical Technicians (EMT, IEMT, EMT-P, RN, and EMT-Basics, EMT-Intermediates, or EMT-Paramedics who have duty assignments as Field Training Officers) working assigned full-time schedules delivering patient care on Ambulances in Maricopa County, Arizona.
> Excluded:
> All part-time employees, office and clerical employees, support services employees, fleet service employees, dispatch employees and supervisors.

PMT argued that under *Levitz Furniture Co.,* 333 NLRB 717 (2001), it had a "good faith reasonable uncertainty" that the Union represented a majority of unit employees. On March 31, 2009, the Regional Director dismissed the petition because PMT failed to establish the requisite good faith uncertainty. On April 14, 2009, PMT appealed the dismissal and as of the close of the hearing in this case the Board had not yet ruled on the appeal.

Under settled Board law the Union is entitled to a rebutable presumption that it continues to enjoy the support of a majority of employees in the unit; this presumption stems from PMT's recognition of the Union in 2006. Under *Levitz* an employer may rebut that presumption and lawfully withdraw recognition from a union if the employer shows objective evidence that the union no longer has majority support. In this case PMT has failed to show actual loss of majority support. It follows that by withdrawing recognition from the Union, PMT violated Section 8(a)(5) and (1).

Because I shall order PMT to resume its recognition of the Union I now address an issue raised by the General Counsel concerning the appropriate unit. As described above, PMT recognized the Union as the collective-bargaining representative for certain full time employees. The General Counsel argues that the unit should also include part time employees who are not also employed as firefighters in those classifications. The General Counsel argues that the

record shows that a unit that includes part time employees would be an appropriate unit. Indeed, that appears to be the case. But the issue is not whether such a unit could be appropriate; rather the task is to identify the historical unit and then determine if the historical unit is also appropriate. No party contends that the historical unit is inappropriate and I therefore find no reason to alter the agreed upon unit.

The complaint alleges that on about May 28, 2009, PMT unlawfully changed the healthcare benefits it provides to unit employees by increasing employee contributions for premiums and co-pays for emergency room expenses. After PMT withdrew recognition from the Union it made a number of unilateral changes to the health insurance benefits it provides to unit employees, including the addition of $250 co-payments by employees for emergency room visits and requiring employees to pay 50 percent of the cost for co-insurance. But PMT also made changes in healthcare benefits in 2006, 2007, and 2008 and the Union never requested to bargain about those changes.

Healthcare benefits are mandatory subjects of bargaining that, absent waiver by a union, cannot be unilaterally altered by an employer. *Coastal Derby Refining CO.,* 312 NLRB 495 (1993). PMT argues that the Union did waive its right to bargain about the most recent changes it made to healthcare benefits due to the Union's acquiescence to its unilateral changes to those benefits in the past. However, even if the Union did waive past bargaining opportunities, this kind of waiver does not continue forever. The waiver is broken by a demand to bargain over future changes. *Roll and Hold Warehouse,* 325 NLRB 41, 42 (1997). Here the Union did not request to bargain about the changes that PMT made in mid 2009, but any such request would have been entirely futile because PMT had unlawfully withdrawn recognition from the Union and any ambiguity over the matter should be resolved against the wrongdoer, in this case PMT. Or put differently, an unlawful withdrawal of recognition has the foreseeable consequence of barring a union from requesting bargain about practices that the union opted not to bargain about in the past. To remedy that foreseeable consequence the status quo ante must be restored as far as possible to allow the process to proceed as if there had been no unlawful withdrawal of recognition. The full restoration the status quo ante must include making employees whole for the losses they suffered as a result of the changes. In its brief PMT relies heavily on *Post-Tribune Co.,* 337 NLRB 1279, 1280-81 (2002). But that case did not involve changes to health benefits that occurred after an unlawful withdrawal of recognition. By changing healthcare benefits without first allowing the Union an opportunity to bargain about the changes, PMT violated Section 8(a)(5) and (1).

The complaint alleges that on about May 9, 2009, PMT unlawfully discontinued allowing Union President Barkley and his designees use of PMT's electronic communications equipment contrary to the terms of the Memorandum of Understanding.[8] It will be recalled that the Memorandum of Understanding signed by the parties and described above included the following provision:

> The Union may have reasonable access to all communication and electronic devices, to be limited to the Union President or his designee, and the receiver of such message, on an as needed basis.
> All messages must be in compliance with applicable laws governing the use of such devices.

[8] The complaint also alleges that this conduct violated Section 8(a)(3). Because I conclude below that PMT's conduct violated Section 8(a)(5), I need not decide allegation because the remedies are substantially similar.

PMT provided certain unit employees, including Barkley, with a BlackBerry. PMT also has BlackBerrys that are assigned to each station. PMT and its employees use the BlackBerrys to communicate with each other. For several years Barkley used his personal computer to send messages to employees concerning union business. But in 2009 Barkley began using his PMT BlackBerry to communicate with employees about union business. On May 9, 2009, Barkley sent a message via the BlackBerry to other PMT vehicles; the message urged the employees to use the Union's website to "[e]ducate yourself on real deal issues, facts and documents. Icep vs PMT in federal labor court mid june." That same day Ramsey sent Barkley the following message:

> Josh you are ordered to cease from using PMT's active communication equipment for personal communication. The business of PMT's ON-DUTY Staff, Ambulance and technology is for EMS only.
> Do you understand that you are on duty and you are an FTO. Remember your position in EMS and the REAL-TIME reason AMBULANCES are on alert, on duty available and on calls.
> I have no recourse but to request removal of you from active duty today until the issue is resolved administratively, if you do not cease these actions.
> Please cease IMMEDIATELY.
> THIS IS AN EXTREME VIOLATION. I hope you may not know and may not understand fully what you are doing, but you must cease your actions on duty. I respect your right to have different views than PMT but this is neither the forum or the place.
> Please Confirm your understanding of this order now. We can resolve your personal views legally later in the correct format in the proper and respectful place. If you need to and wish to access field employees in our designated proper tools please use the proper channel and submit your information and the notice to be sent out to HR and our legal staff.

Barkley replied "Copy." Shortly thereafter PMT disabled and then collected the BlackBerrys that it had provided to certain employees, including Barkley's.[9] Barkley credibly denied that PMT ever gave the Union notice of its intent to disable and remove the BlackBerrys.

As noted, Ramsey's message instructs Barkley to stop using the BlackBerry for "personal communication." At the trial PMT failed to produce subpoenaed documents that would show the purposes for which the BlackBerrys had been used. PMT agreed that I could draw an adverse inference and find that the BlackBerrys had been used by employees for non-work matters, and I do so. This inference is supported by the credible testimony of Linda Combs, who works as a paramedic for PMT at Station 605. Combs is also the Union's business manager; before that she was a member of the Union's negotiating team. At the time she was given a BlackBerry Combs expressed reluctance to be responsible for yet another electronic device. In an effort to persuade Combs to use the Blackberry her direct supervisor told Combs that she could use it for personal matters as well as work. Thereafter she used it for a wide variety of personal matters.

[9] In his brief, the General Counsel argues that PMT violated Section 8(a)(5) by "unilaterally removing Blackberries from Unit employees." I again reject the efforts by the General Counsel to resolve issues not encompassed by the complaint.

An employer may not unilaterally change conditions of employment. *NLRB v. Katz,* 369 U.S. 736 (1962).[10] Here PMT and the Union agreed that Barkley could use PMT's electronic communications systems for union business yet PMT unilaterally terminated that agreement. In its brief PMT stresses that its agreement with the Union allows "reasonable" access to its electronic communications systems. It argues that because Ramsey's message allowed Barkley to continue to use the BlackBerry if he submitted his "information and the notice to be sent out to HR and our legal staff" reasonable access was not denied. But Barkley's use of the BlackBerry was entirely consistent with the manner in which BlackBerrys were used for other nonwork related matters. No other type of communication among employees required that communications first be routed through PMT's human relations department and PMT's legal staff before it could be sent. Applying PMT's own standard for using BlackBerrys, the restrictions it placed on Barkley's use was unreasonable. By unilaterally disallowing the Union president or his designee reasonable access to all PMT's communication and electronic devices, PMT violated Section 8(a)(5) and (1).

D. Section 8(a)(1) Allegations.

The complaint alleges that on about September 2, 2008, PMT disparaged the Union in order to discourage employees from supporting or assisting the Union by informing its employees that the Union president had engaged in bad behavior and was spreading untruths. On September 2, 2008, Ramsey sent an email message to unit employees that read:

> If you have received an email recently from Joshua Barkley through the companies email system, I need to make a simple comment. His emails are a product of misinformation and false statements by him. I hope you will disregard his untruths. . . .
> I am so sorry that it was necessary to send you this email tonight but I can no longer wait for his bad behavior to return to the positive attitude that he displayed in earlier days and I do not believe his attitude will change. Just to make sure that the record is correct, I have recognized the union and hope that they will return to the Management Employee Labor processes that was agreed to in our Memo of Understanding that we both signed. This organization has all legal authority to communicate to our employees, hold meetings and to provide high performance quality care to our customers. We still provide service and operate in the State of Arizona and the United States of America.
> …
> Special Note: Remember that Joshua walked away from negotiations and Employee/Management processes despite his commitment to earlier agreements and in the signed Memo of Understanding. Management's continued invitation to Joshua Barkley to participate is still valid.

The next day, September 3, PMT sent another email message to unit employees that also criticized Barkley for making "baseless accusations" to unit employees. The message gives specific examples of the baseless accusations and then continues:

[10] In *The Register Guard,* 351 NLRB 1110 (2007), the Board held that employees do not have a Section 7 right to use an employer's email system to send union-related messages. That decision does not apply in this case because PMT and the Union negotiated an agreement to permit Barkley to send emails to employees concerning union-related messages.

> In the final paragraph of Josh's letter he refers to the IAFF firefighters as "blue collar heroes we all know and love" and calls upon them to stop working for PMT. These 'heroes" are the same employees that on December 8, 2007, Josh DEMANDED that PMT terminate employment of all career firefighters. PMT's leadership team have been ardent supporters of the firefighters in the valley for over 20 years.
>
> We continue to support them and value their support and employment as professional members of our employee team.
> …
> We continue to recognize the union and encourage them to return to the bargaining table and participation in management labor processes. We look forward to reaching an agreement and enjoying a long cooperative relationship. We will be providing you with periodic updates of the process of our efforts to negotiate a contract with the ICEP as well as dispelling additional false and misleading comments by Josh Barkley.

In assessing[11] this issue, I note that the General Counsel cites *Sears, Roebuck, and Co.,* 305 NLRB 193 (1991). In that case the Board held that "Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)." In the footnote that accompanied this statement the Board expressly overruled *Future Ambulette,* 293 NLRB 884 (1989), to the extent that it held that statements of disparagement alone may support a violation of Section 8(a)(1). The General Counsel also cites *M.K. Morse Co.,* 302 NLRB 924 (1991), but in that case the Board dismissed allegation that an employer unlawfully disparaged union supporters by calling them "liars." Id. at 945. Having correctly cited precedent to show there is no support for this allegation, I am puzzled as to why the General Counsel continues to argue in favor of a violation. As PMT points out in its brief, in *Children's Center for Behavioral Development,* 347 NLRB 35 (2006), the Board held that:

> [A]n employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1) provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees.

Id. I dismiss this allegation.

The complaint alleges that on about September 4, 2008, PMT unlawfully threatened an employee with unspecified reprisals (presumably because of union or protected concerted activities) and promulgated an overly-broad and discriminatory rule prohibiting employees from posting anything that is "divisive, inflammatory or derogative towards employees [of the] management." On September 4, 2008, Patrick Cantelme, PMT's CEO for its 911 Emergency Services, sent Barkley the following message:

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[11] At the trial I rejected GC Ex. 38. I ruled that the General Counsel had failed to show the relevance of that document because he failed to show that PMT was aware of the document's content. At the trial the General Counsel conceded that he had not shown that PMT was aware of the content of GC Ex. 38. Now, in his brief the General Counsel argues that PMT's September 4 message was in response to GC Ex. 38. I adhere to my ruling. I must rely on the parties to explain the relevance of proffered documents; if they cannot do so at the time they are offered, or at least before the hearing closes, they will be and remain rejected

Re: Posting materials in PMT work sites

Joshua,

I am in receipt of a letter sent via email from you to the members of ICEP. The letter begins "My fellow Americans." Although the letter is not dated, the email was sent this morning, September 4, 2008. The email asks members to "please post everywhere, hand out to new people. . . ." PMT recognizes and respects the right of the Union to post information at all PMT work sites. That however does not include the right to post anything that is "divisive, inflammatory or derogative towards employees, management or the Company". In the attached referenced letter sent by you with the request that members post it at work sites I am highlighting the sentences I consider to be derogatory and inflammatory towards management.
I am going to ask all Field Training Officers to remove this letter from all PMT work sites as long as the highlighted phrases are included. Please do not take this as an attempt to restrict the union from posting relevant Union materials so long as they do not violate the above referenced lawful guidelines. I am available at your convenience to discuss the matter at length if you so desire.

Attached was the message Barkley sent to employees; he prepared it at home on his personal computer and sent it to the personal computers of the unit members. I have underlined the sentences that Cantelme highlighted.

My fellow Americans:

It is indeed a great time to be a union member and all should take pride in our accomplishments. The outcry of support from all of you has been most comforting and yes, motivating. As you all know, we are scheduled to have our contract mediated by the Federal Mediation and conciliation services. Our first meeting is on the 12th and the next on the 30th. A mediator from the federal government will assist us in hashing out our differences with PMT management. This process is an American institution provided to us by the founding fathers of organized labor. We should all remember them at this time in the same regard we hold all American heroes.

Their road was unmarked, their path undiscovered and the journey was not describable in any words that I can convey to you now. Please understand that we are following in the footsteps of men and women who have paved our way through the Nation Labor relations Act 1935. We intend to protect your rights and freedoms as EMS professionals in private Industry. In no way will we sacrifice the integrity or mission of this union. I will not allow it. For others who choose to resort to low road politics, I bid you adieu. We have, and we will maintain the position that we are a group of Professionals that deserve to be heard and treated as such. We are the ICEP. Deal with it.

I believe that recent events have outlined our success in protecting our position. We aren't asking for anything unreasonable. We are asking to consummate our relationship with a contract. I want to be able to spend time with my children, provide them the things they need and protect them in times of pain and sickness. I want to retire from the EMS industry, proud of what we have done, what I have done, the people that we helped, the comfort we have provided, the trauma

> we responded to. I want to look back on these days with no regret, no remorse. The individuals that run our industry have forgotten us. We are not worthy of weingarten rights, health benefits, pay scales or time off without providing that our family is sick or in need of our help. We are not worthy of their respect, their regard for human rights or the needs that our members require to simply live life. This is intolerable as a person, as a family man and as an EMS professional and definitely not tolerable as a Union President. I call on all of you, to maintain your integrity, your honor and the cohesiveness of our Union. Please do not get involved in debate with management or disagreements that were designed for you to participate in. Divide and conquer has been replaced with intelligence and grace under fire, performance under duress and Adversity Management. We move forward and will continue to serve with honor and pride. We are second to no one and will accept no other scenario. Godspeed my friends.

After Barkley received the message he called Cantelme and expressed his anger that PMT was reading the personal email from his home personal computer to Union members. Cantelme explained that he was not insinuating that Barkley would be disciplined but only that PMT would remove the message wherever it was posted because of the derogatory language. Barkley asked how Cantelme knew that he had asked that the message to be posted; Cantelme said that he would have to get back to Barkley for the answer to the question. About three hours later Cantelme told Barkley that Barkley's message had been "stolen by a Union rat." Cantelme said that he does not work that way and therefore would not follow-up on anything concerning Barkley's message. Barkley said that he appreciated that, that he and Cantelme were "good to go."

I begin the analysis of this issue by observing that a union does not have a statutory right to post materials on an employer's premises. *Eastex, Inc.,* 215 NLRB 271, 272 (1974), enfd. as modified 556 F. 2d 1280 (5th Cir. 1977), affd. 437 U.S. 556 (1978). An employer must therefore agree to allow a union to post materials on its premises. These agreements typically arise either pursuant to collective-bargaining agreement or by past practice, and the employer may also place limits on the matters posted. However, once collective-bargaining agreement or past practice establishes those parameters, an employer violates the Act if it removes posting that fairly fall within the established parameters. *Special Machine & Engineering, Inc.,* 247 NLRB 884 (1980). Here the General Counsel has failed to show what the past practice has been, if any, regarding the posting of union-generated matters. This compels the dismissal of this allegation. *Stevens Graphics, Inc.,* 339 NLRB 457 (2003). As indicated, the General Counsel also alleges that this communication contains an unlawful threat, but he fails to identify exactly what the threat is. I cannot pinpoint any threat, so I dismiss this allegation too.

The complaint alleges that on about February 11, 2009, PMT undermined the Union by telling employees the Union never gained the confidence of a majority of the employees and that PMT doubted that the Union represented a majority of the employees in the unit, dealt directly with employees by telling them that negotiations had been a disaster, and invited employees to decertify the Union. It will be recalled that on February 11, 2009, PMT withdrew recognition from the Union. Later that day PMT sent out the following message:

> As we look back to July 2006, when we recognized ICEP as your bargaining agent, we now realize that many things could have been done better. What started out as a well-intentioned management decision has evolved over time into a failed experiment of good labor relations with ICEP leadership.

> The ICEP never gained the confidence of a majority of you who still have not designated the ICEP as your bargaining agent. Our negotiations with ICEP have been a disaster. ICEP first agreed to most contract language by December 2007 and then reneged on all prior agreements. In subsequent negotiations, Josh Barkley, as head of ICEP, had made demands to fire our part-time firefighter employees. He has also demanded the termination of contracted city employee rescue units which are required by the city and our DRS-approved city contracts. Our lack of trust and confidence in the ICEP leadership grew to the point that we now doubt that they represent a majority in the bargaining unit or ever did. Ill-considered conduct by the ICEP leadership has resulted in threats to field employees, who are members of the bargaining unit, forcing management to complain to the NLRB by filing unfair labor practice charges against ICEP leader, Josh Barkley. Our doubts regarding ICEP's status as a bona fide labor union having majority status has lead us to filing a petition for an election with the NLRB.
>
> Unions must file government reports accounting for dues money they collect. Our request for this information from Josh and the ICEP is still pending before the Department of Labor. We met with Josh and the ICEP on Wednesday, February 11, 2009 and insisted that he demonstrate the Union's lawful status as your representative either through a card check by a third party neutral or by a secret ballot NLRB election. Josh refused and walked out, ending the meeting.

The General Counsel sees an invitation to decertify the Union in this communication, but again does not pinpoint the language he relies on. The other arguments made concerning this allegation are without merit. I dismiss this allegation.

The complaint alleges that on about May 9, 2009, PMT threatened employees with removal from active duty for engaging in union activity. The General Counsel relies on the email message, described above, to Barkley from Ramsey concerning Barkley's use of the BlackBerry. I have already concluded that PMT violated Section 8(a)(5) when it unlawfully refused to permit Barkley to use the BlackBerry for union business. I also conclude that the message Barkley sent to employees was protected union activity. PMT response was to threaten Barkley with removal from duty if he did not stop that protected activity. By threatening to remove an employee from active duty because he engaged in union activity, PMT violated Section 8(a)(1).

The complaint also alleges that on about May 9, 2009, promulgated an overly-broad and discriminatory rule prohibiting Union officials from using electronic communications while allowing electronic communications against union activities. But the General Counsel presented no evidence to support this allegation. See, *The Register Guard,* 351 NLRB 1110 (2007). I dismiss this allegation

The complaint alleges that on about May 9, 2009, PMT promulgated an overly broad and discriminatory rule requiring Union officials to obtain PMT's prior approval for electronic communications to employees. The General Counsel does not present any argument to support this allegation. To the extent that this argument is premised on a restriction of an independent Section 7 right to use PMT's, the argument is inconsistent with *The Register Guard,* id. I dismiss this allegation.

E. Bad Faith Bargaining Allegation

Finally, the complaint alleges that by the course of the unlawful conduct described in the complaint PMT has engaged in overall bad faith bargaining. I examine the totality of PMT's conduct, both at and away from the bargaining table. *Mid-Continent Concrete,* 336 NLRB 258 (2001), enfd. sub. nom. *NLRB v. Hardesty Co.,* 308 F. 3d 859 (8th Cir. 2002); *Atlanta Hilton & Tower,* 271 NLRB 1600 (1984). I have concluded that on two occasions PMT unlawfully refused to provide the Union with information and dealt directly with employees concerning its obligation to provide that information. I have also concluded that PMT unilaterally assigned unit work to nonunit firefighters and installed security cameras for a period of time in the living quarters of employees. PMT also relocated two stations without bargaining over the effects of the relocation on unit employees. However, I have dismissed the allegation that PMT unlawfully bargained in a "take it or leave it" fashion and dismissed all allegations concerning Section 8(a)(1) conduct prior to PMT's unlawful withdrawal of recognition.

The parties have been unable to reach a complete contract despite the passage of over two and a half years from recognition to withdrawal of recognition. And while PMT certainly must bear much responsibility for the slow pace of negotiations, the Union also contributed to delays, especially initially as it found its footing. While no complete contract was reached, PMT and the Union did sign the Memorandum of Understanding described above. PMT did finally accede to the Union's demands by submitting a comprehensive proposed contract and meeting with the federal mediator. The General Counsel argues that PMT sought to "bargain away legitimate rights of employees." The record does contain some evidence concerning a dispute between the Union and PMT over *Weingarten* rights as described above, but the record is too thin for me to make any more definite findings on this issue. I acknowledge that the issue of whether PMT engaged in overall bad-faith bargaining is a close one, but assessing all the relevant factors I cannot conclude the General Counsel has met his burden. I dismiss this allegation.

Conclusions of Law

1. By the following conduct the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

(a) Withdrawing recognition from the Union as the collective-bargaining representative of the employees in the following unit:

> Full time field paramedics, EMT's, IEMT's, and registered nurses, but excluding administrative staff individuals, support services or personnel not directly operating in the field as an EMS provider.

(b) Refusing to provide the Union with requested information that is relevant to the performance of the Union's duties as the collective-bargaining representative of employees.

(c) Failing to give the Union an opportunity to bargain over the effects of the relocation of Stations 606 and 607 on the working conditions of unit employees.

(d) Changing healthcare benefits without first allowing the Union an opportunity to bargain about the changes.

(e) Unilaterally placing security cameras in the living quarters of employees at several stations.

(f) Dealing directly with employees instead of with the Union as the collective-bargaining representative of the employees.

(g) Unilaterally assigning unit work to nonunit firefighters.

(h) Unilaterally disallowing the Union president or his designee reasonable access to all PMT's communication and electronic devices.

2. By threatening to remove an employee from active duty because he engaged in union activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the PMT has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I have concluded that PMT unlawfully failed to provide the Union with an opportunity to bargain concerning the effects of the relocation of Stations 606 and 607. The General Counsel contends that to adequately remedy this unlawful conduct PMT should be ordered to provide the employees with a remedy consistent with *Transmarine Navigation Corp.,* 170 NLRB 389 (1968). But here, unlike in *Transmarine* and its progeny, there is no loss of employment. The General Counsel counters by claiming that this does not make a difference, citing *Live Oak Skilled Care,* 300 NLRB 1040, 1042 (1990). In that case the Board ordered a *Transmarine* remedy for employees who were terminated but were immediately hired by a successor employer. So in *Live Oak*, unlike here, the employees were terminated. Under the circumstances here the employees were not terminated and the automatic minimum of two weeks back pay seems disproportionate. On the other hand, I recognize that a mere order to bargain over the effects of the relocation, coming as it will months if not years after the relocations happened, cannot hope to recreate the situation as it existed at the time. While I shall order bargaining over the effects, I make it clear that bargaining must include, at the option of the Union, the payment of some monetary compensation to the unit employees whose working conditions suffered as a result of the relocations.

I have concluded that beginning in September 2008 PMT unlawfully transferred unit work to nonunit firefighters, thereby depriving unit employees of unscheduled overtime. I shall therefore order PMT to rescind that transfer, restore that work to unit employees as it existed prior to its unlawful conduct, and make whole all unit employees who at the compliance stage of this proceeding are determined to have lost earnings and other benefits as a result of the unlawful transfer of bargaining unit work. Back pay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

I have found that PMT unlawfully changed healthcare benefits for unit employees in 2009. I shall order PMT to rescind those changes and restore, and make available to unit employees, the same healthcare benefits that were available to such employees immediately prior to its unlawful conduct. In addition, PMT must make the unit employees whole by reimbursing them for any losses resulting from the unlawful conduct, with interest as prescribed in *New Horizons for the Retarded*, id.

Citing *Public Service Co. of Oklahoma,* 334 NLRB 487, 490-491 (2001), the General Counsel requests an order that PMT not only post a notice but also to send the notice on the

email system that it uses to communicate to employees. I agree. The record shows that PMT communicates to its employees primarily by electronic messaging. Moreover, it appears that employees visit PMT's main office on an infrequent basis and thus may never see a notice posted there. I shall therefore order that PMT also send, on the first day of notice posting as required herein, a copy of this notice to employees on the same basis as it electronically communicates to its employees.

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

ORDER

The Respondent, Professional Medical Transport, Inc., of Tempe, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully withdrawing recognition from the Union as the collective-bargaining representative of the employees in the unit described above.

(b) Refusing to provide the Union with requested information that is relevant to the performance of the Union's duties as the collective-bargaining representative of employees.

(c) Failing to give the Union an opportunity to bargain over the effects of the relocation of Stations 606 and 607 on the working conditions of unit employees.

(d) Changing healthcare benefits without first allowing the Union an opportunity to bargain about the changes.

(e) Unilaterally placing security cameras in the living quarters of employees at several stations.

(f) Dealing directly with employees instead of with the Union as the collective-bargaining representative of the employees.

(g) Discontinuing employees use of PMT's electronic communication devices because employees engaged in union activity.

(h) Unilaterally assigning unit work to nonunit firefighters.

(i) Unilaterally disallowing the Union president or his designee reasonable access to all PMT's communication and electronic devices.

(j) Threatening to remove an employee from active duty because he engaged in union activity.

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

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

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

(a) On request, bargain with the Union[13] as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Full time field paramedics, EMT's, IEMT's, and registered nurses, but excluding administrative staff individuals, support services or personnel not directly operating in the field as an EMS provider.

(b) Provide the Union with requested information that is relevant to the performance of the Union's duties as the collective-bargaining representative of employees.

(c) Remove the message concerning a "Request to Withhold Personal Information" from all bulletin boards.

(d) Bargain with the Union over the effects of the relocation of Stations 606 and 607 on the working conditions of unit employees.

(e) Within 14 days from the date of this Order, notify the Union president in writing that he or his designee is permitted reasonable access to all PMT's communication and electronic devices.

(f) Rescind the transfer of unit work to nonunit firefighters that began in September 2008, restore that work to unit employees in the manner that existed prior to that unlawful conduct and make whole all unit employees who at the compliance stage of this proceeding are determined to have lost earnings and other benefits as a result of the unlawful transfer of bargaining unit work as described in the Remedy section of this decision.

(g) Rescind the unlawful changes in healthcare benefits for unit employees in 2009 and restore, and make available to unit employees, the same health care benefits that were available to such employees immediately prior to its unlawful conduct and make the unit employees whole by reimbursing them for any losses resulting from the unlawful conduct, with interest.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards,

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[13] An affirmative bargaining order is typical in cases involving unlawful withdrawal of recognition. For the last several years the Board has done a *Gissel* like analysis to justify to the courts its imposition of this entirely typical remedy. In all cases, to my knowledge, after the analysis the result has been the same. The Board does this because a Court of Appeals, without serious justification in my view, conflated unlawful withdrawal of recognition cases with *Gissel* cases. This seems a waste of time and resources and a distraction from the many legitimate issues that arise in litigation. I therefore decline to go through this perfunctory but time consuming analysis.

personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its stations in and about Tempe, Arizona, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 25, 2008. PMT shall also send, on the first day of notice posting as required herein, a copy of this notice to employees on the same basis as it electronically communicates to its employees.

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

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

Dated, Washington, D.C., November 9, 2009.

_____
William G. Kocol
Administrative Law Judge

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

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT unlawfully withdrawing recognition from the Independent Certified Emergency Professionals of Arizona, Local #1 as the collective-bargaining representative of the employees in the unit described below.

WE WILL NOT refuse to provide the Union with requested information that is relevant to the performance of the Union's duties as the collective-bargaining representative of employees.

WE WILL NOT fail to give the Union an opportunity to bargain over the effects of the relocation of Stations 606 and 607 on the working conditions of unit employees.

WE WILL NOT change healthcare benefits without first allowing the Union an opportunity to bargain about the changes.

WE WILL NOT unilaterally place security cameras in the living quarters of employees at their work stations.

WE WILL NOT deal directly with employees instead of with the Union as the collective-bargaining representative of the employees.

WE WILL NOT unilaterally assign unit work to nonunit firefighters.

WE WILL NOT unilaterally disallow the Union president or his designee reasonable access to all our communication and electronic devices.

WE WILL NOT threaten to remove an employee from active duty because he engaged in union activity.

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

WE WILL, on request, bargain with the Independent Certified Emergency Professionals of Arizona , Local #1 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Full time field paramedics, EMT's, IEMT's, and registered nurses, but excluding administrative staff individuals, support services or personnel not directly operating in the field as an EMS provider.

WE WILL provide the Union with requested information that is relevant to the performance of the Union's duties as the collective-bargaining representative of employees.

WE WILL remove the message concerning a "Request to Withhold Personal Information" from all bulletin boards.

WE WILL bargain with the Union over the effects of the relocation of Stations 606 and 607 on the working conditions of unit employees.

WE WILL, within 14 days from the date of this Order, notify the Union president in writing that he or his designee is permitted reasonable access to all our communication and electronic devices.

WE WILL rescind the transfer of unit work to nonunit firefighters that began in September 2008, restore that work to unit employees in the manner that existed prior to that unlawful conduct and make whole all unit employees who at the compliance stage of this proceeding are determined to have lost earnings and other benefits as a result of the unlawful transfer of bargaining unit work as described in the Remedy section of this decision.

WE WILL rescind the unlawful changes in healthcare benefits for unit employees in 2009 and restore, and make available to unit employees, the same health care benefits that were available to such employees immediately prior to the unlawful conduct and make the unit employees whole by reimbursing them for any losses resulting from the unlawful conduct, with interest.

Professional Medical Transport, Inc.

(Employer)

Dated _____ By _____

(Representative) (Title)

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.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

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, 602-640-2146.