UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

FLAGSTAFF MEDICAL CENTER, INC.

and Cases 28-CA-21509

28-CA-21637 28-CA-21664

COMMUNICATION WORKERS OF AMERICA, LOCAL UNION 7019, AFL-CIO

and Case 28-CA-21548

NATIONAL NURSES ORGANIZING COMMITTEE/ CALIFORNIA NURSES ASSOCATION (NNOC/CNA)

FLAGSTAFF MEDICAL CENTER, INC. and SODEXHO, INC., as Joint Employers

and Case 28-CA-21704

COMMUNICATION WORKERS OF AMERICA, LOCAL UNION 7019, AFL-CIO

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

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GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

I. **INTRODUCTION**

This matter is before the Board upon the General Counsel's Consolidated Complaint alleging that Flagstaff Medical Center, Inc. (FMC or the Hospital) and Sodexho America, LLC (Sodexho) (collectively, Respondents) violated §§ 8(a)(1), (3), and (5) of the Act. Respondents' conduct followed an organizing drive by Charging Party Commercial Workers of America, Local 7019, AFL-CIO (CWA), in the Hospital's Ancillary Services Department.

A hearing was held over the course of 16 days between August 7, 2008, and January 14, 2009, during which the General Counsel presented 27 witnesses, including 13 current employees, in support of the compliant allegations. In contrast, Respondents failed to present even a *single employee witness* to rebut any of the dozens of unfair labor practice violations alleged against them. On May 20, 2009, Administrative Law Judge Gerald A. Wacknov (ALJ) issued a decision upholding in part and dismissing in part the Consolidated Complaint (Complaint). See *Flagstaff Medical Center*, *Inc.*, JD(SF)-19-09. In particular, the ALJ found that Respondents had violated § 8(a)(1) of the Act by interrogating employees, engaging in surveillance, threatening employees, and prohibiting employees from engaging in union activity in a break room. The ALJ, however, dismissed the majority of Complaint allegations, including the allegation that FMC illegally subcontracted its patient transport function to chill Hospital employees' unionizing efforts. In doing so, the ALJ misconstrued the applicable law and misread or ignored the record. Because the ALJ simply ignored large portions of the record (rather than discrediting specific portions of it), this Brief will set out a complete version of the relevant record facts, followed by an analysis of that record.

¹ References to the ALJ's decision in this matter, dated May 20, 2009, are designated as "ALJD." References to the

transcript of the hearing in this proceeding are designated as "Tr." References to the decision and transcript are followed by the appropriate page number and as applicable, a colon and the line number(s).

II. FACTUAL BACKGROUND

A. Respondents' Business

FMC is a 240-bed, not-for-profit hospital owned by Northern Arizona Healthcare (NAH). (ALJD 3; Tr. 50, 52) NAH's official position is that it opposes unionization at the Hospital. This position is set forth in an official Hospital policy and distributed to each new hire. (Tr. 52-54; GC 2)

Bill Bradel became the Hospital's President in April 2006. (Tr. 56, 1568) From March 2006 until July 2007, Patricia Crofford served as the Hospital's Director of Human Resources. In July, she was promoted to NAH's Vice-President of Human Resources, and Janet McNeese took over as Director. (Tr. 73, 1451, 1453) Roger Schuler, who reports directly to Bradel, is the Vice-President of Ancillary Services, and has held that position for approximately 4½ years. (ALJD 4; Tr. 49-50, 56) Doug Umlah is the Hospital's Executive Director of Strategic Projects. (Tr. 1472, 1791)

B. The Ancillary Services Department

The Hospital's Ancillary Services Department includes seven departments, including Environmental Services (EVS, also known as Housekeeping) and Dietary (also known as Nutrition Services). The Dietary Department is led by Janine Drake, who has held this post since April 2004. (ALJD 4; Tr. 56, 575, 727) Reporting to Drake are Production Supervisor Augustine Robledo, who oversees catering and patient food, as well as the kitchen and the cafeteria, and Lead Nutrition Assistant Lisa Dominguez, who supervises the nutrition assistants and the dieticians. (Tr. 56-57, 727) Between June 2005 and the end of March, Sarah Klein-Mark served as a Nutrition Services Coordinator in the Hospital's Dietary Department. (Tr. 215) Michael Martin, Vikki Porras, and Frances Otero are Lead Cooks who oversee approximately fifteen employees. (Tr. 58-60)

The EVS Department employs approximately 55 housekeepers and 4 laundry employees. (Tr. 62, 77-78) For the year ending in May, Vivian Kasey was the Department's Director. After she left the Hospital, Joe Brown took over her role from June 18 until approximately November, when he transferred to another hospital. (ALJD 4; Tr. 61, 431-32) Reporting to the EVS Director are Supervisors Linda Keeler and Rosemary Yazzie, as well as Department Secretary Alice Colorado, who assists with creating the Department's work schedules. (ALJD 4; Tr. 61-62, 432-33, 1129)

C. Respondents' Anti-Union Stance

Conspicuously absent from the ALJD is any mention of Respondents' attack on their employees' efforts to organize. This myopia appears to serve an essential function in the ALJ's analysis of individual violations; on numerous occasions, he simply postulated that nothing in the record suggested an untoward motivation behind the actions of Respondents' supervisors or managers. An accurate reading of the record, however, belies this contrivance. What follows below is a summary of relevant facts, *none of which* the ALJ explicitly considered or addressed in his decision:

1. Prior Organizing Campaign

In June 2006, the Hospital's nurses voted in a representation election in which the National Nurses Organizing Committee/California Nurses Association (the Nurses' Union) sought to represent them. (Tr. 1565) The Nurses' Union lost. After objections to FMC's conduct were sustained, a rerun election was scheduled for September 2007. (Tr. 1565) After the CWA filed the charges underlying this proceeding, the rerun election was blocked. (Tr. 1565-66) FMC's animus towards unions was apparent, based on its heavy-handed response to the Nurses' Union campaign. As former housekeeper Toni Harmon testified, she ran across evidence of FMC's planned response to a Nurses' Union victory scrawled on a white board in the Hospital's executive suite. This board essentially stated that, if the Union were "confirmed,"

there would be "wage freeze[s]" and "lower benefits." (Tr. 1101-02) When Harmon told thensupervisor Barb Mesa what she had seen, Mesa ordered her not to tell anyone else what she had seen. (Tr. 1103, 1107)

2. Respondents' Second Anti-Union Campaign

In October 2006, the CWA began organizing the Ancillary Services staff by holding organizational meetings. At the same time, pro-Union documentation began appearing in employee break rooms. (Tr. 728, 1091, 1316-17) The record indicates that management was aware of the campaign almost immediately. In October 2006, CWA adherent and nutrition aid Paula Souers told her direct supervisor, Lisa Dominguez, that she was going to attend a meeting with a CWA organizer who had come to town. (Tr. 729)

Respondents' reaction to the CWA campaign was surgical and ruthless. Respondents hired professional anti-union consultants who took residence at the Hospital and worked with its management to weed out pro-Union employees. FMC's President personally solicited grievances and warned employees that a Union would make meeting with him impossible in the future. Respondents then remedied these grievances. Supervisors also read aloud anti-Union literature to Navajo employees who had trouble reading English. FMC even tried to turn the Ancillary Services staff against its nurses (who had previously attempted an organizing campaign) by subcontracting out work the nurses hated doing, but the Ancillary Services staff enjoyed.

Indeed, Respondents' anti-Union attack began even before the CWA campaign itself got started. Prompted by the 2006 Nurses Union organizing efforts, Respondents decided to "take the temperature" of Ancillary Services employees' desire for union representation. More specifically, FMC hired a professional, union-avoidance consulting firm, Global Labor Employment Strategies, Inc. ("GLES"), which was installed in an office space at the Hospital from October 2005 to October 2007. (Tr. 93-94, 440-41, 1486, 1566) Although initially

retained to respond to the Nurses' campaign (Tr. 91, 1476, 1566), GLES also ultimately assisted Respondents' managers in determining where their employees stood with respect to the CWA. (Tr. 442-43, 1476, 1485, 2250-51) Respondents' main contacts with GLES were Annette Raggette and Bill Jonas. (Tr. 92, 1477) These GLES representatives met extensively with Respondents' supervisors and management, including Schuler. (Tr. 94-97) Despite both Schuler's and Drake's evasiveness in response to questions regarding the role of GLES (see Tr. 99-100, 620), Human Resource Director Crofford testified, consistent with the documentary evidence, that GLES retained lists of employees' names, and consulted with individual leads and managers about each individual's Union proclivities, and that this information was relayed to her. (Tr. 918, 1486, 1501; GC 24)

In early 2007, GLES met with groups of FMC leads and managers, including Dietary managers Drake, Robledo, Martin, Porras, Walsh, Otero, to discuss individual employees' support for the Union. Meeting with GLES was also a priority for the EVS managers; the record establishes that, within a day of his being appointed Director of EVS, a meeting was arranged between Brown, Kasey and GLES. (Tr. 439-40)²

The record established that GLES promoted numerous violations of the Act through its managerial training. As early as December 2006, GLES representatives told supervisors to "keep an eye on the employees, to see who is talking" and further instructed them, "you will know when they are talking about the Union, because they will scatter like cockroaches." (Tr. 1720-21) Unfortunately, much of what GLES did at FMC will never be known. Despite the fact that FMC had been served with unfair labor practice charges at the time, and in contravention of FMC's own written record retention policy, Raggette shredded "lists and other sensitive info" on

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² Absent from the ALJD is any note of the duplicity of Respondents' witnesses concerning these meetings. Robledo and Drake admitted attending these meetings, but only when cross-examined; Otero denied about participating in any such meetings. Not surprisingly, Respondents did not call Martin, Porras, or Walsh to testify. (Tr. 621, 689-90, 918-21)

October 9, 2007. She informed Crofford and Bradel of this, but they took no action to retrieve or preserve any documents that may have been relevant to the Board's investigation. (GC 38, 39; Tr. 1481, 1488, 1500-03)

The record further established that Department Head Drake was particularly anti-Union and considered it part of her job to weed out Union adherents. She enthusiastically reported those she had identified as having pro-Union proclivities; in her words, "I would just say if I *got some* or not." (Tr. 621-22, 2144) (emphasis added). As early as mid-May 2006, Drake had started to identify Dietary Department employees who had expressed pro-Union sentiments; at a staff meeting, she questioned Dietary employees about their prior experiences with unions, including employee Sandoval, who admitted union activity at a previous job. Drake passed along Sandoval's name, along with the names of other employees who had told her about "positive experiences" with unions, to Vice President Schuler and Human Resources executives at NAH. Drake testified that it was "important" for her to identify such pre-union employees to upper management. (Tr. 648-50; GC 24)

III. SUBCONTRACTING ALLEGATIONS (Exceptions 1-11)

A. The Record Evidence

1. Respondents' Subcontracting Plan and Its Strategic Use in the Anti-Union Campaign.

The ALJD's recitation of facts surrounding FMC's decision to subcontract omits key record evidence. As a preliminary matter, the record demonstrated that, coinciding with the start of the CWA campaign, Respondents considered subcontracting out the work of the entire Ancillary Services department. (Tr. 1676-79) Although this plan was never implemented, the prospect of subcontracting out employees' jobs was a prominent feature of Respondents' anti-Union campaign. Flyers were distributed and posted around the Hospital 2006 or 2007, warning employees that:

SUBCONTRACTING

- May Not Be a Mandatory Subject of Bargaining -

Certain managerial decisions such as subcontracting, relocation and other operational changes may not be mandatory subjects of bargaining, even though they affect employees' job security and working conditions.

The issue of whether these decisions are mandatory subjects of bargaining depends on the employer's reasons for taking action.

On "non-mandatory" subjects, that is, matters that are lawful but not related to "wages, hours, and other conditions of employment," the parties are free to bargain and to agree, but neither party may insist on bargaining on such subjects over the objection of the other party.

Source: Basic Guide to the N.L.R.A. – Page 24.

(GC 43; Tr. 1533-35, 2269, 2289) According to Human Resources Director Crofford, the fact that FMC could potentially subcontract without bargaining with a union was a message she wanted to ensure was communicated to the employees. (Tr. 1534, 2291)

2. Ancillary Services Department Heads' Threats to Subcontract

During a staff meeting in the last quarter of 2006, Drake made it clear that she knew that some of the Dietary Department employees were organizing and that she would stop at nothing to prevent them from being successful. According to former employee Elizabeth Shirley, Drake told the employees that, if they brought the Union in, management would freeze their wages.

Drake added:

who's to say that the hospital would not fire all of [you] and bring in Hurricane Katrina victims to take [your] place because they would be grateful to even have a job.

(Tr. 1123) Shirley testified that, although she normally did not pay close attention in these meetings, she was "struck" by this comment, and "just couldn't believe she just said that." (Tr. 1123) The ALJD makes not mention of this incident.

Drake's counterpart in the EVS Department, Kasey, made a similar threat to her employees in Fall 2006. The unrebutted record evidence establishes that Kasey told employees:

if the Union were to come in, they would just subcontract out and since it was an FMC thing, and we were already under the authority of Sodexho, it really wouldn't do [you] any good.

(Tr. 1093-95, 1132-33) Harmon related this comment to other Hospital employees. (Tr. 1103) This unrebutted evidence was likewise ignored by the ALJ.

3. The Patient Transport Function

The record establishes that patient transport happens "constantly" at FMC. Patients are transported in several manners: wheelchair, gurney, stretcher, or bed. Patients are regularly transported to areas "all over the Hospital" for treatment, testing, surgery, or discharge. (Tr. 287, 326-27) Patient transport affects every department in the Hospital, insofar as it impacts on the level of care it delivers. (Tr. 1575)

Before July, four dedicated transporters were based in the Radiology Department, but the majority of patient transport were carried out by the Hospital's Patient Care Technicians (PCTs) and nurses. (Tr. 294-95, 305, 1470) It was no secret that nurses did not enjoy patient transport duties, which took them away from their patients, increased the workload for the nurses that remained on the floor, and raised safety issues, which had previously been raised in the Nurses' organizing campaign. (Tr. 1471-72, 1556, 1558) However, for PCTs, who assist with patient care, including bathing patients and changing their clothes, transporting patients constituted a break from these tedious duties. (Tr. 268, 1852) For example, when a PCT transported a patient to Radiology for testing, the PCT could have downtime of 20 to 40 minutes, during which he would have to do nothing but wait. (Tr. 324)

4. The Subcontracting Decision

The record establishes that, on April 24, FMC's Senior Management Team, including Schuler, ³ Crofford, Bradel and Dean, met. Umlah presented a proposal about the future of the transport function, including the "pros and cons of outsourcing." (GC 36) According to Crofford, there had been, prior to this meeting, "debates back and forth about the pros and cons" of this course of action. (Tr. 1468) The proffered rationale for subcontracting was that a centralized department would enhance "patient throughput," that is, the facilitation of patient movement throughout FMC. (Tr. 1468, 1799) A secondary reason offered for subcontracting was to free up the nurses' time to provide professional care, instead of misusing their expertise on transporting patients. (Tr. 1578) Testimony by respondents' witnesses established that, other than the patients themselves, nurses were the biggest beneficiaries of the subcontracting, but there was a concern that the Radiology Transporters would not be happy to be converted into Sodexho employees. (Tr. 1515, 1800) Another "con" discussed was the overall cost associated with subcontracting. (Tr. 1513-14) These potential downsides to subcontracting, however, did not carry the day, and the April 24 meeting minutes remarks stated, "Senior Management Team supports outsourcing." (GC 36)

The record reveals a stunning dearth of witnesses willing to take credit for the weighty decision to subcontract out the FMC employees' work. Umlah, who was undisputedly FMC's point man with respect to the patient transport issue, testified that he had no idea who decided to subcontract out the FMC employees' work, finally offering, "maybe it was, you know, a group." (Tr. 1963-64) He then claimed "somebody" had directed him to pursue that option, but he had no recollection who it was. (Tr. 1888) Bradel claimed he discussed this decision with Shuler,

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³ Schuler explicitly testified that he was not involved in the decision to subcontract to Sodexho, and had "nothing to do with that decision." (Tr. 107) But both Crofford and Umlah testified that he *was* involved. (Tr. 1467, 1846-47) Later, Crofford tried gallantly to protect her boss, claiming that he never expressed an interest in subcontracting out the entire EVS department. After further questioning, however, she claimed to have confused FMC with the last hospital she had worked for, and then admitted that she and Schuler had in fact discussed this option. (Tr. 1522)

but Shuler insisted he had "nothing to do with that decision." (Tr. 107, 1964) What is certain is that, during the process of considering whether to use Sodexho for the transport function, Respondents discussed the possibility of subcontracting out the work of the *EVS employees* as well, just as Kasey had reported to Mesa. (Tr. 1864)

5. <u>Carrying Out the Threat to Subcontract</u>

In August, FMC carried through on its plan to contract-out its patient transport function to Sodexho. (Tr. 1462-63, 2014) The four "dedicated" Radiology Department transporters lost their FMC jobs and were "rehired" by Sodexho. (Tr. 1356, 1463, 2015) Contrary to the ALJ's finding, Crofford established through her testimony that Respondents were aware at the time that the CWA, as part of its campaign, was seeking to organize these employees. (See ALJD 6, n.7; Tr. 1580-81) The subcontracting directly impacted the PCT's job duties, in that they had performed the majority of patient transports. (Tr. 294-95, 305, 14700

The four Radiology transporters were issued new Sodexho uniforms and told to report to a new Sodexho manager. Their reporting location was changed from the Radiology Department to a location far on the opposite side of the Hospital campus from their prior location. (GC 40; Tr. 1355-58, 1504-06) They were given new job orientation training and made to understand that they were now subject to Sodexho's policies and rules. (Tr. 2028) As part of their "departure" from FMC, they were paid their accrued paid time off (PTO), and told they had to work a year for Sodexho before they could accrue (or use) any PTO or be eligible for any raise they would have otherwise been entitled to from FMC. (Tr. 1367, 1507-08)

By the first week of September, Sodexho hired more employees for its newly formed department, doubling the number of transport-dedicated employees at FMC. (Tr. 1358, 2015)

After this point, the record establishes that there were too many transport employees; after the subcontracting, the Sodexho transporters would often tag along with another transporter moving a patient because they were bored and had nothing else to do. (Tr. 1359, 1368) Sodexho

Transport Department Supervisor Joe Fitzhenry admitted to sending out extra employees for jobs, in part because the various FMC departments were not utilizing the Sodexho employees' services, and he was trying to keep their spirits up. (Tr. 2017)

The record makes clear that fact that the patient transport subcontracting was no secret. Umlah worked with FMC's Public Relations Department on how to tell FMC employees that Sodexho employees would perform the work previously performed by the nurses and PCTs. The subcontracting plan was announced to FMC employees officially between June and July via a hospital-wide e-mail, memoranda, and posted announcements throughout the hospital. The announcements were posted in employee break rooms and even in the interior of bathroom doors. The announcements included a memorandum from Bradel himself. (Tr. 288, 290-92, 1470, 1511-12, 1851; GC 10, 42, 58, 69)

There is no dispute that the introduction of Sodexho transport employees was a change that impacted all of FMC's employees. (Tr. 1851) It was impossible to miss: the new operation was centralized and located clear across the FMC campus from the prior location of the Radiology transporters. (Tr. 320, 1362-63; GC 40) The newly-minted Sodexho employees could not be overlooked because they were required to wear tan pants and green shirts with a gold "Sodexho Transport Team" logo as they appeared in their departments to perform the work they had previously done as FMC employees. (Tr. 292, 1362) At least some of them were also recognized by staff as former FMC-employed Radiology transporters, who had used to perform their jobs wearing Hospital scrubs. (Tr. 292-93)

According to the record established by Respondents' own witnesses, the nurses, who were at the time scheduled to vote in a rerun election for representation by the Nurses Union, were pleased with the subcontracting of the transport function (which diminished support for the Nurses' Union); FMC's Chief Nursing Officer reported that the new department lightened their workload and allowed more time with their patients. (Tr. 1471-72; 1559; 1565) While the

subcontracting decision may have pleased FMC's nurses, the message sent to the Ancillary Services employees was far more ominous. Dietary Cook White's testimony spoke volumes:

Q: Have you ever had any concerns about your job being outsourced?

A: Yeah. I've thought about it.

Q: Why?

A: After the transport department got outsourced to Sodexho, I thought it could happen to any department.

(Tr. 365)

The overstaffing of the department was noted by Hospital employees. The record reveals that employees observed two or three people transporting a single patient in a wheelchair, a truly "strange" sight at the hospital. (Tr. 299-300) Transporter Hassenflug testified that employees had noticed him tagging along on transports and that he explained to them that there was simply not enough work for them. (Tr. 1359) Employees also noticed that the new operation was less efficient; it could take up to 20 minutes to wait for the new Sodexho transporters to arrive. Hassenflug testified that the operation had not made the transport more efficient, but, rather, had overcomplicated a system that was working fine previously, and that many FMC employees had complained to him about this. (Tr. 1360-61, 1366-67) The unrebutted record evidence establishes that, when time was of the essence, such as when a family was waiting for a discharged patient or an emergency required a transport "stat," the PCTs and nurses simply performed the transport themselves. (Tr. 304-05)

B. The ALJ Erred by Not Finding that FMC Subcontracted the Patient Transport Function to Chill Union Organizing Efforts.

The ALJD misses the mark with respect to the allegation of illegal subcontracting. While acknowledging that partial closures are governed by the principles set forth in *Darlington*Manufacturing Co., the ALJ failed to engage in any serious analysis of the factors set forth by the court as relevant to such a case. 165 NLRB 1074, 1083 (1967), enfd. 397 F.2d 760 (4th Cir.

1968), cert. denied 393 U.S. 1023 (1969). Instead, he applied a truncated version of a burden shifting analysis and summarily concluded that there was no evidence that FMC "had an ulterior, unlawful motive." (ALJD 9) As set forth below, the ALJ's analysis is seriously flawed.

Although it apparently went unnoticed by the ALJ, the record contains ample direct evidence of FMC's intent to chill unionism and its reasonably foreseeable effects. After the Union had begun organizing both FMC's nurses and Ancillary Services employees, Respondents engaged in an aggressive anti-Union campaign, including informing employees that they were free to subcontract out jobs without consulting any union. Both Drake and Kasey told their employees that their jobs would be subcontracted if they voted for the CWA. When employees continued their organizing efforts, FMC made good on its threats, advertised the subcontracting. and conspicuously overstaffed the new, Sodexho-staffed transport department at a time when they knew that the nurses were facing a re-run election, and the CWA's organizing was gaining traction.

While Respondents' witnesses could not agree on *when* the subcontracting decision was finalized, it is undisputed that it was arranged for implementation in the middle of the CWA's organizing campaign, which strongly indicates an unlawful motive. See *Gaetano & Associates*, *Inc.*, 344 NLRB 531, 533-34 (2005), enfd. 183 Fed. Appz. 17 (2d Cir. 2006) (timing of employer's decision to subcontract, in relation to known union activity, "can supply reliable and competent evidence of unlawful motivation"), citing *Davey Roofing*, *Inc.*, 341 NLRB 222 (2004) (finding unlawful layoffs occurring on same day employer received prounion petition). The timing of this decision is "stunningly obvious" and gives rise to a presumption of union animus. *NLRB v. American Geri-Care*, 697 F.2d 56, 60 (2d Cir. 1982), cert. denied 461 U.S.

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⁴ The ALJ improperly credited Umlah's unconvincing effort to "back up" the date of the subcontracting decision. Umlah testified that he had been interested in the connection between patient transport and patient through-put since 2004. (Tr. 1800) His testimony was a rehearsed effort to "blend" his historical interest in centralization with the idea of subcontracting the work of FMC employees. (Tr. 1801-02) But no Department Director corroborated Umlah, and Crofford, as head of Human Resources, testified that the first time anyone suggested subcontracting was in the fall of 2006, when Umlah presented Sodexho and Crothall (one of Sodexho's competitors). (Tr. 1518-19)

906 (1983); see also *Special Mine Services, Inc.*, 308 NLRB 711, 722 (1992) (layoffs and subcontracting out of unit work, occurring rapidly over a period of fewer than two months after the union election, supports an inference of strong anti-union animus).

The record is devoid of any explanation as to why FMC could not have centralized the transport function itself or why it did not consider that option. (Tr. 1832-33) Although Umlah testified that an expert, professional transport manager was necessary to head up the new department, Fitzhenry, the "expert" Sodexho manager tapped to head the transport team, had *no* prior experience managing a transport department. (Tr. 1808, 2029) Umlah also claimed that he was inspired to subcontract patient transport after seeing Sodexho's program in action at other hospitals and concluded that FMC simply did not have the "expertise to pull this off in-house." He admitted, however, that FMC could have done so, if it had so chosen. (Tr. 1839, 1843)

Notwithstanding this evidence, the ALJ held that Bradel decided that using Sodexho employees was necessary for an efficient transport department. But Bradel's testimony on this point was *directly contradicted by Fitzhenry*, the Sodexho transporters' own supervisor, whose testimony established that converting the transporter workforce was gratuitous. Fitzhenry noted that transporting required no special certifications beyond basic CPR, and required no special expertise. (Tr. 2030) Umlah testified that anyone who could operate a beeper and phone to respond to the automated system was qualified. (Tr. 1856-57) In this regard, the ALJ ignored documentary evidence that one of Sodexho's competitors, Crothall, had submitted an alternate, less-expensive⁵ proposal whereby only the managerial positions would be subcontracted (in the same manner as EVS Department). (GC 68; "Transporters will be employed by Flagstaff Medical Center.") Interestingly, part of Crothall's proposal was to seamlessly integrate its

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⁵ Umlah insisted that the Crothall proposal was \$200,000 *more expensive* than the full-freight, Sodexho option. This testimony was contradicted by Respondents' documents, which actually show that the Crothall option would have cost \$160,000 *less*. (Tr. 1850-51; GC 64)

managers, without visible use of its name or logo, so as to minimize the impact on the rest of FMC's workforce. (Tr. 1813, 1859-60; GC 65)

Even without this direct evidence, the record is still clear that FMC used the transport function subcontracting to inhibit union activity within the ranks of the Ancillary Services employees. Absent direct evidence of the proscribed chilling motivation and its reasonably foreseeable effect, the Board will rely on the "fair inferences arising from the totality of the evidence, considered in the light of then-existing circumstances." *Darlington Manufacturing*Co., 165 NLRB at 1083. "[P]roof of motive may be supplied by circumstantial evidence which affords a sound basis for drawing inferences." Id. The types of circumstantial evidence the Board considers include whether there is "contemporaneous union activity at the employer's remaining facilities," the "geographic proximity of the employer's facilities to the closed operation," "the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact," and any "representations made by the employer's officials and supervisors to other employees." *Bruce Duncan Co.*, 233 NLRB 1243 (1977), enfd. in relevant part 590 F.2d 1304 (4th Cir. 1979).

A proper analysis under *Darlington* indicates that each of these factors is present in this case. First, there was contemporaneous union activity within the Hospital on two fronts:

(a) a rerun election among the Hospital's nurses, who greatly disliked transporting patients themselves; and (b) a organizing campaign among the Hospital's Ancillary Services staff.

Second, the transporters remained geographically close to all of the Hospital's other employees.

Indeed, by virtue of their function -- to transport patients between and among FMC's various departments -- the Sodexho transporters constantly interacted with the other staff and, thus formed the perfect vessel for carrying Respondents' anti-Union message. Third, FMC made sure every Hospital employee was informed about the change by announcing the subcontracting to employees via e-mail and posting throughout the facility, and by making the Sodexho

transporters wear a new, conspicuous uniform as they performed their duties. Fourth, as described in detail above, the record contains dire and explicit threats to Ancillary Services employees by both Drake and Kasey that their continued organizing efforts would result in their own jobs being lost to subcontracting. This, coupled with the conspicuous overstaffing of the new transport function with Sodexho employees, sent a powerful message to the remaining employees, such as White, who reasonably became concerned for their jobs.

A fair reading of the record leads to only one unfortunate conclusion: the ALJ failed to apply the *Darlington* factors. For the reasons set forth above, the Board should reverse the ALJ's finding that FMC did not illegally subcontract the patient transport function in violation of § 8(a)(1) and (3) of the Act.

IV. SECTION 8(a)(3) ALLEGATIONS

With respect to each of the alleged violations of § 8(a)(3) in this matter, the record evidence established that the General Counsel has met its burden under *Wright Line*, and that Respondents had failed to prove a legitimate non-pretextual business reason for their actions.

A. Changes to Sandoval's Schedule and Work Assignment (Compl. ¶ 6(b); Exceptions 14-15)

1. The Record Evidence

The record discloses that, in March, and approximately two weeks after Drake interrogated Sandoval about her Union leanings, Drake changed her schedule⁶ and altered her duties. (Tr. 868, 877, 1063) Robledo knew she preferred to work the earlier shift; he described the change as a "significant" one. (Tr. 870-72, 1063, 1184-85) Robledo could not recall reassigning any other employee in this manner. (Tr. 1062) Robledo claimed that he changed Sandoval's schedule, in part, because a coworker had been complaining about her being missing

night, had made it known for years that she had problems with her night vision. (Tr. 1215-16, 1218)

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⁶ Previously, Sandoval had worked a regular shift from 6:00 a.m. to 2:30 p.m.; she had put in for this assignment a year and a half earlier when it was vacated by another employee's departure, and told Robledo at that time that she worked the day shift because she had problems seeing at night. In fact, Sandoval, who must wear glasses to drive at

from her work station. Neither he nor the ALJ, however, explained how changing Sandoval's shift remedied this problem, and Robledo never mentioned it to Sandoval when he told her about her new assignment. (Tr. 1183)

Robledo testified that Drake made the final decision to transfer Sandoval in a management team meeting at which he and three other managers were present; the ALJ ignored the fact that Robledo could not recall who actually suggested Sandoval's name (except that it was not him). (Tr. 876-77, 885) Not a single witness corroborated him. (Tr. 877) He also ignored evidence that, contrary to Drake's claimed that she had no idea whether Sandoval was a pro-Union employee at the time her schedule was changed, the documentary evidence showed that, a year before this event, Drake had in fact reported to upper management that she knew Sandoval had a "positive experience" with a union at a prior job. (Tr. 648-50; GC 24)

2. The ALJ Erred in Not Finding that FMC Changed Sandoval's Work Assignment in Violation of § 8(a)(3) of the Act.

It is undisputed that Drake had long suspected that Sandoval was a Union supporter; she had felt it "important" to report this to GLES. (Tr. 648-50; GC 24) Just two weeks before her schedule was changed, Sandoval was interrogated by Drake and Robledo about what she thought a union could do for the Hospital, and had confirmed to each of them her pro-Union sentiments. The Board has held that it "is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation." *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004).

The ALJ accepted FMC's pat explanation that it reassigned Sandoval to fill a new position designed to increase sales in later cafeteria hours, but the only plausible explanation offered for why *Sandoval* was selected for this assignment was Robledo's assertion that she was spending too much time talking to the employees in the kitchen. Significantly, FMC never disciplined Sandoval for this, although Otero would later chastise Sandoval for circulating a

Union petition in the kitchen. (Tr. 885) Thus, the record strongly indicates that the only credible reason asserted for changing Sandoval's schedule was to isolate her, a strong Union supporter, and prevent her from communicating with her coworkers, and the ALJ erred in failing to so find. *Nortech Waste and Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO*, 336 NLRB 554, 567 (2001) (assigning an employee new duties that aim to isolate him from his fellow employees so he will be unable to participate in further union activities violates § 8(a)(3) of the Act) (citations omitted).

B. Changes to Gorney's Schedule and Job Duties (Compl. ¶ 6(d); Exceptions 18-22)

1. The Record Evidence

It is undisputed that, prior to June, Laverne Gorney was regularly scheduled to work Monday through Friday. (Tr. 1410) Beginning in June, Drake began scheduling Gorney for nearly *double* the amount of weekend shifts she had worked the two prior years. This new schedule was implemented mere days after Gorney's appearance in the pro-Union *Arizona Daily Sun* advertisement which Drake admits she saw on May 28. (Tr. 1413-14) Gorney confronted Robledo about this, who blamed the decision on Drake. Although Drake told her that she had also changed others' schedules, FMC never offered any evidence to support this, nor did Gorney observe any other changes. The worst part of Gorney's new schedule was that, during her weekend shift, she was expected to multi-task on different job routines, which she found difficult. (Tr. 1415-16)

2. The ALJ Erred in Not Finding that the Change to Gorney's Schedule and Job Duties Violated § 8(a)(3) of the Act.

Even prior to Gorney's appearance in a full-page Union advertisement in the local newspaper, FMC had been curious about her Union leanings. Klien-Mark had interrogated her, along with Laverne Gorney, earlier in March. It is likewise undisputed that the change to Gorney's schedule (which involved additional job responsibilities), was a significant adverse

action. *Five Star Mfg.*, *Inc.*, 348 NLRB 1301 (2006) (changing employees' work schedules in retaliation for union activities violates § 8(a)(3)). The ALJ's conclusion that Gorney's chief complaint was that Drake failed to *consult* her before changing her schedule is unsupported by the record evidence: the record shows that Gorney was unhappy with her new schedule and job duties. This "straw man" argument concocted by the ALJ ignores the fact that FMC offered absolutely *no* legitimate business reason for the action it took against her, and the ALJ erred in failing to find a violation.⁷

C. Denial of Mesa's Vacation Request and Change to Her Work Schedule (Compl. ¶¶ 6(e), (f); Exceptions 23-27)

1. The Record Evidence

It is undisputed that, between 1997 and 2006, Mesa worked 24 hours a week, and she never asked to have her hours increased. Working as a lead between 2006-07, she agreed, at Kasey's request, to work 32 hours a week. She kept working this number of hours after stepping down to a non-lead Housekeeper position in early 2007. (Tr. 1609, 1630-31; GC 47- GC 49) Mesa normally had every other Monday off; this was something she had agreed to with Kasey based on the department's staffing needs. (Tr. 1634) In her 20 years with the Hospital, Mesa only had two of her vacation requests denied. (Tr. 1711) Indeed, as former EVS Supervisor Keeler testified, such requests were granted about 85% of the time. (Tr. 1151)

It is likewise undisputed that, in July, Brown became aware that Mesa was on the Union organizing committee, and that she had been reported to GLES as a Union supporter. (Tr. 2252-53) On July 10, she applied for time off during the last week of that month (between July 22 and July 29), and Keeler denied this request the very same day. (Tr. 1152, 1158, 1626-27; R 4) Brown actually reviewed the decision to deny her vacation and signed off on it. In the time he

the weekends.

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⁷ The ALJ also reasoned that changing Gorney's schedule was justified because, two months *later*, she – along with others solicited by Bradel and Schuler in the June 29 meeting – requested to be regularly schedule for 40 hours (in order to increase her fringe benefits). This is simply nonsensical, and fails to rationalize forcing Gorney to work on

was Director, Brown never got involved with – or denied – any other employee's vacation request. (Tr. 481) Questioned by the ALJ, Brown admitted that he got involved in Mesa's vacation requests "because she was a union proponent." (Tr. 504-05)

Days later, Mesa noticed that another employee, Ernie Pullium, had been given time off during the same period she had requested, and she complained about this to Keeler. In response, Keeler stated that she had nothing to do with it, and that Mesa's request had been denied by Kasey. (Tr. 1628-29) Respondents deal with vacation requests during short-staffed periods in a variety of ways, including granting partial vacation requests, using second shift employees to cover the time, or having managers cover the shifts. In Mesa's case, they did none of these things. (Tr. 537, 1158) During the time Mesa had asked to be off work, but was denied, four other employees were allowed out on leave. (Tr. 538-39; GC 16)

It is likewise undisputed that Mesa's schedule was changed in July. Mesa was scheduled to work every weekend, and for a total of 40 hours a week. (Tr. 1637; GC 50) Kasey and Brown's assistant, Alice Colorado, informed Mesa that Brown had specifically ordered that she be scheduled to work every weekend. (Tr. 1637) In his testimony, Brown denied issuing such an order, and claimed that Colorado was responsible for the decision. Colorado did not testify. The record is undisputed that the July schedule changes increased no other employee's hours. (Tr. 541) The record is also undisputed that, before Brown revised the schedule that led to Mesa's hours being increased and her weekends off taken away, Brown consulted with Bill Jonas, one of the GLES representatives on site. (Tr. 449) According to Brown, Jonas thought Brown's changing the schedule was a good idea. (Tr. 449)

2. The ALJ Erred in Not Finding that Denying Mesa's Vacation Request and Changing Her Work Schedule Violated § 8(a)(3) of the Act.

The ALJ found that Brown's treatment of Mesa was even-handed and in keeping with his treatment of other employees. Brown, he opined, believed in putting the Hospital's cleanliness ahead of individual employees' scheduling needs. But this is not what Brown said in his testimony. Brown actually testified that he changed the schedule based on employee complaints of unfair treatment. The ALJ could not rely on this reason, however, because this proferred explanation "imploded" when the employee in question denied complaining of any unfair treatment. Brown also asserted at hearing that he had investigated and discovered that Mesa was scheduled for a four-day weekend every other weekend. (Tr. 450, 457-58) This was exposed as a lie by the documentary evidence in the form of Mesa's historical work schedules. (GC 47-49) Respondents by their post-hearing brief averred that Brown had been "mistaken" about this.

Ever helpful, the ALJ simply ignored Respondents' clumsy effort to somehow justify their actions and politely disregarded the glaring evidence of discriminatory intent in Brown's decision to change the schedule. By his own admission, Brown had reported to GLES that Mesa was pro-Union and *specifically discussed a GLES representative the idea of changing her schedule*. Moreover, the ALJD pays no mind to the fact that, by Brown's own testimony, it was *Colorado* who actually made the decision to increase Mesa's hours and work her every weekend. The ALJ's ignoring this admission by Brown was crucial to finding that Respondents had a legitimate, nondiscriminatory reason for these actions. Notably, Colorado never testified.

With respect to Mesa's vacation request, the ALJ summarily credited Brown's testimony that he denied other, unidentified employees' vacation requests at the same time as he denied Mesa's. (ALJD 35) In so doing, he completely ignored *documentary evidence* indicating that Respondents granted leave to four other employees for the same period of time that Mesa had asked to be off work. (Tr. 538-39; GC 16) Moreover, the ALJ ignored Brown's own admission that he never involved himself with vacation request denials, and only did so in Mesa's case

because of her Union support. Accordingly, the ALJ's conclusions are not supported by the record.

D. Discharge of Conant (Compl. ¶ 6(g); Exceptions 28-30)

1. The Record Evidence

The record established that Conant had worked as a Housekeeper for Respondents for approximately two years at the time of his discharge on August 1. (Tr. 1315) On August 1, he went to Brown's office to discuss a night-shift position he wanted to apply for. Without warning, Brown handed him a termination notice and said, "I'm sorry I have to do this." (Tr. 1322-23) Brown had recommended Conant for termination, but Shuler made the final decision. (Tr. 100, 433-34) Both were aware of Conant's Union support at the time. (Tr.106, 471) Moreover, Conant was on GLES' list of Union adherents; Keeler had reported him as a Union supporter to the GLES representatives earlier that year. (Tr. 2252-53)

Conant's attendance was, by all accounts, less than stellar. In July 2006, Conant received a verbal warning for having four unscheduled absences in six months. In November 2006, he received a written warning for having nine unscheduled absences in six months. At that time, he had ten absences within the past twelve months, and therefore should have been terminated. Instead, he was not terminated for another eight months, shortly after he became an open Union supporter.

The Hospital's attendance policy provides for the following standards and stages of discipline:

Absences w/in a	Action
6-Month Period	
4	Verbal warning
5	Written warning
6	Final warning. Discussion of possible extenuating circumstances with employee and HR and possible 3-day suspension
7	Termination

Absences w/in a Action	
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12-Month Period	
7	Verbal warning
8	Written warning
9	Final warning. Discussion of possible extenuating circumstances with employee and HR and possible 3-day suspension
10	Termination

(GC 12) Brown testified that Conant was terminated in accordance with both the Hospital-wide and EVS Department attendance policies. (Tr. 436-37) Documents produced by Respondents disclosed that, in the EVS Department, this policy was not followed in over 80 *percent* of cases. (GC 30, 55, 63) Inexplicably, Brown indicated on Conant's termination paperwork that he had displayed "poor customer service." (R. 10) During the entire time he worked at the Hospital, Conant was never counseled or disciplined regarding his customer service skills or interactions with customers. (Tr. 1316) Brown also indicated that, in deciding to discharge Conant, he considered a prior suspension issued to him for using threatening language at work. (Tr. 525-26) But following his discharge, Conant continued a part-time job he had held that involved his performing high-risk work at FMC (handling used needle containers) as an employee of Bio Systems, a subcontractor of FMC. (Tr. 1315)

2. The ALJ Erred in Not Finding that Discharging Conant Violated § 8(a)(3) of the Act.

While Conant's attendance may have been imperfect, Respondents seized on this as a convenient way to divest themselves of one of the boldest Union supporters in the EVS department. The very fact that Respondents tolerated Conant's attendance infractions for two years, and tolerated other employees with far worse attendance records, strongly suggests that the real reason for discharging him was his Union support. See *Made in France, Inc.*, 336 NLRB 937, 947 (2001).

Contrary to the ALJ's determination, Respondents have not, and cannot, demonstrate a practice of applying their attendance policy with any consistency whatsoever, and Respondents' overkill when it came to justifying Conant's discharge indicates pretext. In particular, Brown

fabricated a "customer service" problem and attributed it to Conant; there is no evidence of such a problem, yet it was conspicuously featured on his termination paperwork. In addition, Respondents' concern about Conant's threatening conduct at work can be viewed as nothing other than pretext, considering that the Hospital allowed him to continue working at the Hospital for a subcontractor, giving him full access to biowaste. This evidence is completely inconsistent with Respondents actually having a safety concern about Conant. See, e.g., *Spirit Construction Services, Inc.*, 351 NLRB No. 56, slip op. at 8 (2006) (finding pretextual employer's post-discharge claims that employee had "bad attitude" when not supported by the record). The ALJ's failure to find Conant's discharge to be discriminatory is not supported by the record.

E. Drake Subjects Mackey to More Onerous Work Conditions. (Compl. ¶ 6(j); Exceptions 31-33)

1. The Record Evidence

Dale Mackey was hired under a program for special needs individuals who require accommodations to perform their jobs. (Tr. 655) It is undisputed that:

- In May 2007, Drake had observed that Mackey frequently ate lunch with the Union representatives in the cafeteria, and helped them distribute fliers and leaflets. She reported him to GLES as a potential Union supporter. (Tr. 655-56)
- In mid-July, Mackey began wearing a Union pin at work.
- On July 25, Drake asked Mackey if he knew about the Union, and he replied that he had been in union at a prior job. He also told her that he had enjoyed that job, because the union had gotten him better pay raises, and the employees had a say in operations. Drake said something negative about the Union and then left. (Tr. 1248-49)
- Just four days later, Robledo sat down with Mackey and presented him with a document that he explained was Mackey's "new job description." (Tr. 1258-59; GC 31) On the same day, Respondents revised the form used to issue Mackey's job evaluation. (GC 32)
- Mackey's new schedule meant that he was on duty at 1:30 p.m., when it was busiest. (Tr. 1263-64) Robledo testified that this multiplied Mackey's work by at least *five times* during this period. (Tr. 914-15, 1259; GC 31) It also meant that Mackey was not able to eat lunch with any of his coworkers, because nobody else was scheduled for lunch at 11:00 a.m. (Tr. 1264)

Mackey struggled with his increased job duties, and complained to Robledo that he was unable to keep up with this new schedule, who did nothing to help. (Tr. 1266-68, 1307-08) Mackey struggled to keep up with his increased workload, sometimes injuring himself to do so. (Tr. 1270-71) In case Mackey did not get the connection between his Union support and his increased workload, a few days after he was placed on the new schedule, Drake personally brought anti-Union literature to his work station and, while he tried to get his work done, read it aloud to him. (Tr. 1250, 2113)

2. The ALJ Erred in Not Finding that Changing Dale Mackey's Work Conditions Violated § 8(a)(3) of the Act.

The ALJ found that burying Mackey with work was justified, because Drake and Robledo did so to *help him*. There is nothing in the record to suggest such a saintly motive. On the contrary, the record is clear that Mackey's schedule was changed *adversely*: he could no longer eat with his coworkers and was scheduled to work, instead of take a break, for the busiest time in the cafeteria. Most egregiously, Drake and Robledo were aware that Mackey was already was struggling with his job; under these circumstances, ramping up the physical demands of his job almost immediately after he began openly supporting the Union was as far from helpful as imaginable. The ALJ's acceptance of FMC's "tough love" argument is not supported by the record and should be reversed.

V. INDEPENDENT § 8(a)(1) ALLEGATIONS

The record contains evidence that Respondents systematically rooted out Union sympathizers through a variety of means, and then proceeded to subject its workforce to various methods of intimidation. Although the ALJ could not avoid finding a number of violations, he engaged in insubstantial reasoning and disregarded the credible and often unrebutted record evidence in support of numerous other violations, as discussed below.

A. Klein-Mark's Interrogation of Souers (Compl. ¶ 5(a); Exceptions 34-35)

1. The Record Evidence

The undisputed record evidence establishes that, on February 23, 2007, Klein-Mark called Souers into her office to discuss her performance. (Tr. 217) During this conversation, Souers expressed a concern that Hospital President Bradel had "badmouthed" some of the employees in the Dietary and EVS departments, by saying they came from "the wrong side of the tracks." (Tr. 219-20) Klein-Mark admitted asking Souers how she thought the CWA could help the relationship between the Dietary Department employees and the Hospital's nursing staff. (Tr. 731) Klein-Mark then testified:

- Q: And she said she didn't feel comfortable talking about the [U]nion, is that right?
- A: Yes.
- Q: And you told her it was okay to talk about it?
- A: I said it was okay to have an open dialogue about it.
- Q: She said again she didn't want to talk about it, is that right?
- A: Yes.

(Tr. 220-21) According to Klein-Mark, Souers never answered her question. (Id.)

Souers had never previously broached the subject of unions with Klein-Mark. She had worn a button in support of the Nurses Union during its prior organizing campaign, but Klein-Mark herself admitted that she questioned Souers on this occasion because she was curious to see what Souers thought the Union could do with respect to the interaction between the nurses and her *own* department. (Tr. 220, 236, 245-47, 732)

2. The ALJ Erred in Not Finding that Klein-Mark's Questioning of Souers Constituted an Illegal Interrogation.

The ALJ improperly found that Klein-Mark's questioning of Souers was appropriate because Souers was a "known union advocate" and Klein-Mark was simply inquiring as to what Souers "believed a union could accomplish." (ALJD at 14) But Klein-Mark admitted that she

was interested in more than Souers' personal union leanings or support of the Nurses' organizing campaign -- she was curious about a union's position on the relationship between the nurses and the Dietary Department employees. Asking an employee to disclose a union's strategic or organizing plans constitutes illegal interrogation. *Central Broadcast Co.*, 280 NLRB 501, 503 (1986) (finding coercive interrogation in supervisor's inquiry into union's strategy).

The ALJ nonetheless reasoned that Klein-Mark's questioning of Souers was innocuous, because Klein-Mark had issued Souers a positive performance appraisal and that the two hugged at the end of the meeting. But this logic ignores a basic, indisputed fact: after Souers informed Klein-Mark that she did not wish to reveal how the CWA planned to deal with the Hospital's nurses, Klein-Mark *persisted* in her inquiry. In other words, in the course of a performance evaluation, Klein-Mark was essentially telling Souers that she was *expected* to provide information about the union's plans and goals even if she did not want to. This was simply not the case in the Board precedent the ALJ relies on, and the ALJ erred in dismissing this allegation. See *Aladdin Gaming, L.L.C.*, 345 NLRB 585, 611 (2005) (finding one-time question to employee surrounded by 20 coworkers as to what benefits he expected from the union not coercive); *Enloe Medical Center*, 345 NLRB 874, 876-77 (2005) (finding supervisor's single question to three open union supporters uncoercive, where employees did not hesitate to answer).

B. Drake's Ban on "Negative Talk" (Exceptions 36-37)

1. The Record Evidence

The record establishes that, eleven days after Klein-Mark's interrogation, Klein-Mark, along with Drake, accused Souers of spreading "malicious gossip" about Bradel by telling other employees about Bradel's "wrong side of the tracks" comment. Souers admitted that she had discussed the comment with other employees, and that other employees had "spread it around." Souers asked if Drake did not want her to talk about the incident. Drake told Souers that she did not want any negative talk in the department, and specifically that she should not repeat Bradel's

comments, because "it would bring down morale." (GC 20; Tr. 603-05) Drake documented this exchange with Souers as a "coaching record" in a private computer file which she admittedly uses to construct an employee's year-end evaluation. (Tr. 603)

2. The ALJ Erred in Refusing to Allow CGC to Amend the Complaint to Add an Allegation of Unlawful Promulgation of a Ban on "Negative Talk" Based on Souers' Testimony.

Even absent evidence of enforcement, the mere maintenance of a rule that would likely have a chilling effect on § 7 rights is unlawful. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The Board has found that rules, such as Drake's pronouncement, which prohibit employees from saying "negative" things about members of management, violate the Act. *KSL Claremont Resort, Inc.*, 344 NLRB 832 (2005). In this case, prohibiting Souers from discussing Bradel's disparagement of her coworkers *with her coworkers* was a transparent attempt to keep employees from discussing essential terms and conditions of employment. As such, Drake's pronouncement is unlawful on its face. *The Loft*, 277 NLRB 1444, 1461 (1986); *Automatic Screw Products Co.*, 306 NLRB 1072 (1992). The ALJ's rationale that FMC was somehow denied the opportunity to present evidence on this subject is misplaced; in fact, after Souers' testimony, Respondents *recalled* Drake, who explicitly *denied* having made any such remark. As such, the allegation has been fully and fairly litigated, and the denial of CGC's motion to amend was in error.

C. Drake's Solicitation of Grievances From Sandoval (Compl. ¶ 5(b)(2); Exception 38)

1. The Record Evidence

The ALJ credited employee Lydia Sandoval's testimony that her supervisor, Drake, engaged her in a coercive conversation in March. More specifically, as Sandoval worked, Drake told her that the nurses' union was "foolish" and then, in Sandoval's words, "asked my opinion on what I thought the union [the CWA] could do for us that FMC couldn't or wasn't already

doing." (ALJD 14, Tr. 1185-86, 1240) Sandoval said that the Union would represent the employees and support them. (Tr. 1187)

2. The ALJ Erred by Failing to Address Whether Drake Illegally Solicited Grievances from Sandoval.

Although clearly stated in the Complaint and explicitly briefed by the General Counsel, the ALJ completely ignored this allegation of illegal solicitation by Drake. The record fails to disclose any past practice by Drake whereby she engaged employees in one-on-one discussions to solicit their workplace grievances. *Idaho Falls Consolidated Hospitals, Inc.*, 257 NLRB 1045, 1045 (1981). In this case, Drake asked Sandoval what FMC should be doing, in the apparent hope of derailing her support for the CWA. This unique invitation to describe any problems or grievances carried with it an implied promise to act, and thus violates the Act. See *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000) (solicitation of grievances made during the midst of a union campaign inherently constitute an implied promise to remedy the grievances, which is rebuttable only by showing that the employer had a past practice of soliciting complaints).

D. Kasey's Surveillance of Mesa (Compl. ¶ 5(c); Exceptions 39-41)

1. The Record Evidence

The record establishes that Mesa has worked at FMC for over 20 years. She served as a supervisor in a lead housekeeper position for a year ending in February. At that time, she stepped down to a non-supervisor position, because she was dissatisfied with the way Department Head Vivian Kasey was running the EVS Department. (Tr. 1607-09) Almost immediately thereafter, Mesa became "very active" in the Union campaign; Mesa did not, however, openly advertise herself as a Union supporter by wearing a Union button until after June. (Tr. 1134, 1609)

On one occasion, near the end of March, Mesa chatted during her lunch hour with CWA

organizers in the Hospital cafeteria. As she did so, Kasey stood about 20 feet away, staring directly at Mesa with her arms crossed and an accusatory look on her face. During the more than three years Mesa had worked with Kasey, she had never seen her engage in such conduct. Next to Kasey stood Sodexho General Manager Rock Jenson, who stared at the ground. (Tr. 1611-12) Mesa became uncomfortable, and positioned herself so her back was turned away from Kasey, so she "wouldn't feel her watching." (Tr. 1613-14) Mesa stayed about two more minutes and then left the cafeteria. To do so, she had to pass by Kasey, who was holding her ground; as Mesa walked by her, Kasey, with whom she was normally friendly, said nothing. (Tr. 1614-15, 1718)

2. The ALJ Erred in Not Finding that Kasey Engaged in Illegal Surveillance of Mesa.

The ALJ explicitly credited Mesa's testimony, but found that he was "unable to conclude that Kasey's preoccupation with Mesa was, under the circumstances, union-related rather than work-related." (ALJD 32) Mesa, he reasoned, had recently stepped down from a supervisory position because of her dissatisfaction with Kasey. Thus, the ALJ appears concerned that Kasey's decision to subject Mesa a prolonged, hostile stare as she stood at a table with CWA organizers could have simply been a coincidence. But the ALJ had no need to speculate as to the nature of Kasey's interest in Mesa's activities in the cafeteria: he explicitly credited testimony that Kasey, mere weeks after the alleged surveillance incident, had ordered a front-line supervisor to inform Mesa that she was exceeding her lunch breaks in the cafeteria talking to the Union people. The ALJ found this statement to constitute the creation of the impression of surveillance. (See ALJD 32) Under the circumstances, his dismissal of what by all accounts

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⁸ The fact that employees were engaging in union activities in a public area is no excuse because the Board has held that employers may not engage in conduct that is "out of the ordinary" in order to observe these activities. *Parsippany Hotel Management Co.*, 319 NLRB 114, 126 (1995), enfd. 99 F.3d 413 (D.C. Cir. 1996); see also *Southern Maryland Hospital Center*, 293 NLRB 1209, 1217 (1989). Here, Kasey engaged in conduct that was certainly "out of the ordinary" for her, by staring with an accusatory expression, arms crossed, in a conspicuous manner, directly at Mesa, and then refusing to greet her later as she walked by. Observation of employees in such a "sustained, close, and conspicuous manner" constitutes illegal surveillance regardless of where it occurs. See *Montgomery Ward & Co. v. NLRB*, 692 F.2d 1115, 1122 (7th Cir. 1982).

appears to have been the underlying surveillance is inconsistent and should be reversed.

E. Dominguez' Threat of Reduced Scheduling Flexibility (Compl. ¶ 5(j); Exceptions 42-43)

1. The Record Evidence

The ALJ credited the testimony of current employee Craig, who related an instance in June in which her direct supervisor, Lead Nutrition Assistant Lisa Dominguez, spoke to her and two other employees about the Union. (Tr. 249, 655, 829-30) Dominguez told the employees that she had just gotten out of a meeting with Drake, who had told her that, "if we got the Union in that we would no longer be able to switch shifts and that our schedule would be set." Surprised, Craig said, "[o]h my gosh. Are you serious?" Dominguez confirmed that this was what Drake had told her. (Tr. 831-32; 846)

2. The ALJ Erred in Not Finding that Dominguez

Threatened Employees With Reduced Scheduling Flexibility.

The ALJ found that Dominguez's unambiguous threat did not violate the Act because employees could have reasonably believed she was simply imparting "Drake's assessment of working conditions under a union contract." (ALJD 19) This rose-tinted analysis simply ignores current Board law. It is settled that an employer violates the Act by telling employees that management will lose "flexibility" in scheduling matters should a union win the right to represent them. *Exelon Generation Co., LLC*, 347 NLRB 815, 826 (2006). 9

F. Respondents' Ban on Employees' Use of Cameras (Compl. ¶ 5(bb), (cc); Exceptions 44-48)

1. The Record Evidence

It is undisputed that Mesa carried a cell phone equipped with a camera feature at work. Shuler was aware that she used her cell phone camera at the Hospital, because she had openly photographed him with it. (Tr. 1674) In April, Mesa had used her cell phone camera to

⁹ The ALJ's reliance on *Maestro Café Associates*, *Ltd.*, is misplaced as that case involved an explicit statement by a supervisor that "the *Union* would impose uniform regulations and as a result the employees would lose benefits by having to work full-time schedules." See 270 NLRB 106, 108 (1984) (emphasis added).

document that someone had rifled through her work locker, removing a pro-union flyer. (Tr. 1672) Mesa informed the Hospital's security department that she had taken these pictures. (Tr. 1672-73) That same month, according to Crofford, NAH's senior management team began reviewing and revising its policy entitled, "TELEPHONE, CELL PHONE AND OTHER PORTABLE ELECTRONIC EQUIPMENT." (Tr. 2260) In July, a new version of the policy was issued that read, in relevant part, as follows:

The use of portable electronic equipment including, but not limited to CD players, iPods, MP3 players, or cameras during work time is not authorized. The use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited.

(GC 52, p.2; Tr. 1669-70) Crofford sent the revised policy to all department directors marked "Immediate Attention Required." (Tr. 1723-24)

Respondents' explanation for the new policy was that it was concerned about patient privacy and potential violations of the Health Insurance Portability and Accountability Act ("HIPAA"). But, in fact, the Hospital already had a comprehensive policy against photographing patients; this policy, in place since 2004 (shortly after HIPAA became effective) was specially designed to communicate to Hospital employees how to comply with HIPAA in this regard. (Tr. 2279-81) Respondents claimed that the prohibition on photographing Hospital equipment, property or facilities was included to ensure that patients were not "inadvertently" photographed, but the new policy inexplicably prohibited photography of *all* Hospital facilities, not just areas where patients were allowed. (Tr. 2264, 2284, 2295) However, the record evidence established by Respondents' own witness, Crofford, this policy, as drafted, prohibits photography that implicates absolutely no HIPAA or other privacy interest. (Tr. 2285)

2. The ALJ Erred in Not Finding that Respondent's Ban on Employee Photography is Overly Broad and Illegally Limits Employees § 7 Rights.

The ALJ summarily dismissed this allegation, reasoning that "the specific right to take photos in the workplace would not reasonably seem to come to mind as an inherent component of the more generalized fundamental rights of employees set forth in Section 7 of the Act." (ALJD 20) In other words, the ALJ believes that employees would not consider it a right to document their employer's unlawful acts by, for example, photographing captive audience meetings, vandalism of their personal property, or the removal of union literature. The ALJ is mistaken in believing the Act is so limited.

3. The ALJ Erred in Not Finding that Respondents Adopted the Ban on Employee Photography Because of Employees' Union Activity.

The ALJ credited Respondents' explanation that they implemented the camera ban because of patient privacy and HIPAA concerns, even though the record is clear that FMC already had a policy to address these concerns. The record is utterly devoid of any evidence to suggest why new rule was implemented, except for Respondents' awareness that employees were using cell phone cameras to document its anti-Union campaign. The timing of the rule's promulgation, after the organizing campaign began, and shortly after Mesa had used her cell-phone camera to document retaliation against her for Union activities, undermine the ALJ's analysis that there was no violation. See *Dillon Companies*, *Inc.*, 340 NLRB 1260 (2003).

- G. Bradel and Schuler's Solicitation of Grievances, Threats of Loss of Access to Management, and Statements of Futility; Schuler and Drake's Remedying of Grievances (Compl. ¶ 5(l)(1), (2), (3), ¶ 5(n), ¶ 6(a)); Exceptions 12, 13, 49-54)
 - 1. The Record Evidence
 - a. The July 29 Meeting

The record is undisputed that on June 29, FMC President Bradel and Ancillary Services Vice-President Schuler held a meeting with the Dietary Department employees. Drake was not invited and was not told why. (Tr. 64, 614, 738, 1938-39, 2093) Present, however, were Crofford and McNeese of NAH's and FMC's Human Resources departments, respectively. (Tr.

65, 739) Although Drake held regular staff meetings for the Dietary Department, during which employees were invited to raise issues and concerns, Respondents' witnesses testified that, for at least the past 11 years, the subject of unions never came up at these meetings, and neither Bradel nor the prior Hospital president had ever led the meeting. (Tr. 1044-45)

The record is also undisputed that Shuler and Bradel solicited grievances at the meeting and promised employees they would follow up on their complaints. (Tr. 65, 68, 357, 739, 1139, 1194-95, 1941; GC 4) The complaints included employee Ana Nez' concern about her pay, and other employees' complaints that they were budgeted 32 hours, but were really working 40 hours per week. (Tr. 69-70, 357-58, 739-40, 1940; GC 4) Schuler testified that his response to "many" of the issues raised by employees was that he would have to look into the issue and get back in touch with them, hopefully within ten days. (Tr. 67)

Based on Bradel's own admission, the record reflects that told employees he "knew there was some Union activity" in their department. ¹⁰ (Tr. 1941) Bradel said he wanted them to think about their decision to unionize, because, if they went Union, they *wouldn't*¹¹ have any more meetings with him like this one. (Tr. 359-60, 741, 1196-97) They did not, Bradel told them, need a "third party" such as their "friend in the cafeteria" brought in. (Tr. 741, 1231-32) When an employee protested that the Union was not a third party, because the Hospital employees would select from among themselves for representatives who would sit down and negotiate a contract with the Hospital (Tr. 71-72, 360-62, 741, 1942), Bradel responded, "if you think you're going to sit down across the table with me and negotiate a contract, you're wrong." (Tr. 741-42, 1197) While certain employees recalled variations on the precise words Bradel used, they

¹⁰ White and Souers testified to a more nuanced, but consistent, version of Bradel's comments, wherein he told the employees he wanted to talk to them about their "friend in the cafeteria." (Tr. 359; 740-41) They understood this to mean Union organizer Barnes, who had installed himself in the cafeteria to meet with employees for some time at that point. (Tr. 359, 741)

¹¹ Bradel admitted to a slightly less heavy handed version of these remarks wherein he said that he "appreciated" talking to them directly, and that, "if we had a union [] it would be difficult to have that same direct communication." (Tr. 1941-42) But current employees consistently testified, both on direct and cross examination, that Bradel's threat was far more direct and unequivocal. (See, e.g., Tr. 408-11, 1196-97, 1230-31)

consistently testified that he made it clear he would refuse to negotiate with the CWA even if the employees elected it as their bargaining representative. (See, e.g., Tr. 1281, "he said he wouldn't be there if there was anybody coming in and representing the union. He would not attend it. He made that very specific"). Bradel, for his part, admitted that he unequivocally stated that he "would not be negotiating with the union." (Tr. 1942)

The record establishes that Bradel normally does not attend staff meetings; in fact, Bradel had never led a meeting for the Dietary Department employees, and certainly had never met with them outside the presence of their Department Head, Drake. This did not go unnoticed by the employees. (Tr. 204, 392, 1121) Indeed, Bradel had only spoken at one such meeting before, months earlier when he was introduced as the new Hospital President. (Tr. 787-88) But, the record establishes, Bradel had never been introduced to this group "in a setting like this." (Tr. 65) At that prior meeting, Drake had been present, and there had been no mention of "contracts" or an alternative to a "third party" such as the CWA. (Tr. 403, 826)

b. The July 6 Meeting

It is undisputed that, on July 6, a "follow up" meeting was held for the Dietary

Department employees. (Tr. 73) Again present from management were Schuler, McNeese and

Crofford, but not Bradel. In addition, Drake was also present. (Tr. 614-15, 743) It is undisputed
that Shuler began by addressing the issues that had been brought up at the prior meeting. (Tr.
615, 743, 2094) In all, Schuler's own notes reflect that, during the two meetings, ten separate
issues were raised by employees, ranging from pay and benefits issues to the employee dress
code; in each case, Schuler described what "Action/Follow Up" he told the employees had or
would be taken to address the issue. (GC 4; Tr. 131-32) With respect to Nez' complaint about
her pay, he said it would be "taken care of" and they were going to try to make some adjustments
for her. (Tr. 743, 1201) Shuler also said that Drake had looked at the employees' concern about

being budgeted for only 32 hours, while regularly working 40 hours, and that she was going to "take care of it." (Tr. 134, 615; GC 4)

c. Drake's Remedying of Grievances

The undisputed record evidence establishes that, following Bradel's meeting with the Dietary Department employees, Schuler told Drake about Nez' complaint regarding her wages. (Tr. 75, 617-18) According to Nez, Drake subsequently came to her and said she would be earning more from that point on. (Tr. 1382) Drake admits she spoke with Nez, but claims that she simply told her that she had looked into her complaint and that she was, in fact, earning more than the externs. (Tr. 2096) She admits, however, that she did show Nez a form indicating that she was getting a raise, but claims that this was only because Nez was, along with all other FMC employees, getting a merit increase. (Tr. 2098-99)¹²

In early July, following the July 6 meeting, Drake admittedly approached each of the six employees in the Dietary department who was scheduled for 32 hours and asked them if they wanted to be scheduled for 40 hours instead. All but one said yes. She consulted with Human Resources, and, on July 16, submitted the paperwork to make the change, which became effective in early August. (Tr. 616, 2138; GC 5) As Schuler explained, this change had an immediate effect on how much the employees were regularly paid, in that they were now eligible to use their PTO to make up time lost up to 40 hours actually worked. Drake reported back to Schuler that the problem had been addressed. (Tr. 135-36)

¹² Nez testified that she received two raises that summer; what is undisputed is that, based on their timing and her conversations with Drake, a reasonable employee would believe that their pay grievance was being remedied.

2. The ALJ Erred in Refusing to Find That Bradel and Schuler Illegally Solicited Grievances, and that Schuler and Drake Remedied Grievances.

The ALJD tries to portray the June 29 and July 6 meetings as a minor event, finding Drake's unexplained absence *and* Bradel's reference to a union organizer as "irrelevant" to any analysis. (ALJD 10, n.12 & 11) A careful review of the record, however, reveals that there is no cogent explanation for the ALJ's conclusion that, before the CWA organizing campaign, FMC had a prior practice of soliciting grievances that was even remotely akin to Bradel and Schuler's efforts in June and July. While management witnesses testified in general about "open door policies" and informal bagel breakfasts, there is nothing in the record to suggest that, before the Union campaign, FMC highest management officials, flanked with human resources managers, held meetings with employees in the absence of their Department Head, in which they both requested grievances and discussed the pros and cons of unionization. As such, the ALJ's conclusion, relying on apparently no case law whatsoever, that essentially *anything* can constitute a past practice would turn the law of solicitation on its head. See *Southern Maryland Hospital*, 276 NLRB 1349 (1985).

3. The ALJ Erred in Refusing to Find That Bradel Made a Statement of Futility.

The ALJ also found that Bradel's admission that he had no intention of bargaining with the Union to be an innocuous statement of fact. The employees, according to the ALJ, could reasonably have understood that Bradel was simply informing them that he would not take part in collective-bargaining negotiations, should the CWA represent them. This, according to the ALJ, would not cause a reasonable employee to believe selecting a union representative was futile. But the record evidence indicates that this is exactly how the employees interpreted the remark; current employee Dale Mackey, for example, testified that it seemed "very strange" that Bradel, as the head executive of FMC, would refuse to bargain with the Union. (Tr. 1282) As

such, FMC additionally violated § 8(a)(1) when Bradel told employees he had no intention of negotiating with the Union. See *Albert Einstein Medical Center*, 316 NLRB 1040 (1995).

H. Paula Souers' Reprimand and Performance Appraisal (Compl. \P 5(0)(1), (2); \P 5(p); \P 6(c); Exceptions 55-60)

1. The Record Evidence

The ALJ determined that FMC could lawfully issue Paula Souers a negative performance appraisal for speaking with her coworkers about the Union, and prohibit her from obtaining signatures on her Union petition from employees who were on the clock. These findings are premised on supervisor Francis Otero's testimony that, on a single occasion in July, Souers came in on her day off and disrupted kitchen employees for an "extended period of time." (Tr. 22) In particular, Otero claimed that she saw Souers speaking with three on-duty employees for ten minutes each that day; however, the record is clear that the *total time* she actually observed Souers interacting with employees was "a minute or two." This is the same amount of time Otero testified that off-duty employees, who visit the kitchen to pick up their paychecks and check their schedules, regularly spend chatting with their on-duty coworkers during these times. (Tr. 699, 714) FMC's true interest in silencing Souers is revealed in an email from Drake to Crofford, McNeese and Schuler:

Subject: Update

Shawn White and Paula Souers were here all Friday afternoon on the patio and in the dining room. It appeared they were trying to get employees to sign something.

[Robledo] reported that [Otero] just told him that [Souers] was here on Sunday in the late afternoon. She was walking back and forth to the kitchen. [Otero] stopped her and [Souers] said she was getting things from her mailbox. [Otero] said she had seen her talking to employees and that she cannot do that while they are working and told her not to be coming back to the kitchen.

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(GC 19; Tr. 601-02)

On August 10, 2007, Drake presented Souers with her annual evaluation. Also present was Nutrition Services Coordinator Sheila Walsh. (Tr. 594-95) Drake, who describes Souers as a "good employee," issued her a ranking of "2," indicating "needs improvement," which was the first time Souers had received such a low ranking. Under the commentary section, Drake chastised Souers for tape recording staff meetings and then wrote:

You need to conduct off work business in public areas and not interfere with employee during their shifts.

(GC 18 at § VI) Drake had never put a similar comment in another employee's appraisal. (Tr. 607) The ALJ found that there was no evidence that this comment referred to union solicitation, and additionally found that the performance evaluation was warranted. (ALJD 31)

In finding that FMC's actions towards Souers were not aimed towards her Union activities, the ALJ simply *ignored* such inconvenient evidence. He was likewise necessarily forced to sidestep the following, undisputed record evidence:

- During the month of July, Souers kicked her organizing efforts into high gear. She took one-month vacation and dedicated herself to helping Barnes organize. The majority of the time, she visibly sat with Barnes in either in the cafeteria or outside, in its patio area. Grill Cook White, who was an open Union supporter, helped steer employees towards Souers to sign the CWA petition. During that month, Souers observed Drake walk past her and make direct eye contact, once at the precise moment an employee was signing the petition. (Tr. 748-49, 757)
- Souers also visited the kitchen to catch potential petition-signers. (Tr. 751) Otero was well aware of this. Near the end of July, Souers had attempted to talk to a coworker who was on break and smoking outside the building with Otero. Souers announced she had the petition and asked if the employee wanted to sign, but Otero interrupted, stating that the employee's break was "over." (Tr. 751-52)
- During the two years prior to the CWA organizing campaign, the United Way representative for the Dietary Department, nominated by Department Head Drake, was Nutrition Aide Paula Souers. In that role, she was permitted to approach members of her department, including supervisors, while they were working and she was off the clock. (Tr. 364-65, 587-99, 682, 744)
- Souers solicited 100% participation in her department by "pounding the pavement" and approaching her coworkers, even when she was off-duty. Respondents' managers knew this; when she came in, off-duty, she would ask her supervisor, Dominguez and the other leads, which employees were working on

such occasions so she could catch them. She approached employees in the kitchen, the café, the cafeteria, and in the Dietary Department's hallways. With managers present, she even approached employees at their workstations; sometimes the employee in question would even turn away from their work to engage with her. Prior to the events alleged in the Complaint, Souers was never forbidden from this conduct, or told it could present a safety concern. (Tr. 598, 746-47, 827, 2101)

Drake admitted that she never addressed Souers' visit to the kitchen with her before issuing her the performance appraisal. She was also unable to identify what she considered an "excessive" amount of time for employees to be talking at work, and finally admitted that the amount of time was *not* the issue, but rather that Souers had been "disrupting people's work" and potentially causing a safety issue. (Tr. 608, 2137)

These concerns never arose when Souers solicited aggressively for the United Way, and Souers had never before been told she could not enter the kitchen or café when she was off duty. (Tr. 597, 757) As numerous employees testified, there was nothing unusual about such conduct and it was not uncommon for non-Dietary employees to visit the kitchen while off duty to visit employees. (Tr. 757) All of this occurs with the knowledge of Respondent. For example, Brittany Ruffinaque, a Hospital nurse, visits her boyfriend, supervisor Robledo, in the kitchen area regularly. (Tr. 402-03, 2061; see also Tr. 837; "Q: And when was the last time you saw her talking to [Robledo] in the kitchen? A: The day before yesterday"). Prior to July, dietary department employees had never previously been instructed not to talk about non-work subjects at work, and had never been told that doing so could pose a safety issue. (Tr. 832-33)

2. The ALJ Erred in Not Finding that Souers' Appraisal Violated § 8(a)(1) of the Act.

By refusing to find Drake's ban on "off work business" violated the act, the ALJ ignored the mountain of record evidence indicating that this term was simply a proxy for "union business." The record evidence makes it clear that FMC in fact maintained no across-the-board ban on non-work conversation in the kitchen. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793,

803 fn. 10 (1945), citing *Peyton Packing*, 49 NLRB 828, 844 (1943); *Opryland Hotel*, 323 NLRB 723, 729 (1997). To the contrary, kitchen employees regularly chatted with each other all day long. Moreover, Respondents had both condoned and encouraged Souers' off-duty solicitations on behalf of the United Way during 2006 and 2007, during which she engaged her coworkers extensively while they worked, in order to solicit their participation in the Hospital's charitable campaign. As such, Drake's ban on "off work business" violated § 8(a)(1) of the Act, and the ALJ erred in failing to so find.

3. The ALJ Erred in Not Finding that Souers' Appraisal Violated § 8(a)(3) of the Act.

Despite Drake's admission that the amount of time Souers had spent talking to employees was *not* the motivation for her negative appraisal, the ALJ found that it *was*. The record is undisputed that no employee other than Souers had been issued a performance evaluation prohibiting discussing "off work business" with coworkers, and that FMC maintained no broader non-solicitation rule. Drake's inclusion of the non-solicitation rule in Souers' evaluation was within 11 days of her reporting to Shuler and Human Resources that Souers had been seen with a coworker "trying to get employees to sign something" outside the cafeteria, and after Otero had reported she was engaged in the same activity in the kitchen. Under these circumstances, the ALJ erred in failing to find that Souers' annual appraisal was based on, and was a vehicle for, FMC's discriminatory preclusion of Union-based solicitation, while it sanctioned (and even sponsored) non-Union solicitation and violated § 8(a)(3) of the Act.

¹³ Absent such a general ban, an employer's restriction on protected activity cannot be justified by the mere fact that the activity occurred during worktime. *Selwyn Shoe Mfg. Co.*, 172 NLRB 674, 676 (1968), enf. denied, on other grounds 428 F.2d 217 (8th Cir. 1970).

I. Otero's Banning Mesa from the Kitchen (Compl. ¶ 5(q); Exceptions 61-63)

1. The Record Evidence

The record establishes that, in August, approximately two days after Drake issued Souers' performance appraisal, Mesa entered the kitchen through its back door to retrieve a flier posted on the Union bulletin board that she needed for campaigning. (Tr. 1662) After briefly joking with a coworker about lunch, she started to leave the department through its hallway. Otero called her name and stated, "[y]ou are not allowed in here to talk to these employees." (Tr. 1663) Mesa explained that she had simply had been retrieving the flier she needed, and that she had only spoken with one employee about a personal matter. Otero responded, "You are not allowed in here." (Tr. 1664) While Otero initially testified that she simply asked Mesa "to please leave," she eventually admitted that she really *told* Mesa *to leave*. (Tr. 674-77) Mesa is the only non-kitchen employee that Otero had ever kicked out of the kitchen. (Tr. 2066) When Otero walked Mesa out of the department, she saw Souers, who was standing outside the exit door, waiting for Mesa. Otero realized that Souers, whom she had previously barred from entering the premises when she was off duty, had sent Mesa in her place. (Tr. 678)

Even though she had previously admitted that kitchen employees chat about non-work subjects constantly while they work, Otero tried to claim that Mesa's presence constituted a threat to employee safety. Otero asserted that, if "several people" were to walk into the kitchen without warning, "someone could get hurt." (Tr. 2044) Otero never explained why this would justify asking a single employee to leave, nor how disaster was averted despite the frequent presence of Ruffinaque, Robledo's nurse-girlfriend.

2. The ALJ Erred in Not Finding that Otero's Banning Mesa from the Kitchen Violates § 8(a)(1) of the Act.

Restrictions that are imposed to discourage organizational activity, including limiting the access of employees not scheduled to work, violate the Act. *Cast-Matic Corp.*, 350 NLRB 1349, 1349 (2007) (citing *Schwartz Mfg. Co.*, 289 NLRB 874, 878-879 (1988)). Here, the ALJ ignored substantial record evidence that off-duty employees frequented the kitchen on a regular basis. He also ignored record evidence that Otero had never asked a non-kitchen employee to leave the area. Finally, he failed to engage in any critical analysis of Respondents' obviously pretextual reason for prohibiting Mesa from remaining in the kitchen. As such, his dismissal of this allegation is flawed, and should be reversed.

J. Otero's Impression of Surveillance and Disparagement (Compl. \P 5(r)(2), (3); Exceptions 64-66)

1. The Record Evidence

It is undisputed that, the same day she prohibited Mesa from remaining in the kitchen, Otero invited herself to eat lunch with Souers and Mesa, even though there were plenty of other tables empty in the cafeteria. (Tr. 685, 759, 1664) While Otero initially claimed there was "nothing unusual" about this, she later admitted that she rarely ate in the cafeteria with Souers and had never eaten with Mesa. (Tr. 714-15) During the conversation that ensued, Otero said that she could tell when people were talking about the Union, because they "scurried like cockroaches" when she came around the corner. (Tr. 687, 759-61, 1665) ¹⁴ The word "cockroach" had a special significance to Mesa, who, like Otero, had attended meetings with GLES. During one of these meetings, Mesa had been told Union supporters could be spotted because when they were caught talking they would "scatter like cockroaches." (Tr. 687-88, 1720-21)

¹⁴ Otero testified to a slightly different version of this comment; she claims to have said, "I think you are discussing things that you shouldn't be discussing, because every time I come around the corner, you scatter like cockroaches." (Tr. 686-87)

2. <u>The ALJ Erred in Not Finding That Otero Gave</u> the Impression of Surveillance and Disparaged Union Supporters.

By telling employees that union supporters were identifiable based on their tendency to "scatter like cockroaches" when she spotted them, Otero made it clear to Mesa and Souers that she had been looking out for, and had identified, union supporters based on their "cockroach"-like body language. Otero's gloating over her ability to root out Union supporters was intended to give these employees pause before they "outed" any more of their colleagues by attempting to talk to them when Otero might be on the lookout for them. By such comments, Otero created an illegal impression of surveillance. See *Link Mfg.*, 281 NLRB 294 (1986), enfd. mem., 840 F.2d 17 (6th Cir. 1988), cert. denied 488 U.S. 854 (1988).

Otero's "cockroach" remarks were additionally intended to cast aspersions on the Union's supporters, by suggesting they were weak and scared of management. "An employer that denigrates the Union in the eyes of employees violates Section 8(a)(l)." *Regency House of Wallingford, Inc.*, 347 NLRB 173, 182 (2006) (citations omitted). Otero's reference to Union supporters "scattering like cockroaches" had a doubly disparaging impact, because it suggests that a mere glance from a supervisor will send the Union's supporters running for cover and that the Union is unable to protect them or stand up to management. Certainly, if disparagement occurs when an employer tells its employees that the union is too "weak," *Albert Einstein Medical Center*, 316 NLRB 1040 (1995), or that the union's organizers are "cowardly," *Sportee Corp. of North America*, 176 NLRB 1055, 1060 (1969), such a characterization, combined with the visual comparison to unwelcome vermin, violates the Act. 15

Once again, the ALJ's analysis was less than comprehensive. He concluded that, because Otero had "apologized" for using the term "cockroach" (i.e., clarified that she did not intend to

(1959) (manager referred to union representatives as "cockroaches and communists").

¹⁵ The term "cockroach" has historically been used to threaten union supporters and/or refer to them in a derogatory manner. See, e.g., *Jorgensen's Inn v. Bartenders, Culinary Workers and Motel Employees Union Local 158, AFL-CIO*, 227 NLRB 1500, 1501 (1977) (supervisor threatened that [h]e would stomp on these people [who work for the Union] like they were cockroaches"), enfd. 588 F.2d 822 (1978) (table); *Tetrad Co., Inc.*, 125 NLRB 466, 475

insult the women), there could be no violation of the Act. But Otero did not recant the insinuation that she knew who the Union supporters were by observing them, nor did she in any way clarify that she believed Union supporters were brave individuals who would not easily back away from a fight. In other words, her "apology" was meaningless from a legal perspective, and the ALJ's reliance on it inappropriate.

V. THE ALJ ERRED IN FAILING TO FIND THAT FMC AND SODEXHO ARE JOINT-EMPLOYERS.

A. The Record Evidence

The record establishes that FMC contracts with Sodexho to manage its EVS department; in other words, Sodexho directly employs the individuals who supervise the EVS employees, including Brown, Kasey, Keeler, and Yazzie. (Tr. 51-52, 62, 1452) These individuals have actual authority to direct the work of, and issue discipline to, the approximately 59 housekeepers and laundry employees, who are each directly employed by FMC. (Tr. 62, 77-78, 2034) Contrary to the ALJ's finding, Schuler testified that the Sodexho managers and supervisors attend FMC managers' and supervisors' meetings and participate in the discussion and setting of Hospital policies. Sodexho managers may seriously discipline or discharge an EVS employee without FMC management being consulted. (Tr. 54-55) They perform appraisals and reviews of the employees they supervise; these appraisals are used to determine what wage increase, if any, is to be given to the employee. (Tr. 80, 207-08) The Sodexho managers also make final hiring decisions. ¹⁶

Respondents' relationship is designed to be "transparent." The Sodexho supervisors in EVS appear in every way the same as FMC supervisors in other departments, down to wearing "FMC" identification badges. New EVS employees are not told that their supervisors work for Sodexho, and they are expected to follow these supervisors' instructions and directives as if they

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¹⁶ According to former Sodexho-EVS Supervisor Keeler, the Sodexho managers' decisions to hire individual employees were never reversed; Brown recalled only one such occasion. (Tr. 433, 1131-32)

were given by a FMC supervisor. (Tr. 76-78) At least one Sodexho supervisor – Kasey – was actually previously employed directly by FMC as a supervisor in the EVS Department in 2002. (Tr. 76)

Pursuant to the contract between FMC and Sodexho, FMC does *not* fully retain its authority over the EVS employees. Instead, under the parties' agreement, FMC has agreed that it "shall hire, discharge or discipline Supervised Employees upon Sodexho's reasonable request if such action is in accordance with [FMC's] employment policies and procedures." (GC 56) The parties have also agreed to indemnify each other for employment-related liabilities. Id.

B. The ALJ Erred in Not Finding That Respondents Constitute a Joint Employer. (Compl. ¶¶ 2(j), (k) and (l); Exceptions 68-70)

The ALJ improperly found that the Sodexho, through the EVS Department managers and supervisors, does not play any role in formulating policies relating to the department's employees. But testimony by Schuler himself demonstrates that they do just that. Moreover, the ALJ's reliance on *Lee Hospital*, 300 NLRB 947 (1990), and *Richmond Convalescent Hospital*, *Inc.*, 313 NLRB 1247, 1260-61 (1994), is misplaced. Unlike the employers in those cases, FMC has not fully retained its authority over the employees at issue. Moreover, the parties' joint indemnification in this case further demonstrates that they intend to share control over employment decisions. Finally, in this case, Respondents hold themselves to the general public as joint-employers, inasmuch as Sodexho managers are physically indistinguishable from FMC managers. See *Computer Associates Intl.*, 332 NLRB 108 (2000) (finding joint-employer status based on shared control over hiring and supervision, where parties were held out to public as joint employer).

VI. CONCLUSION

Based upon the above facts and legal analysis, the General Counsel submits that the ALJ erred by failing to find that Respondents engaged in numerous violations of the Act. The

General Counsel asks that the Board find that Respondent engaged in these unfair labor practices and issue an appropriate order remedying them.

Dated at Phoenix, Arizona this 1st day of July 2009.

Respectfully submitted,

/s/Mara-Louise Anzalone

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS in FLAGSTAFF MEDICAL CENTER, INC., Cases 28-CA-21509 et al., was served by E-Gov, E-Filing and by E-mail, on this 1st day of July 2009, on the following:

Via E-Gov, E-Filing on the following:

Lester A. Heltzer, Executive Secretary National Labor Relations Board Attn: Executive Secretary 1099 14th Street N.W., Room 11600 Washington, D.C. 20570

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