

**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 ASSOCIATION**

**FLAGSTAFF MEDICAL CENTER, INC. and
SODEXO, AMERICA, LLC**

and

**Case 28-CA-21704
28-CA-21728**

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

**FLAGSTAFF MEDICAL CENTER'S AND SODEXO'S
ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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STATEMENT OF THE CASE

Flagstaff Medical Center is a hospital located in Flagstaff, Arizona. FMC employs approximately 2000 employees in 90 departments. This case involves the Communication Workers of America's attempt to organize employees in two of those 90 departments.

From 2002 to 2006, two unions attempted to organize FMC nurses culminating in two unsuccessful elections in 2003 and 2006. [RT 160, 1565.] In October 2006, the CWA began off-site organizing meetings [ALJD 12], and in March 2007, began openly organizing in the FMC cafeteria with Environmental Services and Nutrition Services employees. [RT 1908.] In August 2007, the CWA began filing a series of unfair labor practice charges. In September 2007, the CWA filed one general "interference" charge. The CWA filed approximately 70 8(a)(1) and (a)(3) allegations by early-2008. No union filed any 8(a)(5) allegations as stated by the Counsel for General Counsel in the CGC's Exceptions Brief at 1.

From May 6 to September 25, 2008 (not August 7, 2008 to January 14, 2009, as stated in the CGC's Brief at 1), the ALJ heard evidence in this case. During the hearing, Respondents called both management *and* employee witnesses in response to the CGC's allegations (contrary to the CGC's statement that FMC did not call a single employee witness [Brief 1]). After hearing the evidence, the ALJ dismissed all of the 8(a)(3) allegations and, as the CGC acknowledges, "the majority of Complaint allegations." [Brief 1.]

The ALJ's findings reflect the uncontradicted evidence that FMC promotes and sustains a work environment where a union supporter affectionately referred to her manager as "mi hijo" (my son), where a manager and an ardent union supporter hugged after an evaluation session, where managers traveled from Flagstaff to Phoenix to visit an alleged discriminatee in the hospital when he suffered a serious medical condition, and where a manager drove an outspoken union supporter to and from work when the employee needed help. [RT 238, 783, 935, 1000-01, 1065, 1212.] Indeed, both union supporters and managers agreed that FMC managers and employees – most of whom have long tenure with the hospital – enjoy warm, friendly relationships with each other. [RT 158, 238-39, 259, 666, 830-31, 1000-01, 1212-13, 2229,

2233.] Thus, the record evidence contradicts the CGC’s hyperbolic jargon and rhetorical attempts to characterize FMC management as warmongers who led a “heavy handed,” “surgical and ruthless” “attack on their employees’ efforts to organize.” [Brief 3-4.] To the contrary, after years of union organizing with FMC’s nurses, FMC managers knew well in 2007 that Environmental and Nutrition Services employees had every right to support and advocate for the CWA. [RT 160-61, 1909.] Indeed, one of the CWA’s vocal supporters (Shawn White) testified he had “no problems” with anyone after he began openly advocating for the union. [RT 397.]

Nevertheless, the CGC takes exception to numerous findings by the ALJ. But the CGC does little more than challenge the ALJ’s credibility determinations claiming that the Administrative Law Judge suffers from “myopia” and engaged in a “contrivance” to reach his “seriously flawed” decision. [Brief 3, 13.] However, the CGC fails to support her characterization of the ALJ’s deliberative abilities with a “clear preponderance” of evidence demonstrating error as required under the Board’s *Standard Dry Wall* test. Instead, the CGC offers only out-of-context snippets, a disturbingly large number of factual inaccuracies that miscite and misstate the record evidence, and repeated attacks on the ALJ’s judicial abilities. The CGC also labors under the misapprehension that Board law requires the ALJ to expressly credit or discredit every assertion in the 2,300 page record, and that an employer’s preference to work directly with its employees equals anti-union animus. As set forth below, the ALJ correctly found that FMC and Sodexo did not violate the Act as alleged, and the Board should affirm the ALJ’s findings on the issues raised by the CGC.

For the Board’s ease in reading, Respondents address the factual and legal issues in the order presented by the CGC.¹

¹ The CGC, CWA, and CNA did not file any exceptions to the ALJ’s findings regarding Complaint Allegations 5(f)(1)(2), 5(h), 5(l)(2), 5(r)(1), 5(u)(3), 5(v), 5(w)(2), 5(x), 5(y), 5(z), 5(aa), and 6(h). Accordingly, the Board should affirm the ALJ’s decision on those allegations.

QUESTIONS INVOLVED

- I. Did the ALJ correctly find that “After exhaustive consideration, [FMC] decided that contracting out the entire [transport] operation to Sodexo was in the best legitimate business interest of FMC. There is no contrary evidence.” [Complaint ¶ 6(k); Exceptions 1-11.]
- II. Did the ALJ correctly credit supervisor Robledo’s testimony that FMC modified Sandoval’s schedule based on legitimate reasons? [Complaint ¶ 6(b); Exceptions 14-15.]
- III. Did the ALJ correctly find that Nutrition Services director Drake modified Gorney’s work schedule for legitimate business needs? [Complaint ¶ 6(d); Exceptions 18-22.]
- IV. Did the ALJ correctly credit EVS director Brown’s testimony that he modified Mesa’s work schedule and denied a vacation request due to hospital needs and understaffing? [Complaint ¶¶ 6(e), (f); Exceptions 23-27.]
- V. Did the ALJ correctly credit EVS director Brown’s testimony that Conant was discharged because of attendance violations? [Complaint ¶ 6(g); Exceptions 28-30.]
- VI. Did the ALJ correctly credit Nutrition Services managers’ testimony that they modified Dale Mackey’s break time for legitimate reasons? [Complaint ¶ 6(i); Exceptions 31-33.]
- VII. Did the ALJ correctly find that Nutrition Services coordinator Klein-Mark *did not* coercively interrogate Souers? [Complaint ¶ 5(a); Exceptions 34-35.]
- VIII. Did the ALJ correctly deny the CGC’s post-hearing request to amend the Complaint to include an allegation that the parties did not litigate? [Exceptions 36-37.]
- IX. Did the ALJ address whether Nutrition Services director Drake unlawfully solicited a grievance from Sandoval? [Complaint ¶ 5(b)(2); Exception 38.]
- X. Did the ALJ correctly find that EVS director Kasey *did not* engage in the unlawful surveillance of Mesa? [Complaint ¶ 5(c); Exceptions 39-41.]
- XI. Did the ALJ correctly find that lead nutrition assistant Dominguez *did not* threaten the loss of scheduling flexibility? [Complaint ¶ 5(j); Exceptions 42-43.]
- XII. Did the ALJ correctly credit Human Resources vice president Patsy Crofford’s testimony that FMC’s “Telephone, Cell Phone and Other Portable Electronic Equipment” Policy was implemented for lawful business considerations regarding patient privacy concerns? [Complaint ¶¶ (5)(bb), (cc); Exceptions 44-48.]
- XIII. Did the ALJ correctly find that FMC vice president Schuler *did not* unlawfully solicit, promise to, or remedy grievances, and that FMC president Bradel *did not* unlawfully suggest futility? [Complaint ¶¶ 5(l)(1), (3), 5(n)(1), (2), (3), 6(a); Exceptions 12, 13, 49-54.]

- XIV. Did the ALJ correctly credit Nutrition Services managers' testimony that they properly responded to Souers' extended disruption of work in the kitchen? [Complaint ¶¶ 5(o)(1), (2), 5(p), 6(m); Exceptions 16, 17, 55-60.]
- XVI. Did the ALJ correctly credit lead cook Otero's testimony that she asked non-kitchen employee Mesa to leave the kitchen based on FMC's legitimate business reasons? [Complaint ¶ 5(q)(1),(2); Exceptions 61-63.]
- XVII. Did the ALJ correctly credit lead cook Otero's testimony that she *did not* create an impression of surveillance of employees' union activities and *did not* disparage them during a conversation in the cafeteria? [Complaint ¶ 5(r)(2), (3); Exceptions 64-66.]
- XVIII. Did the ALJ correctly find that FMC and Sodexo do not jointly employ EVS employees? [Complaint ¶¶ 2(j), (k), (l); Exceptions 68-70.]

ARGUMENT

I. THE ALJ MADE A WELL-SUPPORTED CREDIBILITY DETERMINATION THAT FMC SUBCONTRACTED FOR A SORELY-NEEDED CENTRALIZED PATIENT TRANSPORT FUNCTION TO IMPROVE PATIENT CARE.

Complaint ¶ 6(k) alleges that “Since on or about August 3, 2007, . . . the Respondent FMC has subcontracted its patient transport work to a third-party enterprise.” As described by the ALJ, “The General Counsel does not maintain that the new transport system was unnecessary or not a marked improvement over the prior method of transporting patients, but maintains that FMC should have itself set up the system in-house, furnishing its own managers and hiring the necessary employees; or, at the least, should have contracted out to Sodexo only the managerial and computerized functions of the new department, while retaining and hiring FMC employees to transport patients” to avoid a “chilling effect upon the union activity of the dietary and housekeeping employees” [ALJD 6.] At the hearing, the CGC further added that the allegation does not involve any claim regarding the four FMC radiology transport employees who changed employment (without interruption) from FMC to Sodexo, but rather is based solely on why FMC chose to subcontract its first-ever centralized patient transport function rather than perform it in-house. [RT 1827-31.]

A. The ALJ Properly Dismissed The Allegation Based On His Credibility Determination That FMC Made The Decision For Legitimate Reasons.

Based on the record evidence cited here, the ALJ found – and the CGC acknowledges – that prior to late-2007, FMC had an inefficient, decentralized patient transport process (using four transporters for radiology patients, but nurses or Patient Care Technicians for all others) and needed a centralized system to substantially increase the time nurses and Patient Care Technicians could attend patients, decrease the overall workload on nurses and PCTs, and address nurse and PCT safety issues (related to patient lifting). [ALJD 5; Brief 8-9; RT 1807-09, 1875, 1900-03.] The ALJ found – and the CGC acknowledges – that FMC had no experience with centralized, hospital-wide patient transport. [ALJD 6 (“FMC really . . . didn’t have the expertise to set up and run a program like this.”); Brief 8; RT 1807-08.]

Next, and crucially, the ALJ found – and the CGC quite tellingly does not dispute or even mention – that: (1) FMC gave “exhaustive consideration” to a multi-year study of patient transport models and options from 2004 to 2006, spearheaded by executive director of strategic projects, Doug Umlah; (2) based on Umlah’s recommendations and his own research, FMC president Bradel decided to subcontract both the management and “*the employee component*” of the function “in September 2006, (*prior to the commencement of the Union’s organizing campaign*)”; (3) “in February [2007]” FMC made “the final decision to contract with Sodexo”; (4) “in May [2007], the contract was entered into with Sodexo”; and (5) “in August [2007], Sodexo assumed the patient transport function” [ALJD 5-9 (emphasis added); RT 1463-66, 1507, 1512, 1518-19, 1526-28, 1574-75, 1579, 1803-14, 1831-34, 1837-39, 1841, 1849-50, 1862-63, 1877, 1882-83, 1887-89, 1892-94, 1896-1901, 1903, 1906-07, 1918-20, 1965, 1986-87, 1993-98; R Ex. 40; GC Exs. 36, 39, 41, 42, 57, 58, 64, 68.]

The ALJ further found – and the CGC does not dispute – that FMC selected Sodexo to perform the centralized patient transport management and staffing functions because (1) “in the late Summer of 2006 [FMC president] “Bradel contacted colleagues at three different hospitals [and] inquired about their models of patient transport”; (2) “these hospital administrators that I talked with said that it has to be a complete—for maximum performance and patient safety that

they felt that their experience with having the management *and the employees* all under one umbrella was the most successful”; (3) “[i]t was anticipated that transport employees who exclusively performed this type of work would acquire expertise in handling a variety of transport situations that would enhance patient safety”; (4) the executive director of strategic projects, Doug Umlah, along with the director of nursing, Ruth Eckert, personally “visited two hospitals in Phoenix” and “was impressed with their patient transport systems, operated by Sodexo;” (5) “FMC already had an ongoing relationship with Sodexo”; (6) “Sodexo offered a complete program, including software it utilized for implementing the automated system, that was successfully in operation at other hospitals”; (7) Sodexo “offered [FMC] a discount on the necessary software”; and (8) buying the whole package (management and staffing) was “kind of a one-stop shop in order to be able to provide all of the training and oversight of its employees,” which “increases the accountability of the staff to that manager.” [ALJD 6-7 (emphasis added); RT 1804-09, 1831-34, 1837-39; 1863, 1869, 1882-88, 1898-99, 1900-01, 1918-20, 2037; R Ex. 40.]

Based on that record evidence, the ALJ found: “The Respondent’s witnesses, *whom I credit*, are experienced hospital professionals with expertise in hospital administration, and Sodexo’s patient transport system is a sophisticated system that had been tried and tested at other hospitals.” [ALJD 8-9 (emphasis added); RT 1791-1801, 1806-08, 1895-99, 1986-87.] “After *exhaustive consideration*, they decided that contracting out the entire operation to Sodexo was in the best legitimate business interest of FMC. There is no contrary evidence. The contention by the General Counsel that FMC had an ulterior, unlawful motive in contracting out the patient transport work and would not have done so in the absence of the Union’s organizing drive, *is contradicted by persuasive, substantial and uncontroverted* record evidence.” [ALJD 9 (emphasis added).]

B. The CGC’s Exceptions Fail For At Least Six Independent Reasons.

The CGC did not call any witness or offer any exhibit to contradict or rebut any of the extensive FMC testimony about the genesis, analysis, research, negotiation, timing, or selection

process for the centralized patient transport program that took place between 2004 and 2007. Not one. Instead, the CGC simply picks at the uncontroverted evidence with a broadside of irrelevant, inaccurate, and rhetorical arguments that boils down to a challenge to the ALJ's finding that "I credit" the "Respondent's witnesses." The CGC's arguments fail as follows.

First, regardless of the legal theory used, the core question boils down to whether FMC subcontracted employee staffing for the centralized patient transport function for legitimate reasons or to chill employee organizing in the Environmental Services (EVS or housekeeping) and Nutrition Services (NS) departments. By definition, FMC could not intend to chill employee organizing that did not yet exist. The CGC cannot and does not dispute the record evidence and the ALJ's finding (cited above) that FMC president Bradel made that decision in September 2006, "*prior to the commencement of the Union's organizing campaign.*" By the CGC's own admission, the CWA did not begin "holding organizational meetings" with the EVS and NS employees until "October 2006." [Brief 4.] Thus, the CGC's entire "intent to chill" argument fails for lack of the factual predicate.²

Nevertheless, the CGC attempts to undermine that undisputed chronology by arguing in a footnote that "[t]he ALJ *improperly credited* Umlah's unconvincing effort to 'back up' the date of the subcontracting decision" because – according to the CGC – "his testimony was a rehearsed effort," "no Department Director corroborated Umlah," and the HR director testified

² See, e.g., *Leeward Nursing Home*, 278 NLRB 1058, 1075 (1986) (finding that an employer's decision to control cost by subcontracting dietary and housekeeping services did not violate the Act even though the employer made the final decision and implemented the change after union organizing began because the "critical evidentiary point is that Respondent embarked on a pursuit of the subcontracting option . . . at a time when, on this record, there were no union activities among its employees"); *Liberty Homes, Inc.*, 257 NLRB 1411, 1411-12 (1981) (finding that the employer did not violate the Act by subcontracting one of its operations after its employees sought union representation because the employer initiated inquiries concerning the subcontracting *before* learning of its employees' union activities); see also *Daikichi Sushi*, 335 NLRB 622, 631-32 (2001) (employer lawfully outsourced work of employees shortly after union won election because employer had "looked into" outsourcing earlier, and "firms routinely take months before arriving at a decision as significant as contracting a significant part of their business"); cf. *Wal-Mart Stores, Inc.*, 348 NLRB 274, 286 (2006) (dismissing charge regarding the employer's elimination of a meat-cutting department because "[t]he evidence demonstrated that the Employer decided prior to the start of union activity to expand the case-ready beef program, thus sustaining the Company's *Wright Line* defense"); *Redwood Empire, Inc.*, 296 NLRB 369, 391-93 (1989) (employer's decision to consolidate trucking operations not discriminatorily motivated or otherwise in violation of the Act because the employer began planning prior to any union organizing activities).

she first heard about subcontracting “in the fall of 2006.” [Brief 13 n.4 (emphasis added).] However, the CGC’s footnote arguments about Umlah’s testimony do not help the CGC because: (1) FMC president Bradel, not Umlah, made the decision in September 2006, and the CGC does not even mention Bradel’s uncontradicted testimony, much less demonstrate by a clear preponderance of the evidence that the ALJ erred by crediting Bradel; (2) the ALJ had more than ample evidence from Umlah’s 100-plus pages of testimony about the evolution of the patient transport decision (cited above) to credit Umlah’s testimony about the timing of the decision, which means that the CGC cannot meet the *Standard Dry Wall* test;³ (3) as discussed below, then-HR department director Patsy Crofford *did* corroborate Umlah, but more to the point, the final decision maker, FMC president Bradel, corroborated Umlah’s chronology; and (4) the CGC surprisingly misstates the record regarding now-HR vice president Patsy Crofford’s testimony; Ms. Crofford did not testify as stated by the CGC “that the first time anyone suggested subcontracting was the fall of 2006”; rather, she testified that the first time “*I heard Sodexo*” was fall of 2006, that she did not join FMC until March of 2006 as HR director, that she did not become part of the executive team privy to strategy discussions as HR vice president until July 2007, and that when she heard Umlah talk about Sodexo in the fall of 2006, “I got the impression that they were looking at centralized transport services *for some time.*” [RT 1517-19 (emphasis added).]

Second, the CGC argues the wrong legal theory. The CGC argues that the subcontracting issue should be analyzed under the plant-closing scenario presented in *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (holding that an employer may not close one of several plants for the purpose of chilling union activity at other plants). But *Darlington* itself

³ The Board has held countless times that “[i]t is [our] established policy not to overrule an administrative law judge’s resolutions with respect to credibility unless the *clear preponderance* of all of the relevant evidence convinces us that the resolutions are incorrect.” *Standard Dry Wall Prods., Inc.*, 91 NLRB 544, 545 (1950) (emphasis added), *enfd.* 188 F.2d 362 (3rd Cir. 1951). Where the record provides ample evidence to support an ALJ’s credibility determination, there can be no “clear” error. *Beverly Enters. v. NLRB*, 139 F.3d 135, 142 (2d Cir. 1998) (holding that Board should not reverse a judge’s decision to credit a witness unless that witness’s testimony was hopelessly incredible or flatly contradicted either by the law of nature or undisputed documentary testimony).

expressly noted that it did not address subcontracting cases. *Id.* at 272-73 & n.16 (“We are not presented here with the case of a ‘runaway shop’ [or the] analogous problem . . . where a department is closed for antiunion reasons, but the work is continued by independent contractors.”). And Board law makes clear that it analyzes challenges to an employer’s decision to subcontract work under the familiar *Wright Line* analysis. *San Luis Trucking, Inc.*, 352 NLRB No. 34, at *28 (2008).⁴ Notably, the ALJ did not acknowledge that *Darlington* applies here as incorrectly stated in the CGC’s Brief at 12. Yet even if one analyzed this case under *Darlington*, the result would be no different.

Under *Darlington*, closing one of several plants can constitute a ULP if “motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such a closing will likely have that effect.” *Darlington*, 380 U.S. at 275-76. If that standard applied here (it does not), the ALJ made a well-founded credibility determination that FMC’s motivation had nothing to do with chilling unionism (discussed above) and, as described below, the CGC’s blunderbuss attempt to show anti-union motivation does not come close to meeting the *Standard Dry Wall* test. As significant, the CGC’s entire “intent to chill” argument fails as noted by the ALJ because the CGC cannot show the second element of the *Darlington* standard: that FMC would reasonably foresee that subcontracting a new centralized patient transport function would chill unionism in the EVS and NS departments. Why? First and foremost because FMC made the decision before any union organizing began, as well as because no one who had been doing patient transport duties before the subcontracting lost their job after the subcontracting. [ALJD 8 n.10 (noting that the CGC’s “intent to chill” theory “is somewhat problematical” because it is based on the proposition that employees will “fear they will lose their jobs,” “however, in the instant situation, the FMC employees who performed patient transport work did not lose their jobs, but rather

⁴ See also *Lear Siegler, Inc.* 295 NLRB 857, 860 (1989) (rejecting the judge’s analysis of the respondent’s actions in a subcontracting case under *Darlington*; stating that “discriminatory subcontracting [cases] were explicitly distinguished from partial closings in *Darlington*”).

continued to perform patient transport work at the same location for Sodexo rather than FMC”); RT 2015.]

Third, the CGC’s argument also fails under the proper *Wright Line* analysis. Under *Wright Line*, the General Counsel must first demonstrate by a preponderance of the evidence “protected activity, employer knowledge of that activity, and animus against protected activity,” then “the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity,” “however, [if] the evidence establishes that the reasons given for the employer’s action are pretextual – that is, either false or not in fact relied upon – the employer fails by definition to show that it would have taken the same action for those reasons.” *Galicks, Inc.*, 354 NLRB No. 39, at *4 (2009). Here, the CGC cannot make the *prima facie* showing. The CGC cannot show protected activity or employer knowledge of that activity or employer animus towards that protected activity because it is undisputed that FMC president Bradel made the decision to subcontract out employee duties under the centralized patient transport plan *before* the CWA began organizing at FMC.⁵

Fourth, The CGC’s claim that the Board should reverse the ALJ because he purportedly “simply ignored large portions of the record (rather than discrediting specific portions of it)” itself ignores common sense and controlling Board law. [Brief 1; *see also* Brief 3, 5 n.2, 6-8, 13-14 (“Conspicuously absent from the ALJD is any mention of”; “What follows below is a summary . . . , none of which the ALJ explicitly considered or addressed in his decision.”; “Absent from the ALJD is any note of”; “The ALJD’s recitation of facts . . . omits key record evidence”; “The ALJ made not [sic] mention of this incident.”; “This un rebutted evidence was likewise ignored by the ALJ.”; “Although it apparently went unnoticed by the ALJ”];

⁵ In addition, Bradel and Umlah testified without contradiction that they did not know about any CWA activity until the CWA started openly organizing in the cafeteria in the Spring of 2007 [RT 1852-53, 1908], which occurred *after* Bradel not only decided to subcontract, but *after* FMC decided to award Sodexo the contract in February 2007. [ALJD 5, 6; RT 1816-17, 1852-53, 1908; R Ex. 40.] The CGC’s statement that “management was aware of the campaign almost immediately [in October 2006]” misstates the record as the cited testimony reflects only one event in October 2006: that one union supporter told her lowest level lead about a single union meeting and invited her to go. [RT 728-30.] The record does not state that the CWA distributed literature in break rooms in October 2006.

“The ALJ ignored documentary evidence”].] Contrary to the CGC’s suggestion, the Board does not require the ALJ to do the impossible and specifically recite and discredit every factual assertion in a 2,300 page record, including 124 exhibits and 32 witnesses. Under long-standing Board law, by crediting Respondents’ witnesses on the subcontracting issue, the ALJ necessarily discredited any purportedly conflicting testimony.⁶

Fifth, the CGC’s purported evidence of animus unrelated to the CWA does not withstand scrutiny. See *Cardinal Home Prods.*, 338 NLRB 1004, 1009 (2003) (finding CGC’s case concerning employee transfer rested “on little more than suspicion, surmise, and conjecture” and that the evidence did “not establish any link between protected union activity” and the transfer).

For example, the CGC references an objection raised after the nurses’ election in 2006 as evidence of animus. [Brief 3.] However, the record contains no evidence of the substance of any objection or the disposition of any objection. Next, the CGC misstates the record by claiming that a former housekeeper, Toni Harmon, saw a message in the FMC executive suite in 2006 to the effect that FMC would freeze wages and lower benefits if the nurses voted for the union. [Brief 3-4.] However, Ms. Harmon admitted on cross-examination that she did not know who wrote the words she saw about wages and benefits and did not know if they referred to rumors that were circulating among the nurses about what would happen to wages and benefits with union representation; she simply did not know. [RT 1107-08.] Next, the CGC improperly points to alleged unfair labor practices that the ALJ *rejected and dismissed* as evidence of animus. [Brief 4.] Next, the CGC argues that FMC’s retention of a labor relations consultant,

⁶ *G&T Terminal Packaging Co.*, 326 NLRB 114, 114-15 (1998) (ALJ’s “recitation of facts and conclusions reveal that he implicitly credited the testimony of . . . General Counsel witnesses and implicitly discredited . . . Respondent witnesses”); *Shin Nihon Kosan, Inc.*, 273 NLRB 755, 755 (1984) (ALJ was not required to make specific findings regarding a witness’ testimony (that the charging party offered her a bribe in exchange for her testimony) where the ALJ credited the charging party’s testimony that there was no bribe, which “implicitly discredited [the conflicting witness’] testimony with respect to the alleged bribe”); *Gerson Elec. Constr. Co.*, 259 NLRB 640, 640 n.1 (1981) (ALJ was not required to make specific findings about a witness’ testimony (which tended to establish the allegations) where ALJ “completely credited” conflicting testimony by Respondent’s officials based on the ALJ’s observation of the various witness’ demeanor); *Kimball Tire Co.*, 240 NLRB 343, 347 n.5 (1979) (“It is implicit in [the ALJ’s] general statement regarding credibility that he has discredited the testimony of those witnesses whose testimony conflicts with the facts as described by the witnesses he credited”).

GLES, shows animus because the GLES representatives asked managers to report what they knew about their employees' position on the union question. [Brief 4-5.] But contrary to the CGC rhetoric (*e.g.*, "GLES promoted numerous violations of the Act"), the NLRA does not prohibit employers from noting information about employees' union preferences where that information is open and obvious.⁷

Next, the CGC misstates the record by asserting that NS director Jeanine Drake "*questioned* Dietary employees about their prior union experiences" in 2006. [Brief 6 (emphasis added).] The record does not say that. Rather, the record shows that Drake identified to her supervisors "employees [that] had said that they had experience with union [sic]." [RT 648-50.] Nowhere does that record state that Drake "questioned" anyone. Next, the CGC claims that "Respondents considered subcontracting out the work of the entire Ancillary Services Department." [Brief 6.] Even if true, it proves nothing. FMC could not violate the Act by engaging in business planning where the plans never occurred. Next, the CGC inaccurately states that FMC distributed a flyer to employees in 2006 before the nurses' election regarding subcontracting negotiations. [Brief 6-7.] That assertion is irrelevant (the "notice" comes straight out of the NLRB's Basic Guide book and accurately states the law), but the CGC also misstates the record. Human Resources vice president Patsy Crofford specifically testified, contrary to the CGC's statement, that FMC *did not* distribute the flyer orally or in writing to employees or post it around the Hospital. Rather, FMC gave the notice to supervisors to use as a resource if an employee asked a question about the subject. [RT 1534-35, 2269-71, 2287-90.]

Next, the CGC asserts that NS director Drake told union-organizer Barb Mesa's niece in 2006 (during the nurse's campaign) that FMC could freeze wages or replace her and others with

⁷ In the CGC's zeal to paint FMC with a pejorative brush, the CGC again misstates the record related to GLES's decision to dispose of its consulting records. [Brief 5-6.] Contrary to the CGC's inaccurate assertion, FMC managers Crofford and Bradel did not learn that the GLES representative had disposed of the GLES' documents until well after the fact; after the GLES representative had left FMC, when there was nothing to be done and no possible "action to retrieve or preserve any [GLES] documents." [RT 1488-89, 1499-1504, 1567-68, 1579, 1914-15, 1933.] Notably, the CGC did not pursue any subpoena enforcement action against GLES [RT 1777-78], and the ALJ ruled that GLES did not act as FMC's agent regarding the GLES documents. [RT 1588-1592.]

Katrina victims if they supported the union. [Brief 7.] Even if true (it is not), that allegation is irrelevant because there is no evidence that Drake participated in any way in the patient transport subcontracting decision-making process. Moreover, the niece's testimony was contrary to testimony from Drake and Sarah Klein-Mark, who the niece testified was also at the meeting. [RT 1121-23.] Drake and Klein-Mark testified that Drake never made any such threat regarding Hurricane Katrina, but rather informed employees about a Katrina Relief Fund sponsored by the hospital. [RT 2084-85; 2091-92.] Next, the CGC alleges that EVS director Vivian Kasey told two employees in 2006 that if a union came in, FMC would subcontract out "and since it was an FMC thing, and we were already under the authority of Sodexo, it really wouldn't do [you] any good." [Brief 8.] Even assuming Kasey made such a statement, the statement is highly ambiguous, there is no evidence that Kasey participated in any way in the patient transport subcontracting decision-making process, and the CGC acknowledges that Kasey left FMC in May 2006, which means that Kasey could not have had any influence on the patient transport decision-making (if she had been privy to do it, which she was not) in September 2006. Finally, the CGC argues that the subcontracting sent an "ominous" message to EVS and NS employees. [Brief 12 (quoting union organizer Shawn White).] But White admitted on cross-examination that he knew of other prior instances of FMC subcontracting at the hospital and was no more fearful about his job security in this instance than in those because "yeah, businesses do that." [RT 389-91.]

Sixth, even if the CGC made a *prima facie* case under *Wright Line*, the CGC fails to demonstrate error by a "clear preponderance" of evidence as required under *Standard Dry Wall*. The CGC's attempts to create "pretext" evidence fail as follows.

Initially, the CGC attempts to undermine the ALJ's finding that Bradel decided to subcontract both management and staffing of the centralized patient transport function in September 2006 by referring to an April 24, 2007 executive meeting where the executives discussed the pros and cons of outsourcing (suggesting that FMC had not yet made a decision). [Brief 9, 14.] The ALJ specifically considered that theory and rejected it by expressly crediting

Crofford's testimony about the meeting, finding that the discussion "simply served as reinforcement and validation that FMC's earlier February decision [to contract with Sodexo] was the correct one." [ALJD 8; RT 1464-68.] Further, the ALJ found that "even assuming *arguendo* the decision to contract with Sodexo was not finalized until April 24, there is no evidence the decision was motivated by unlawful considerations." [ALJD 8.] Next the CGC argues that the ALJ's credibility determinations are suspect because "the record reveals a stunning dearth of witnesses willing to take credit for the weighty decision to subcontract" [Brief 9.] That argument flatly misstates the record because as noted above, Bradel testified unequivocally, and the ALJ expressly credited his testimony, that Bradel personally made the decision in September 2006. Next, the CGC claims pretext because Sodexo purportedly hired "too many transport employees" and was "less efficient." [Brief 10.] That assertion fails because the Sodexo manager who oversaw the program (Joe Fitzhenry) and Umlah, who tracked the metrics on the program, both testified that the program and the staffing levels met performance expectations after an initial "break in" period; the ALJ credited their testimony. [ALJD 6 ("new transport system was . . . a marked improvement over the prior method"); RT 1842, 2016-19, 2025.] *See Orange County Publ'ns*, 334 NLRB 350, 360 (2001) ("That the changes implemented had the desired effect, while not determinative on the issue of motive, is further support for the conclusion that the Respondent's decision was a legitimate business decision and not motivated by unlawful considerations."). In contrast, the two rank-and-file associates who testified that they thought FMC had too many transporters both acknowledged that they did not know the details of the hospital's needs or the program metrics. [RT 299-300, 319-21, 1364-67.]

Next, the CGC claims pretext because "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." That theory fails because (1) it is wrong (the ALJD specifically found that Umlah considered doing the work in-house, but found "that FMC really . . . didn't have the expertise to set up and run a program like this" and Bradel's personal investigation resulted in reliable input that subcontracting gave the best results for patients) [ALJD 6-7; RT 1804-08, 1831-34, 1898-

99]; and (2) FMC made a reasoned business judgment in deciding to subcontract the staffing function, and the Board gives significant deference to such judgments in the absence of “clear evidence” of deliberate intent to violate the Act; evidence not present here. *Plumbing & Indus. Supply Co.*, 237 NLRB 1124, 1127 (1978) (affirming the ALJ’s finding that the employer’s idea about hiring additional employees shortly before the representation election “*was a business judgment, which it is well settled, is beyond the purview of the Board unless it is clearly shown that the action was deliberately taken for purposes proscribed by the Act*”) (emphasis added); *D & E Elec., Inc.*, 331 NLRB No. 136, at *6 (2000) (affirming that Board will not substitute the ALJ’s, the CGC’s, or the Union’s judgment for that of the employer as to allocation of workloads because an employer “is entitled to considerable latitude in judging the needs of its own business”). Indeed, having acknowledged that FMC needed a centralized patient transport function (but complaining only that FMC should have performed the function in-house), the CGC cannot logically argue that *the timing* of the implementation gives rise to an inference of unlawful intent because the CGC’s argument presumes that the transition to centralized patient transport during the CWA campaign would have been perfectly fine if only FMC had created and staffed the program in-house instead of subcontracting it.

Next, the CGC argues that Sodexo patient transport manager Fitzhenry contradicted Bradel’s testimony that subcontracting “was necessary” because Fitzhenry testified that converting the transporter workforce “was gratuitous.” [Brief 14.] That argument fails because neither Bradel nor Fitzhenry testified as stated by the CGC. Bradel testified that his research showed that subcontracting the entire function gave “maximum performance and patient safety.” [ALJD 7; RT 1901.] Fitzhenry testified that “buy[ing] the whole package” had many advantages. [ALJD 7; RT 2037.] Finally, the CGC argues pretext because FMC did not select a “less expensive” alternative proposal from Crothall that did not include the employee component. [Brief 14.] But the CGC’s statement of the argument exposes the flaw. As Umlah testified and as the proposal that the CGC refers to demonstrates [Brief 14 n.5; GC Ex. 64], the Crothall proposal did not include *the cost of labor*, which the Sodexo proposal did include. The

Crothall proposal also did not include the cost of the centralized patient tracking software, and the Sodexo proposal did. Thus, the Crothall proposal was more expensive, and the CGC once again misstates the record [RT 1812-14, 1844-45, 1850-51, 1877, 1884-85; GC Exs. 41, 64, 68; R Ex. 40], and overlooks the relevant law. Specifically, “[i]t is not for the Board to decide whether other steps might have been equally effective or to substitute its business judgment for that of the Respondent.” *Orange County Publ’ns*, 334 NLRB at 361; *see also Redwood Empire, Inc.*, 296 NLRB 369, 392 (1989).

Based on the foregoing, the CGC does not and cannot demonstrate by a clear preponderance of the evidence that the ALJ erred by crediting Respondents’ witnesses and finding that FMC subcontracted its first-ever centralized patient transport function for legitimate business reasons. Consequently, the Board should affirm the ALJ’s decision.

II. THE ALJ MADE A WELL-SUPPORTED CREDIBILITY DETERMINATION THAT FMC CHANGED SANDOVAL’S SCHEDULE FOR LEGITIMATE BUSINESS REASONS.

Complaint ¶ 6(b) alleges that FMC changed Lydia Sandoval’s work schedule and work assignment in retaliation for her union activity. The ALJ properly dismissed that allegation, concluding that: “FMC presented cogent, persuasive evidence in support of its position that Sandoval’s transfer to the later shift was motivated by legitimate business exigencies, rather than in retaliation for being pro-union. I shall dismiss this allegation of the complaint.” [ALJD 27.] The ALJ also found that supervisor Auggie Robledo “testified that Sandoval’s union activity played no part in the decision to transfer her to the later shift. I *credit* this testimony of Robledo. There is no contrary evidence.” [*Id.* (emphasis added).]

The ALJ described the specific evidentiary details on which he based his credibility determination at length in his decision at 26-27. Uncontradicted record evidence fully supports the ALJ’s credibility determinations. [RT 876, 878-80, 882-83, 886-87, 962-71, 976-79, 1081, 1183-89, 1215-20, 1225-26, 1188-90, 2118-24; R Exs. 5, 16, 23.] Specifically, the ALJ found – and the record fully supports – director Jeanine Drake and supervisor Auggie Robledo transferred dietary employee Sandoval from the day shift (6:00 a.m. to 2:30 p.m.) to a later shift

(11:00 a.m. to 7:30 p.m.) for various legitimate business reasons. [ALJD 26-27.] Robledo testified they changed Sandoval's schedule because: (1) grill cook Joe Caneto (a union supporter) complained that she disappeared from her workstation for long periods of time and he could not rely on her; (2) management had changed the presentation cook's schedule to mornings to assist the grill cook in preparing omelets and to increase revenue through introducing more specials to draw more customers; and (3) Sandoval could assist with catering (the department's greatest revenue source), which Sandoval was very knowledgeable about. [ALJD 26-27; RT 876, 878-80, 882-83, 886-87, 1225, 2118-21.] Sandoval, herself, testified that the grill cook had warned her about being away from her workstation and that Robledo had counseled her multiple times that she needed to be serving customers and not disappearing from her station. [ALJD 27 n.37; RT 1225-26.] Of particular note, in response to the ALJ's direct question about her schedule change, Sandoval testified that her new assignment *was not* more difficult than her previous assignment, and that she "did about the same things" but "just did them at different times." [RT 1188-90.]

Additionally, as the ALJ found, "in the winter it is just as dark at 5:00 a.m., when Sandoval drives to work, as it is a[t] 7:30 p.m., when she now gets off work" and that she also drives "at night to play bingo or for other social purposes." [ALJD 27 & n.38; RT 1216-17.] The ALJ also found Robledo gave Sandoval the option of working an early shift – as she preferred – but Sandoval "declined, and opted to remain on the later shift" because instead of assisting the grill cook, part of her new duties would be to wash dishes, which she did not want to do. [ALJD 27.]

The CGC's challenges to the ALJ's well-supported credibility determination fail under the Board's *Standard Dry Wall* test as follows.

First, the CGC cannot even make the prerequisite showing that Sandoval suffered an adverse employment action under *Wright Line*. In fact, as the ALJ found, Sandoval's own testimony belies such a claim. [ALJD 27.] At trial, in response to the ALJ's question about her schedule change, Sandoval admitted that her new assignment *was not* more difficult than her

previous assignment, and that she “did about the same things” but “just did them at different times.” [RT 1188-90.] Consequently, the CGC had to agree that Sandoval did not suffer more onerous working conditions. [RT 1183-89.] In an effort to preserve a *prima facie* case, the CGC changed theories and argued (as the CGC does now) that the schedule change itself affected Sandoval adversely because she had difficulty driving at night and she preferred to have her nights free. [Brief 16 n.6; RT 1183-89.] Again, Sandoval’s own testimony contradicts the CGC’s argument. As the ALJ found, Sandoval drove in the dark in the mornings on her way to work for her previous shift, just as she drives in the dark at night now for her later shift, and that Sandoval drives at night to play bingo or for other social purposes. [ALJD 27 & n.38; RT 1216-17.] The ALJ also found Robledo gave Sandoval the option of working an early shift – as she preferred – but Sandoval declined. [ALJD 27.] Those facts alone support the ALJ’s dismissal.

Second, contrary to the CGC’s claim, the ALJ did not ignore evidence that Drake and Robledo knew Sandoval supported the union before they changed her shift. [Brief 17.] In fact, the ALJ specifically found they did know. [ALJD 26.] In any event, the CGC’s proffered evidence (similarly rejected by the ALJ) – that Sandoval confirmed to Drake and Robledo her pro-Union sentiments two weeks before the schedule change – fails to show Sandoval’s union support was a substantial or motivating reason for the decision. *See Royal Coach Sprinklers, Inc.*, 268 NLRB 1019, 1026 (1984) (“[t]iming alone is insufficient to establish a causal connection” when the employer has a plausible business reason for its decision).⁸ Other than knowledge and timing, the CGC presented no evidence of animus connecting Sandoval’s protected activity to the decision to change her shift. Notably, Robledo never mentioned the union when he told Sandoval about her reassignment, nor did management assign Sandoval to a job she could not perform. *See Cardinal Home Prods., Inc.*, 338 NLRB at 1009.

⁸ The CGC’s reliance on *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) is misplaced. Unlike here, where the evidence demonstrated legitimate business reasons supporting FMC’s employment action, the employer in *Davey Roofing* failed to provide any evidence to support its claim of a slowdown in business that merited the layoff of three union supporters; all evidence was to the contrary.

Third, even if the CGC established a *prima facie* case, the uncontroverted evidence demonstrates that management changed Sandoval's schedule for legitimate business reasons and would have done so even in the absence of union activity. In addition to Robledo's expressly credited testimony, FMC introduced the following compelling evidence that it did not discriminatorily change Sandoval's shift, but rather treated her like similarly situated employees in her department: (1) FMC's "Work Schedules" policy informs employees that they "may be required to work different hours, shifts . . . as the workload necessitates" and that "there can be no guarantee that an employee will remain on any of the three shifts or that the employee will have certain days off"; (2) Sandoval agreed in her "employment offer" that she could be required to work different hours, shifts, etc. as the workload necessitates; (3) Sandoval testified that since 2005 (long before she supported the union) she had worked numerous different job assignments in the morning, mid-day, night, and graveyard, many which required her to drive to work or home in the dark; and (4) along with changing the presentation cook's shift at the same time as Sandoval on this occasion, management has changed other employees' job assignments over the years.⁹ [ALJD 28; RT 962-71, 976-79, 1081, 1215-16, 1218-20, 2122-24; R Exs. 5, 16, 23.] The CGC presented no contrary evidence, nor does the CGC even address that evidence in the CGC's Brief.

Fourth, the CGC's pretext argument is simply illogical. Citing to *Nortech Waste*, 336 NLRB 554, 567 (2001), the CGC asserts that "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" "because she was spending too much time talking to employees in the kitchen." [Brief 17-18.] The CGC mischaracterizes the record, as it "indicates" no such purpose to isolate Sandoval. The ALJ rejected the CGC's same argument. Here, unlike in *Nortech Waste* where the employee was taken off the assembly line to

⁹ See *Keco Indus.*, 271 NLRB 634, 637 (1984) (ALJ cannot infer discriminatory motive where there is no evidence the employees were treated any different than other similarly situated employees).

work alone outside, there is no evidence whatsoever that management changed Sandoval's schedule to isolate her from her co-workers or that she was in any way isolated. As Sandoval testified, she continued to perform the same tasks of preparing and serving food in the kitchen and cafeteria, just at a different time. The CGC presented no evidence that she performs those tasks alone, isolated from her coworkers; she does not. In fact, her new schedule overlaps with her previous one so she works with various co-workers on both the early shift as well as on her new mid-shift, and has the opportunity to talk with co-workers about anything, including protected activity.¹⁰

Based on the foregoing analysis, the ALJ had ample evidence before him to conclude that FMC changed Sandoval's schedule for legitimate business reasons and not for her union activity. The CGC presented no evidence to the contrary, and has not shown that the ALJ's credibility determination was incorrect by "the clear preponderance of all relevant evidence" under the *Standard Dry Wall* test. The Board should affirm the ALJ's dismissal.

III. THE ALJ CORRECTLY FOUND THAT FMC MODIFIED GORNEY'S WORK SCHEDULE BASED ON LEGITIMATE WORK NEEDS.

Complaint ¶ 6(d), as amended, alleges that FMC modified Laverne Gorney's schedule to give her more weekend shifts in retaliation for her union activity. The ALJ properly dismissed that allegation, concluding that: "It appears that Drake has unilaterally changed Gorney's schedule over the years without first consulting Gorney. While the monthly scheduling records show that in fact Gorney was assigned more weekend shifts beginning in June, at a time when Gorney's union activity was known to Drake, there simply is no probative evidence showing that the change in Gorney's schedule and/or schedule and/or job duties change in June was motivated

¹⁰ *Nortech Waste* is distinguishable. In that case, the employer moved a principal union activist who was a member of the collective bargaining negotiating committee to work outside *alone* rather than on the assembly line with her fellow co-workers under the guise that the transfer was so that she would not aggravate previous industrial injuries. *Id.* at 566-67. In finding that the likelihood of reinjury was just as great performing her outside tasks as it was on the assembly line, the ALJ concluded that the move was really "intended to isolate her from fellow employees so she would be unable to carry out her union and employee leadership role." *Id.* at 567.

by unlawful considerations. Accordingly, I shall dismiss this allegation of the complaint.” [ALJD 28.]

The ALJ specifically found that for the last two years, Gorney washed pots and pans in the dishwashing department. [ALJD 27; RT 1400.] According to the ALJ, although she worked weekend shifts “quite a few times” during the year, she usually worked Monday through Friday. [ALJD 27; RT 1410, 1433.] Beginning in June after her union activity became generally known, “she was assigned three or four Saturday and/or Sunday shifts per month.” [ALJD 27; RT 1413-14.] As the ALJ found, however, Gorney’s complaints about her schedule change were difficult to understand, but that from her testimony it appeared “that her principal complaint [was] not that she was required to work more Saturday or Sunday shifts, but rather that Drake . . . made the schedule changes without first consulting her.” [ALJD 28; RT 1413-17, 1431, 1433, 1436, 1438-40, 1442; R Ex. 16.]

As the ALJ further found, under FMC’s scheduling policy, employees may be required to work different hours, shifts, overtime, holidays and weekends, as the workload necessitates and that there can be no guarantee that an employee will remain on any of the three shifts or that the employee will always have certain days off. [*Id.*; R Ex. 5.] Based on the record evidence, particularly Gorney’s own testimony, the ALJ found that “Drake had always made such schedule changes without consulting the dietary employees, and this had always irritated Gorney well prior to her union activity.” [ALJD 28; RT 971-72, 976, 1438-39, 1442, 2122-23.] For example, with respect to changes to Gorney’s schedule in January and February 2006 (long before the CWA arrived at FMC), Gorney admitted that Drake did not consult her before making those changes. [RT 1440.] As the ALJ further found, “Gorney testified that she, as well as other dietary employees were treated similarly: ‘Anything we say, she [Drake] doesn’t listen to us. . . . She didn’t check with me. But she is the boss. And that is her way.’” [ALJD 28; RT 1439-40.]

Regarding the schedule change at issue, Drake testified that she changed Gorney’s schedule to include a few weekend shifts per month based on department needs, specifically because she considered Gorney an “excellent trainer” who could train new employees to perform

the weekend job routines. [RT 2126, 2138-39; R Ex. 16.] Significantly, Drake scheduled Gorney to work a few weekend shifts in March 2007 – two months before Gorney appeared in the pro-union newspaper advertisement the CGC claims prompted the alleged unlawful schedule change. [R Ex. 16 at Schedule 3/07.]¹¹ Gorney did not complain about the weekend shifts in March. [RT 1438-39, 2126.] Gorney also testified that in the past she worked a variety of hours and job routines. [RT 1440; R Ex. 16.]

The ALJ further found “no record evidence that Gorney’s weekend job duties were more taxing or difficult than her weekday job duties, or that her alleged inability to complete the assigned weekend tasks was other than systemic and applicable to all employees who were assigned to that particular weekend shift, or that she was criticized or warned about work-related deficiencies after being assigned the weekend shifts.”¹² [ALJD 28.] As the ALJ found, the CGC never asked Gorney the nature of her tasks or why she was unable to complete them. [*Id.*] Notably, over the years, Gorney performed the same weekend job duties. [R Ex. 16 at Schedules 09/05, 10/05, 11/05, 12/05, 01/06, 6/06.] In addition, the ALJ found that “only four of Gorney’s 20 shifts per month were weekend shifts; thus, the great majority of Gorney’s shifts continued to be weekday shifts.” [ALJD 28; R Ex. 16.]

The CGC makes several arguments to support the claim that FMC changed Gorney’s schedule in retaliation for her union activity. Those arguments, which challenge the ALJ’s *Wright Line* analysis fail for multiple reasons. Specifically, the CGC cannot show that Gorney suffered an adverse employment action or that her protected activity was a substantial or motivating reason for an adverse employment action. Moreover, even if the CGC could establish

¹¹ The March 2007 schedule is mistakenly dated “2006.”

¹² Gorney initially testified that she felt “confused” or perhaps frustrated because she had been accustomed to performing one job task during her weekday shifts (washing pots and pans), whereas the weekend shifts required she perform various job tasks, apparently because fewer employees worked the weekend and that “she was unable to complete certain tasks before having to begin the next one.” [ALJD 28.] As the ALJ found, however, Gorney recanted this testimony, and instead testified that “she did not feel confused about her job duties; rather she was simply irritated that she had not been consulted prior to the time her schedule and/or job duties were changed.” [*Id.*; RT 1433.]

a *prima facie* case, the record evidence demonstrates that FMC had legitimate business reasons for changing its schedule to which the CGC cannot show pretext.

First, the CGC erroneously asserts that it is “*undisputed*” that the change to Gorney’s schedule was a significant adverse action. [Brief 18-19 (emphasis added).] On the contrary, FMC disputes that Gorney suffered an adverse employment. As the record demonstrates, she did not. The CGC cites to *Five Star Mfg., Inc.*, 348 NLRB 1301 (2006), however, that case is distinguishable. In *Five Star*, the Board affirmed the ALJ’s findings that an employer retaliated against an employee when it moved the employee to a different and more difficult welding job position after he filed a charge with the Board. *Id.* at 1302. The supervisor knew the employee had severe back problems and the employee told the supervisor in the past that the welding job tore up his back. *Id.* The ALJ found an adverse action because the evidence showed that the supervisor reassigned the employee to literally cause him pain and make him quit. *Id.* Here, the uncontroverted evidence shows that Drake did not reassign Gorney to a different and more difficult job, but rather that Gorney had performed that same weekend job routine over the years without complaint. Gorney’s own testimony that she felt irritated that Drake did not consult her, rather than that she was confused about performing the weekend tasks, directly contradicts the CGC’s arguments that the weekend shift adversely effected Gorney because it “involved additional job responsibilities” or required her to “multi-task.” [Brief 18-19.] Similarly, the CGC presented no evidence that Gorney is “unhappy” with the weekend schedule or job duties. Rather, if anything, Gorney is “unhappy” with Drake’s failure to consult her. In any event, such unhappiness does not constitute an adverse employment action. Moreover, unlike the employee reassigned to a completely different and more difficult position in *Five Star*, here, the record shows that the majority of Gorney’s weekday shifts remained the same; only four of her twenty shifts per month were on the weekend. [R Ex. 16 – 06/07 Schedule.] In addition, shortly after her schedule change, Gorney voluntarily agreed to work additional hours, which required her to work weekends. [ALJD 28 n.39; RT 1417.] *See A And G, Inc.*, 351 NLRB No. 92, at *4 n.1, *26 (Dec. 28, 2007) (no violation where employee agreed to the shift change and the CGC

presented no evidence that the employee's prospects for benefits or continued employment were diminished).¹³ Absent an adverse employment action, the CGC fails to establish a *prima facie* case under *Wright Line*.

Second, the CGC misstates the record in trying to connect Gorney's union activity with the subsequent schedule change. [Brief 18.] The evidence shows that there is no connection between Gorney's pro-union newspaper appearance in May 2007 and Drake's decision to schedule her a few weekend shifts per month in June. Contrary to the CGC's claim that Gorney was first scheduled weekend shifts in June, the undisputed evidence shows that Drake scheduled Gorney to work weekend shifts in March 2007 without complaint, two months before her appearance in the newspaper. Specifically, Drake scheduled Gorney to work a few weekend shifts performing the #820 and #5 job routines. [R Ex. 16.] The CGC also asserts that even before that pro-union newspaper appearance in May, FMC was curious about Gorney's union leanings because "Klein-Mark had interrogated her, along with [Anna Nez], earlier in March." [*Id.*] However, the ALJ found that Klein-Mark *did not* interrogate Gorney (or Nez). [ALJD 16-17.] Notably, the CGC did not except to that conclusion, yet the CGC now tries to persuade the Board that this non-existent "interrogation" supports her "timing" argument to show unlawful motivation. In any event, with respect to the June 2007 schedule change, the CGC's argument fails because "[t]iming alone is insufficient to establish a causal connection" when, as here, the employer has a plausible business reason for its decision. *See Royal Coach Sprinklers, Inc.*, 268 NLRB at 1026.

Third, the CGC further misstates the record in arguing that "the ALJ ignores the fact that FMC offered absolutely *no* legitimate business reason" for changing Gorney's schedule. [Brief 19.] To the contrary, the record is replete with evidence that Drake changed Gorney's schedule for legitimate business reasons. Drake testified without dispute that she changed Gorney's schedule based on department demands, one of which was to train other employees. The record

¹³ The schedule change additionally benefited Gorney because she earned premium pay on Sundays. [RT 1438.]

evidence further shows that over the years Gorney worked the weekend shift. *See Cardinal Home Prods.*, 338 NLRB at 1009 (general counsel presented no evidence linking anti-union animus to employee reassignment where employee had previously performed the job to which he was reassigned). Moreover, as Gorney testified, Drake routinely changed all employees' schedules without consulting with employees. *See Keco Indus.*, 271 NLRB at 637 (ALJ cannot infer discriminatory motive where there is no evidence that employees were treated any different than other similarly situated employees). Accordingly, there is no evidence that FMC's legitimate business reasons for changing Gorney's schedule were pretextual, and the Board should affirm the ALJ's dismissal.

IV. THE ALJ MADE A WELL-SUPPORTED CREDIBILITY DETERMINATION THAT EVS DIRECTOR BROWN DID NOT DISCRIMINATE AGAINST MESA.

Complaint Allegations ¶¶ 6(e) and (f) allege that EVS director Joe Brown denied Mesa a vacation request and modified her work schedule because of her union activity. The ALJ properly dismissed both 8(a)(3) allegations, concluding that: "*I credit Brown's testimony. Brown gave cogent, persuasive reasons for taking the action he did, and there is no showing that Brown harbored any animosity toward Mesa. Brown, not Kasey, changed Mesa's work schedule and affirmed the decision to deny Mesa's vacation request. Brown was determined, I find, as the new interim director of housekeeping, to treat all employees similarly, and to apply FMC's personnel policies equally and in accordance with the best interests of the hospital. He was unwilling to make exceptions or to give Mesa or any other employee preferential treatment. I shall dismiss these allegations of the complaint.*" [ALJD 35 (emphasis added).]

The ALJ described the specific evidentiary details on which he based his credibility determination at length in his decision at 33-35. Uncontradicted record evidence fully supports the ALJ's credibility determinations. [RT 452-53, 455, 458-59, 481, 485-89, 494-95, 497-98, 502-03, 505-09, 512, 1153-57, 1164-65, 1628-29, 1634-35, 1708-16; R Exs. 4, 6-7, 38, 54.] Of particular note, the ALJ found – and the record fully supports – that Brown denied Mesa's vacation request because the department was severely understaffed at that time and changed her work schedule to make it the same as other "fill-in" or "float" employees doing the same job.

[ALJD 34-35; RT 452-53, 455, 458-59, 481, 485-89, 494-95, 505-09, 1153-57, 1628-29; R Exs. 4, 54.] Additionally, the uncontradicted evidence demonstrated that in rebuilding the schedule to meet hospital needs, Brown changed other employees' schedules and denied other employees' vacation requests the same as he did with Mesa. [RT 497-98, 506-09, 1156, 1164-65; R Ex. 6.] And Mesa testified that Brown treated her in the same way that he treated any other relief housekeeper he hired thereafter, that FMC previously denied vacation requests due to understaffing, and that Brown approved her vacation requests when staffing improved. [RT 502-03, 512, 1634-35, 1708-16; R Exs. 7, 38.]

The CGC's challenges to the ALJ's well-supported credibility determination fail under the Board's *Standard Dry Wall* test as follows.

First, the CGC argues that Brown did not testify that he believed in putting the Hospital's cleanliness ahead of individual employees' scheduling needs, but that he testified that "he changed the schedule based on employee complaints of unfair treatment." [Brief 21.] The CGC then contends that the ALJ erred in his finding because the ALJ could not rely on the "employee complaint" reason because the employee who Brown identified denied complaining to him. [Brief 21.] The CGC misstates the record. Although one of the factors that prompted Brown to change the schedule were employee complaints about fairness, Brown provided lengthy testimony that he also changed the schedule so that it was consistent and balanced, minimized overtime, and had the right number of employees scheduled to work each day to fix specific problems he saw with the hospital's cleanliness. [RT 452-56.] While CGC witness Soncha Von Hazel did not remember complaining about unfair scheduling as Brown indicated, Brown also testified that Mesa complained to him that the schedule was unfair. [RT 450-51, 505-06.] Mesa never disputed Brown's testimony, and in fact, testified that she had previously stepped down as

a supervisor because she felt the schedule was unfair.¹⁴ [RT 1607-09.] Thus, the record evidence fully supports the ALJ's findings.

Second, the CGC argues that the ALJ “disregarded the glaring evidence of discriminatory intent in Brown’s decision to change the schedule.” No such evidence exists. The CGC maintains that Brown reported to FMC’s labor relations consultant (GLES) that Mesa was pro-union and specifically discussed with the consultant “the idea of changing her schedule.” [Brief 21.] Again, the CGC misstates the record evidence. While Brown testified that he identified to the consultant that Mesa was pro-union (information Mesa voluntarily told Brown), he did so as part of a lawful analysis of the workforce as part of a union campaign. [RT 441, 442-43, 446.] Contrary to the CGC’s argument, Brown did not discuss changing Mesa’s specific schedule with the consultant, but informed the consultant that he generally planned to “make some changes to the employee work schedules.” [RT 449.] There is no record evidence whatsoever that they discussed making schedule changes unique to Mesa or any other specific employee. Rather, it is logical that Brown would seek advice from the labor relations consultant (who conducted FMC’s management training) to ensure that he did not take any actions that might violate employee rights by changing the schedules.

Respondents introduced persuasive evidence that Brown’s changes to the schedule affected numerous employees – not just Mesa – none of whom have been shown to have supported the union. As Mesa admitted, Brown treated her in the same non-discriminatory way he treated all other relief housekeepers, requiring them to work 40 hours each week and work weekends. *See Keco Indus.*, 271 NLRB at 637 (no inference of discriminatory motive where there is no evidence that union supporters were treated any differently from other employees); *Chrysler Corp.*, 232 NLRB 466, 475 (1977) (no discrimination unless discriminatee is “singled

¹⁴ The CGC also argues that Brown “lied” when he testified that Mesa was scheduled for a four-day weekend every other weekend, rather than a three-day weekend. [Brief 21.] As the ALJ found, Brown merely misspoke about this peripheral aspect of Mesa’s schedule. [ALJD 34 n.45.]

out” and treated differently than others similarly situated). Accordingly, as the ALJ correctly found, there is no evidence showing that “Brown harbored any animosity toward Mesa.”

Third, the CGC also argues that the ALJ ignored Brown’s admission that “it was Colorado who actually made the decision to increase Mesa’s hours and work her every weekend.” [Brief 21.] Brown never made such an admission. Rather, Brown testified that he worked together with Colorado, who was the department secretary, to rebuild the schedule. [RT 483-84.] Brown testified without dispute that, although they worked together, he made the final decisions regarding the schedule. [RT 432-33.] There is no evidence to the contrary, and the CGC never called Colorado as a witness.

Fourth, the CGC complains that “the ALJ summarily credited Brown’s testimony that he denied other, unidentified employees’ vacation requests at the same time as he denied Mesa’s.” [Brief 21.] The CGC claims that the ALJ “completely ignored *documentary evidence* indicating that Respondents granted leave to four other employees for the same period of time that Mesa asked to be off work. [*Id.* (emphasis in original).] The CGC is disingenuous in the incomplete and misleading evidence she cites to the Board. As discussed above, the documentary evidence shows that Brown (and Keeler) denied Thompson’s and Nez’s time-off requests at the same time as Mesa’s request. [R Ex. 6.] Thompson and Nez (along with Herman), were only later granted their requests because they were able to get other housekeepers to cover their shifts as per FMC’s scheduling practices – Mesa admitted that Brown gave her the same opportunity, but she chose not to seek coverage. [RT 1174.] As for Pulliam, management granted her request because she worked in a separate unit than Mesa. [RT 551-53, 1130; GC Ex. 52.] Pulliam’s linen unit did not have the staffing shortage that the housekeeping unit suffered and Pulliam had coverage. [RT 551-52.]

Fifth, the CGC also claims that 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. [*Id.*] The CGC again misstates the record. Brown testified that he did not usually get involved in the day-to-day vacation requests, but got involved with Mesa’s July

request at Mesa's own initiative when she complained to him and asked him to override Keeler's denial. [RT 480-81.] Thus, Mesa's union support had nothing to do with Brown's involvement with the July vacation request, which is at issue in this matter. As it related to Mesa's subsequent time-off requests that Brown *granted*, Brown did testify that he got involved with those because "it was Barb Mesa and we wanted to make sure we did absolutely correct by everybody." [RT 504-05.] By that point, Mesa had complained about the earlier vacation request denial and schedule changes and, as an ardent union supporter, Brown wanted to ensure that there would be no issues whatsoever regarding any decisions made about her vacation requests. [RT 480-81, 504-05.] The ALJ did not ignore the record evidence.

Based on the foregoing analysis, the ALJ had ample evidence before him to conclude that Brown did not discriminate against Mesa in denying her vacation request and changing her schedule. The CGC has not demonstrated that the ALJ's credibility determination was incorrect by "the clear preponderance of all of the relevant evidence," and the Board should affirm the ALJ's dismissal.

V. THE ALJ MADE A WELL-SUPPORTED CREDIBILITY DETERMINATION THAT FMC DISCHARGED CONANT FOR ATTENDANCE VIOLATIONS.

Complaint Allegation ¶ 6(g) alleges that FMC discharged Michael Conant because of his union activity. The ALJ properly dismissed that allegation, concluding that: "*I credit Brown's testimony*" that "from the inception of his tenure with FMC, [Brown] attempted to enforce FMC's policies with consistency because it was important that all employees be treated equally"; that there was "no showing that Brown granted leniency to any employee who has failed to comply with FMC's absenteeism policy"; and that FMC discharged Conant for FMC absenteeism policy violations, not union activity. [ALJD 35-36.]

The ALJ specifically found that "the only union activity attributable to Conant is the fact that he wore a union button at work during July, the last month of his employment." [*Id.*] The ALJ found that Conant "had a poor attendance record prior to wearing a union button, and had received several corrective actions under FMC's no-fault absenteeism policy, including a verbal warning, a written warning, and a three-day suspension. Then, after a series of 4 unscheduled

absences from May 18 to July 27, he was discharged by Brown” after his recommendation “was approved by [FMC vice president] Schuler.” [*Id.* at 35.] Uncontradicted record evidence fully supports the ALJ’s credibility determinations. [RT at 100-06, 435, 437, 462-66, 472, 496, 513-23, 524, 543-44, 550; R Exs. 10, 11.]

Additionally, Conant admitted that he was counseled and written up many times regarding his attendance before he began wearing a union button. [RT 1338-42; GC Ex. 15; R Ex. 28.] Conant acknowledged that FMC gave him “a break” and many second, third, and fourth chances before *and* after he started wearing a union button. [RT 1341-43.] And the record shows without contradiction that during his brief tenure as director, Brown – following FMC’s policy – recommended discipline for several similarly situated housekeeping employees. [RT 515.] Notably, as the ALJ found: “It appears unnecessary to discuss either Conant’s absentee history or the parameters of FMC’s absentee policy, as the General Counsel *does not dispute the fact that Conant’s absenteeism warranted his discharge* in accordance with FMC’s policy. However, the General Counsel maintains that, as demonstrated by an analysis of FMC’s past practice, [former housekeeping director] Kasey had not strictly adhered to FMC’s absentee policy, and therefore Brown, too, should have been guided by Kasey’s example.” [ALJD 35 (emphasis added).] Kasey played no role in Conant’s discharge. [*Id.*] The CGC does not except to this finding.

The CGC’s challenges to the ALJ’s well-supported credibility determination fail under the Board’s *Standard Dry Wall* test as follows.

First, the CGC claims Conant was “one of the boldest Union supporters.” [Brief 23.] Yet the CGC presents no evidence whatsoever contrary to the ALJ’s finding that “the only union activity attributable to Conant is the fact that he wore a union button at work during July, the last month of his employment.” [*Id.*] In fact, Conant himself testified that wearing the union button in July was the only time he openly engaged in union activity, and Brown confirmed that he first saw Conant wear the union button sometime in July. [RT 470-71, 1317.]

Second, citing to *Made in France, Inc.*, 336 NLRB 937, 947 (2001), the CGC argues that “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.” [Brief 23.] The CGC misstates the record. There is no evidence whatsoever that FMC tolerated Conant’s attendance infractions for two years and that the real reason for his discharge was his union support. *Made in France* is distinguishable. In that case, which coincidentally was heard by the same ALJ who heard this instant matter, the evidence showed that the Respondent employer tolerated the employee’s chronic tardiness throughout the employee’s one-year period of employment *without issuing any disciplinary action whatsoever* for his tardiness. 336 NLRB at 946-47. Although approximately seven weeks before his discharge the employer gave the employee a verbal and written warning for specific infractions (and not tardiness alone), the employee continued to be tardy without receiving any discipline. *Id.* Nevertheless, the employee was discharged for “tardiness” three days after accompanying union representatives when they made their recognition demand, during which occasion the employee advised his manager that if he had anything to say to him he could say it to the union representatives. *Id.* The ALJ found that the evidence showed that the employee’s tardiness alone was something that the employer was willing to tolerate for a variety of reasons and that “[i]t was not until he became a union supporter that the Respondent decided that his tardiness was no longer acceptable.” *Id.* at 947.

In drawing his conclusion here, the same ALJ recognized the factual differences between *Made in France* and the instant matter. Here, the compelling evidence shows that FMC never tolerated Conant’s attendance problems during his two-year tenure with FMC. In fact, as Conant testified, FMC enforced its attendance policy against him by issuing him a verbal warning in July 2006, a written warning in November 2006, and a 3-day suspension/final warning in February 2007 – all before Conant engaged in any union activity. [R Ex. 15.] At best, Conant, like other employees, may have received “a break” by not receiving discipline immediately after violating the attendance policy. However, the undisputed evidence demonstrated there are a number of

legitimate reasons why employees did not receive instantaneous discipline. As the ALJ recognized, Respondents' witnesses testified that there are "individual discrete reasons for not imposing the proper discipline at the time that it should have been [disclosed], because of scheduling, because supervisors weren't present, that they didn't know about the absences, or didn't have time to research it, all this sort of thing." [RT 1736.]

Brown's testimony regarding the discipline of housekeeper Thompson is a perfect example. In that instance, Brown had intended to issue Thompson discipline for her attendance violations on August 21, 2007, but Brown's busy schedule and the unforeseen event of Thompson's additional August 23 unscheduled absence delayed that discipline until August 27. [RT 521-22.] Like with Conant, he gave Thompson the next level of discipline she was scheduled to receive (a 3-day suspension), even though by that point Thompson had enough unscheduled absences to warrant a discharge. [RT 522-23; R Ex. 11.] As with Conant's discipline, the reality of running a hospital prevented the instantaneous issuance of discipline the moment that discipline became appropriate under FMC's attendance policy.¹⁵

Third, citing to GC Exhibits 30, 55, and 63, the CGC further argues that those disciplinary documents disclose that, in the housekeeping department, the attendance policy was not followed in over 80 percent of the cases. [Brief at 23; GC Exs. 30, 55, 63.] Again, the CGC misstates the record. As a preliminary matter, Exhibit 30 is irrelevant as it relates not to an employee who works in the housekeeping department, but rather in the dietary department. Exhibits 55 and 63 are no more helpful to the CGC's argument: Brown had nothing to do with the majority of those disciplinary actions. As a matter of law, what other supervisors did or did

¹⁵ See *Cellco P'ship*, 349 NLRB No. 62, at *1-*2, *29-*36 (2007) (no prima facie case under *Wright Line* because there was no evidence connecting union activity and the decision to discharge an employee for multiple violations of its attendance policy after many "extra chances"); *Neptco, Inc.*, 346 NLRB 18, 18, 27-31 (2005) (the General Counsel failed to show that employer had a union-related motivation to discharge union supporter for violating the company's attendance policy and leaving work area after employer gave him four extra chances where it could have imposed harsher discipline); see also *Palms Hotel & Casino*, 344 NLRB 351, 353 (2005) (Board held ALJ's finding that prior to employee's union activity, employer's "supposed inaction was 'tantamount to condonation' of the misconduct" was not supported by the record when employer had verbally counseled employee for various incidents of misconduct prior to his union activity).

not do regarding discipline can not be used to determine if *Brown* discriminatorily applied discipline. See *Neptco*, 346 NLRB at 30-31 (comparison between employees who have different supervisors not appropriate because “[d]ifferent supervisors may handle matters differently”); *Performance Friction Corp.*, 335 NLRB 1117, 1173-74 (2001) (ALJ attached no weight to the General Counsel’s comparator exhibits showing warnings given by different supervisors).

Nevertheless, the CGC disingenuously tries to use Exhibits 55 and 63 to argue that management in the housekeeping department did not apply discipline consistently with FMC’s attendance policy, and thus, discriminatorily applied discipline to Conant. However, *the ALJ did not admit those documents for that purpose*. The ALJ found that without explanatory testimony about the circumstances behind the attendance records (which the CGC did not introduce), the documents could not be used for comparative purposes. The ALJ expressly received Exhibits 55 and 63 for the limited purpose of showing “that people were absent on a particular day” and as “examples of corrective actions that were administered,” but not that they were relevant for comparative purposes. [RT 1751, 1766-68.] Even if the ALJ had not placed that limitation on the documents (which the CGC does not mention), the documents do not support the CGC’s assertion, which the ALJ correctly rejected.

An analysis of Exhibit 55 shows that, during the 365 days from January 1, 2007 through December 31, 2007, 28 housekeeping employees had attendance issues that the CGC believes merited some level of discipline. Notably, of those, approximately 64% *did not* occur during Brown’s tenure at FMC. Of those 28 employees who had attendance issues in 2007, the record demonstrates that 15 received some level of formal discipline for them. [R Ex. 13; GC Ex. 63.] Although the remaining employees did not receive any discipline (some did not merit any discipline under the policy), the CGC failed to elicit any witness testimony to explain the reasons why those employees did not receive discipline (such as those discussed above).

Moreover, it is undisputed that EVS secretary and non-supervisor employee Alice Colorado – whom Brown relied on to notify him of attendance issues – told Brown about only four of those attendance issues (including Conant’s termination), and Brown applied the policy

each time she brought attendance issues to his attention. [RT 435, 463-66; R Ex. 10; GC Exs. 14, 15.] The CGC offered no evidence of why Colorado did not surface any other attendance issues; there could be myriad reasons. Those few additional issues that occurred during Brown's tenure were addressed by his subordinate supervisors, Keeler and Yazzi, or not at all, for unknown reasons. The CGC did not introduce any evidence and the record does not reflect any evidence of the circumstances when they were addressed, how they were addressed, or even if they were addressed at all. Consequently, the CGC's argument that FMC failed to apply its policy 80% of the time during 2007 has no support in the record. [RT 1767-69.] Notably, the fact that prior housekeeping managers (including Kasey) did not discipline Conant as harshly as they could have does not impact the legitimacy of Brown's recommended decision when Brown learned of Conant's egregious attendance problems. "An employee is not insulated from discipline simply because his previous failures to work to a specification did not come to management's attention." *T-West Sales & Serv., Inc.*, 346 NLRB 132, 135 (2005).

Fourth, the CGC argues "shifting explanations" pretext because Brown indicated on Conant's paperwork that he had displayed "poor customer service" when Conant had never been counseled for poor customer service before. [Brief 23-24.] But a review of Conant's discharge paperwork shows that Brown expressly stated that the "reason" for discharge was "workflow" and "excessive absenteeism." [RT 518; R Ex. 10.] As Brown explained, absenteeism affects workflow, which affects the availability of patient rooms, which affects patients, who are the customers; thus warranting a "poor customer service" rating. [RT 518; R Ex. 10.]

The CGC also claims that Brown testified that, in deciding to discharge Conant, he considered a prior suspension issued to him for using threatening language at work (that he (Conant) would "go Columbine"), and that this also shows pretext. [Brief 23-24.] Not true. Although Brown testified that he knew about the prior suspension, he further testified without dispute that he did not recommend that FMC discharge Conant for the prior threatening comments (which happened before Brown arrived). [RT 544-46, 1327.] In fact, Conant testified that, during his discharge meeting, Brown never said anything about his prior "Columbine"

comments. [*Id.*] The only reason Respondents addressed this issue at the hearing was because it was referenced in Conant’s prior discipline paperwork that was part of the record. Respondents’ counsel asked Brown questions about the incident solely to explain its context. [RT 1333-34.] As Brown testified, it did not play a role in his decision to recommend Conant’s discharge. [*Id.*]

Based on the foregoing analysis, the ALJ had ample evidence to conclude that Respondents did not violate the Act when FMC discharged Conant. In addition, the CGC has not demonstrated that the ALJ’s credibility determination was incorrect by “the clear preponderance of all the relevant evidence,” and the Board should affirm the ALJ’s dismissal.

VI. THE ALJ MADE A WELL-SUPPORTED CREDIBILITY DETERMINATION THAT FMC LEGITIMATELY MODIFIED MACKEY’S LUNCH BREAK.

Complaint Allegation ¶ 6(j) alleges that Nutrition Services management subjected Mackey to more onerous work by adjusting his lunch break because of his union activity. The ALJ properly dismissed that allegation, concluding that: “*I credit the testimony of Drake and Robledo. Both gave convincing accounts of the rationale for changing Mackey’s lunch break.*” [ALJD 30 (emphasis added).] In support of their testimony, the ALJ also found: “Further, although Mackey [because of mental disabilities] can not always complete all the jobs assigned to him, it is clear that he has not been warned or reprimanded or otherwise counseled for any work-related deficiencies; rather, he is simply advised to do the best he can. Also it is noteworthy that no other employee has suffered adverse consequences because of their union activity, and it is unlikely that FMC would single out Mackey as the sole recipient of discriminatory treatment.” [*Id.* at 29-30.] The ALJ also noted, although “Mackey complains that the change to his lunch schedule has lessened by 15 minutes the time he has to socialize with his friends at 1:30 p.m. . . . it simply is an incidental consequence of the more pressing considerations set forth above.” [*Id.* at 30 n.41.]

The ALJ described the specific evidentiary details on which he based his credibility determination at length in his decision at 28-30. Uncontradicted record evidence fully supports the ALJ’s credibility determinations. [RT 914-15, 1019-21, 1073-75, 1260-64, 1306-07, 2129-31; GC Ex. 31.] Of particular note, the ALJ found, the record fully supports – and Mackey

admitted – that FMC created and designed Mackey’s job for him as part of a special-needs community outreach program due to Mackey’s disabilities, and his managers adjusted his break time because his prior break time “coincided with the busiest time, and at 2:00 p.m., when he returned from his lunch break, he was overwhelmed with work because at that point he had two jobs to do in the short time before the cafeteria reopened.” [ALJD 28-29; RT 1261-63.] Mackey also admitted that the lunch break change has enabled him to keep up with the trays and dishes on the conveyor belt: “when I have an early lunch, I can keep up with it, but when I had [lunch] before at 1:30 I couldn’t.” [ALJD 29-30; RT 1263-64.] Mackey also testified that Robledo and Drake helped him with his work over the years, and he considered Robledo a friend and had heard that Robledo came to visit him when he had open-heart surgery out of town. [RT 1298-99.]

The CGC’s challenges to the ALJ’s well-supported credibility determination fail under the Board’s *Standard Dry Wall* test as follows.

First, the record evidence shows that Drake and Robledo did not change Mackey’s job duties in August 2007, but that Drake and Robledo simply reviewed his job routine with him then “so that he was aware of his job description.” [RT 627, 1258; GC Ex. 31.] With respect to the job description at issue, Mackey first testified that every job duty and corresponding time for performing the duties listed on the written job routine were what he had always done except for two things: (1) that FMC scheduled him to leave the dish room at 12:45 p.m. to cover another employee’s lunch break by wiping tables and chairs in the dining room, picking up items off the floor, wiping up spills, and keeping the tray conveyor belt clean; and (2) that FMC scheduled him at 2:30 p.m. to take out the trash, keep the dining tables and floors clean, and make sure that the patio tables were clean. [RT 1258, 1288-89; GC Ex. 31.] Mackey, however, clarified his testimony, and admitted that aside from the 12:45 p.m. time-change, he always performed those specified duties. [RT 628, 1290-91, 1297-98, 1302-04, 2128-29.] Mackey’s 2004 Job Description/Evaluation and his 2006 performance evaluation also demonstrate that he performed those duties since at least 2004 – long before any union activity. [RT 1296-97; R Exs. 18, 24.]

Second, as for the change in his lunch break from 1:30 p.m. to 11:00 a.m., the CGC misstates the record in claiming that Robledo testified that “this multiplied Mackey’s work by at least five times.” [Brief 24.] Rather, Robledo testified that the cafeteria was five times busier at 1:30 p.m. versus 11:00 a.m., not that Mackey’s work load increased by five times during that period. [RT 915.] Although the CGC suggests that Mackey’s work became more onerous after his lunch break change because he could no longer “sit out” the department’s busy time, Drake and Robledo testified without dispute that Mackey’s lunch was moved to make his job easier, and that the change did not increase the amount of work Mackey had to accomplish each day. [Brief 25; RT 915, 1020-21, 1073, 2129.] Indeed, Mackey’s own testimony defeats the CGC’s arguments. Mackey testified that prior to the lunch break change, three or four times a week he would return from his 1:30 p.m. lunch break to find that the tray conveyor belt was backed up because of the number of trays and dishes piled on it. [RT 1262.] Thus, Mackey did not escape the busier workload by being on his lunch break at 1:30 p.m., but rather had to complete the work when he returned from his lunch break, which overwhelmed him. Now that he takes his lunch break at 11:00 a.m., Mackey testified that he can keep up with the tray conveyor belt. [RT 1263.] Despite repeated promptings from the CGC at trial to testify otherwise, Mackey maintained that his job duties have not become more onerous since the change to his lunch break. [RT 1263-64, 1307.] See *Northeast Iowa Tel. Co.*, 346 NLRB 465, 476 (2006) (affirming ALJ finding that employer did not violate Section 8(a)(3) of the Act when employee suffered no change in hours, pay, location, or work environment, and when employee did not complain her work had become more difficult or less rewarding in any way).

Third, the CGC’s claim that the lunch break change adversely affected Mackey because he no longer eats with his coworkers is also without merit. [Brief 25.] In fact, Mackey stated he never complained to his managers that he had no one to talk to at lunch. [RT 1306.] As the record shows, Mackey still takes a 15-minute break at 1:30 p.m., which allows him to eat and talk with his co-workers at that time. [RT 2131; GC Ex. 31.] Accordingly, the ALJ did not err by finding that the lessened time at 1:30 p.m. to talk with co-workers “simply is an incidental

consequence of the more pressing considerations” of helping Mackey to better complete his job duties. [ALJD 30 n.41.]

Fourth, contrary to the CGC’s argument, there is no evidence that FMC “ramp[ed] up the physical demands of [Mackey’s] job almost immediately after he began openly supporting the Union.” [Brief 25.] As cited above, neither Drake nor Robledo assigned Mackey new duties he had not performed before.

Based on the foregoing analysis, the ALJ had ample evidence to conclude that FMC did not violate the Act when it changed Mackey’s lunch break. In addition, the CGC has not demonstrated that the ALJ’s credibility determinations were incorrect by “the clear preponderance of all the relevant evidence,” and the Board should affirm the ALJ’s dismissal.

VII. THE ALJ MADE A WELL-SUPPORTED CREDIBILITY DETERMINATION THAT KLEIN-MARK DID NOT COERCIVELY INTERROGATE SOUERS.

Complaint Allegation ¶ 5(a) alleges that then-nutrition services coordinator Sarah Klein-Mark interrogated Paula Souers about the union during a periodic evaluation where Klein-Mark evaluated Souers as an excellent employee. (At the time she testified, Klein-Mark was a non-supervisory employee [RT 215].) The ALJ properly dismissed that allegation, concluding that: “*I credit the testimony of Klein-Mark who appeared to be a forthright witness with a complete recollection of the entire conversation*” in contrast to “Souers’ less comprehensive account of the meeting.” [ALJD 14 (emphasis added).] The ALJ found: “It seems unlikely that Klein-Mark would point blank ask Souers, ‘how do you feel about the union,’ because Klein-Mark already knew the answer to that question as Souers was a staunch union advocate. Accordingly, the ensuing scenario described by Klein-Mark is the more probable.” [*Id.*] The ALJ further found that “[a]sking Souers, a known union advocate, in the context of discussing work-related matters, what she believed a union could accomplish, does not constitute coercive interrogation; this is particularly true given Klein-Mark’s simultaneous excellent evaluation of Souers and her expression of affection for Souers.” [*Id.*]

The ALJ described the additional evidentiary details on which he based his credibility determination at length in his decision at 12-14. Uncontradicted record evidence fully supports

the ALJ's credibility determinations. [RT 218-21, 236-27, 245-46, 730, 780-86, 794, 824-25.] Of particular note, the ALJ found – and the record fully supports – that during the evaluation “Klein-Mark complemented Souers for being a ‘high performer’ (the highest ranking), said that she was a good nutrition assistant, cared for her patients, and took her job seriously,” and that “Klein-Mark concluded the meeting by again telling Souers what a good employee she was, and how good of a job she was doing; and Souers, in turn, said she thought Klein-Mark was doing a good job as a supervisor as well”; then “the two hugged, and the meeting ended.” [ALJD 12-14; RT 218, 237-38, 782-83.]

The CGC's challenges to the ALJ's well-supported credibility determination fail under the Board's *Standard Dry Wall* test as follows.

First, citing to *Central Broadcast Co.*, 280 NLRB 501, 503 (1986), the CGC argues that Klein-Mark admitted that she was interested in more than Souers' personal union leanings and that her question was designed to get Souers to “disclose [the] union's strategic or organizing plans” which constitutes illegal interrogation. [Brief 27.] The CGC misstates the record. Klein-Mark never made such an “admission.” As the ALJ found, Klein-Mark credibly testified that in response to Souers' work-related concerns and concerns about Bradel, she asked Souers “what her *opinion* was about what the union could do to help with relationships between nutrition services and nursing staff and Bill Bradel.” [RT 236 (emphasis added).] Nothing in that question suggests that Klein-Mark wanted to know the union's strategic or organizing plans. In fact, in the CGC's Post-Hearing Brief, the CGC argued the exact opposite, stating that “the very nature of the information Klein-Mark sought – *Souers own feelings about the Union* – creates a presumption of illegal interrogation.” [CGC Post-Hearing Brief at 21 (emphasis added).]

Moreover, *Central Broadcast* does not apply here. In that case, during a union campaign, a radio station program director regularly met with a station announcer to discuss the employer's plans regarding unionization. 280 NLRB at 502. During one of their meetings in which the program director informed the announcer that the employer planned to fire all of the announcers, the program director told the announcer “that he had better ‘do something’ . . . ‘What about this

Union?’ he asked, ‘How strong and tough is this Union of yours?’” *Id.* at 503. Immediately after the station fired the announcers, the program director called the announcer and asked, “Well, when are you going to hit me with an injunction.” *Id.* Affirming the ALJ, the Board found that those questions were coercive and violated the Act. *Id.* Unlike in that case, in response to a concern raised by Souers, Klein-Mark asked one single question about her opinion about what she thought a union could do as far as relationships between the nutrition and nursing staffs and Bradel – not strategic plans the union had for organizing the nurses or the dietary department. [RT 236, 1782.]

Second, the CGC further misstates the record in claiming that Klein-Mark persisted in her inquiry and that in the course of her evaluation “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.” [Brief 27 (emphasis in original).] After Klein-Mark asked the single question and Souers stated that she did not feel comfortable talking about the union, Klein-Mark merely mentioned that it was okay to have an open dialogue about it. [RT 220-21.] When Souers said she did not want to talk about it, Klein-Mark respected Souers’ feelings and asked no further questions about the union. [*Id.*] At no time during the evaluation did Klein-Mark expressly or impliedly tell Souers that she was expected to provide information about the union’s plans and goals.

The CGC attempts to distinguish *Aladdin Gaming, LLC*, 345 NLRB 585, 611 (2005), and *Enloe Medical Center*, 345 NLRB 874, 876-77 (2005), which the ALJ cited to support his conclusion, to try and show that Klein-Mark was “persistent” in her inquiry. However, those cases fully support the ALJ’s conclusion here. The conversation at issue here was quite similar to those in the cited cases. It did not contain any threat of reprisal and was not accompanied by any other words or conduct even remotely susceptible to be characterized as coercive. To the contrary, the meeting started with a glowing evaluation and ended with mutual compliments and a hug between friends. [RT 218, 237-39, 782-83.] One would be hard pressed to imagine coercion in those circumstances. Moreover, the union-related comments lasted a minute or less, happened only one time, occurred with a low-level supervisor, and were prompted by Souers’

comment about FMC president Bradel. [RT 215, 219-20, 236, 245-46, 782, 784.] Souers was an open union supporter and gregarious by nature. [RT 236-39, 728-39, 783-84.] Klein-Mark asked nothing about union organizing efforts or supporters' identity, but sought only to exchange personal opinions with someone she hired and had visited with 8-12 times a week for a year about family and outside activities. [RT 220, 236-39, 782.] Additionally, Souers continued to openly and actively engage in union activities long after her conversation with Klein-Mark. [GC Exs. 11, 53.] Further, Souers testified that she worked in a "comfortable" environment and "talked about [the union] openly with people in the workplace."¹⁶ [RT 780, 784.]

Under the totality of the circumstances test as expressed in *Rossmore House*, 269 NLRB 1176 (1984), and as illustrated by the many analogous cases cited here, there was nothing remotely coercive about the exchange. The Board should affirm the ALJ's dismissal.

VIII. THE ALJ CORRECTLY DENIED THE CGC'S POST-HEARING REQUEST TO AMEND THE COMPLAINT WITH AN UNLITIGATED ALLEGATION.

In a footnote in the CGC's Post-Hearing Brief, the CGC sought to amend the Complaint to add an admittedly untimely allegation that Drake unlawfully told Souers in March 2007 that Souers should not spread "malicious gossip" about FMC president Bradel. [ALJD 13 n.18.] The ALJ denied the CGC's request to amend, finding that the "amendment was not proposed during the course of the hearing, and FMC has thereby been denied the opportunity to present evidence." [ALJD 13.] The CGC takes exception to that ruling [Brief 27-28.], but the CGC's

¹⁶ See *Color Tech Corp.*, 286 NLRB 476, 476 (1987) (supervisor did not violate the Act by asking about "why the employees had gone to the Union" because it did "not contain any threat of reprisal and was not accompanied by any other words or conduct even remotely susceptible to be characterized as coercive"); *Bates Nitewear Co.*, 283 NLRB 1128, 1128 (1987) (supervisor did not unlawfully interrogate an employee by asking "what [she] thought about the Union," where the supervisor's single question was unfocused, unaccompanied by coercive statements and was asked by a first-line supervisor with whom the employee admittedly got along); *Continental Indus., Inc.*, 279 NLRB 920, 920 (1986) (supervisor did not engage in coercive questioning by asking an open union supporter "about this union thing" and "don't you think we can help" to which the supporter said "no"); *Sunnyvale Med. Clinic, Inc.*, 277 NLRB 1217, 1218 (1985) (personnel director did not violate the Act by asking an open union supporter why the employee had joined a union because the two had a "friendly" relationship and the casual questioning was of the type to be expected between supervisors and employees who work closely together); see also *Abramson, LLC*, 345 NLRB 171, 172-73 (2005) (supervisor's question, "What about this Union?" was not unlawful interrogation because it was a "spontaneous off-the-cuff" question, "the conversation occurred informally at the jobsite," and the supervisor did not make any threats or promises).

arguments fail as follows.

First, the Board may consider allegations that are not found in a timely and properly pled Complaint allegation only “if the issue is *closely connected* to the subject matter of the Complaint and has been *fully litigated*.” *Pergament U.S., Inc.*, 296 NLRB 333, 334 (1989) (emphasis added). “[W]hether a matter has been fully litigated rests in part on whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made.” *Id.* at 335. Here, the CGC does not argue that the “negative talk” allegation relates (closely or otherwise) to any other timely pled allegation. Consequently, the CGC’s Exceptions fail for that reason alone. *Am. Direction Boring, Inc.*, 353 NLRB No. 21, at *5 n.14 (2008) (“Any exception to a ruling . . . which is not specifically urged shall be deemed to have been waived.”); *Detroit Newspapers Agency*, 330 NLRB 505, 508 (2000) (affirming ALJ’s decision that, among other things, “[t]he Respondent has waived the conflict-of-interest argument also here . . . by failing to raise the issues . . .”).

Second, under the *Redd-I* standard, even if the CGC had not waived the closely connected argument, the argument would fail. The only other time any witness mentioned the gossip about Bradel came in Souers’ and Klein-Mark’s testimony about the unlawful interrogation allegation discussed in the preceding section, stemming from a conversation eleven days removed from the one subject to the CGC’s untimely amendment. But *Souers* brought the Bradel issue up during that conversation, and Klein-Mark did not say anything to Souers about not speaking with other employees. [RT 219-20, 238-39, 782.] Thus, the two conversations do not relate closely to each other because they arise out of wholly different factual scenarios and involve different legal theories (“unlawful rule” versus “interrogation”) and defenses (“no rule announced/not disseminated/ambiguous/not protected versus “not coercive”). *See Redd-I, Inc.*, 290 NLRB 1115 (1988) (untimely allegation is not “closely related” to a timely allegation when the allegations do not involve the same legal theory, do not arise from the same factual situation or sequence of events, and where respondent would not raise the same defenses).

Third, contrary to the CGC’s assertion [Brief 28], the parties did not litigate the issue. Notably, no party asked *any* witness about the Drake/Souers conversation. Other than having Drake identify the document referencing the conversation [GC Ex. 20], the CGC did not ask Drake any questions about it, and when Respondent objected to its admissibility, the CGC stated that she offered it only to [purportedly] show “animus.” [RT 603-05.] Then, even though the CGC had the document in evidence *before* she called Souers and Klein-Mark to the stand, the CGC did not ask Souers or Klein-Mark about the document or the conversation described in the document. Respondents never asked any witness about the document or the conversation because the Complaint did not allege any wrongdoing associated with the conversation and the CGC did not ask for any amendment related to the document/conversation when the CGC offered the document into evidence. Additionally, the CGC misstates the record when she argues that “Respondents *recalled* Drake, who explicitly *denied* having made any such remark.” [Brief 28 (emphasis in original).] Notably, the CGC does not provide any record citation to support that assertion. [*Id.*] No citation exists. Respondents did recall Drake to respond to testimony from other CGC witnesses given after her original testimony, but Drake’s subsequent testimony related to allegations alleged in the Complaint – not the incident between her and Souers regarding Bradel. Significantly, the CGC did not ask Drake any questions about the document or conversation when Drake returned to the witness stand, which the CGC surely would have done if Drake had “explicitly denied” the remark. [RT 2089-2148.]

The CGC waived the closely connected argument. Additionally, the “negative talk” issue does not closely relate to any other timely allegation and the parties did not litigate or even mention it during the hearing. Consequently, the Board should affirm the ALJ’s decision.¹⁷

¹⁷ See *Atlantic Forest Prods., Inc.*, 282 NLRB 855, 872 (1987) (affirming ALJ’s finding that “the lawfulness of the rule in the handbook was not placed in issue by the complaint, [and if it had] Respondent would have had the right to present evidence to rebut the presumptive invalidity of the rule. As it did not do so and had no notice that it would be required to do so, I find the lawfulness of the rule was not fully litigated and is not properly before me for decision”); *Belcher Towing Co.*, 265 NLRB 1258, 1271 (1982) (affirming ALJ’s decision not to rule on allegation that was not fully litigated where allegation was not in complaint, the CGC did not amend the complaint to add the allegation, no evidence was taken, and the ALJ was “not persuaded that Respondent was adequately put on notice that a defense was required”); *Chandler Motors, Inc.*, 236 NLRB 1565, 1565 (1978) (dismissing allegation that was not fully litigated where (1) allegation was not in complaint; (2) complaint was not amended; (3) “Respondent was
(Continued ...)

IX. DRAKE DID NOT UNLAWFULLY SOLICIT A GRIEVANCE FROM SANDOVAL.

Complaint Allegation ¶ 5(b)(2) alleges that Nutrition Services director Drake unlawfully “solicited grievances” from employee Sandoval in March 2007, when Drake “asked [Sandoval’s] opinion on what [she] thought the union [CWA] could do for us that FMC couldn’t or wasn’t already doing.” [ALJD 14.] The CGC argues that the ALJ did not address that allegation and that the Board should find a solicitation violation because “[t]he record fails to disclose any past practice by Drake whereby she engaged employees in one-on-one discussions to solicit their workplace grievances.” [Brief 28-29.] The CGC’s argument fails as follows.

First, the question “what [did Sandoval] th[ink] *the union* could do for [the employees] that FMC couldn’t or wasn’t already doing?” on its face, is not a solicitation of a grievance (express or implied). It certainly does not grammatically or linguistically equate to “Drake asked Sandoval what FMC should be doing,” as creatively argued by the CGC. [Brief 29.] Rather, that question squarely asked for Sandoval’s views on the relative strengths of the union versus FMC to get things done. Sandoval’s response demonstrates the comparative nature of the question. She responded “the Union would be better for everybody.” Consequently, the solicitation allegation fails because Drake did not solicit any grievance. *Cf. Contempora Fabrics, Inc.*, 344 NLRB 851, 851 (2005) (supervisor’s brief question to employee asking if she “had any problems or did [she] have any questions about the Union, and if [she] did for [her] to come and talk to him about it” was not an unlawful solicitation of grievances); *MacDonald Mach.*, 335 NLRB 319, 319-20 (2001) (an employer may lawfully make a generalized expression of a desire to make things better).

Second, if one could possibly construe the words as a grievance solicitation, Drake routinely solicited employee grievances – contrary to the CGC’s assertion. As an initial matter, although the ALJ did not expressly address this solicitation allegation in his Decision, he did

never subsequently made aware that [a supervisor’s] statement was an issue in the case;” (4) there was “only one reference to [the supervisor’s] statement in [another witness’] testimony;” and (5) “Respondent did not cross-examine [the witness] on this issue or introduce any evidence with respect to the statement”).

expressly find that FMC management as a group had a past “practice of soliciting and attempting to resolve employee concerns.” [ALJD 11.] The ALJ specifically found that there was no evidence that FMC initiated the practice in response to its employees’ union activity and “the fact that it continued this past practice during the course of union activity is not violative of the Act.” [*Id.*] The CGC does not except to that finding. As it relates to Drake specifically, the record contains overwhelming evidence that, like other FMC managers, Drake routinely solicited and resolved employee grievances in daily interactions (many times a day), through formal “rounding,” and at department meetings since becoming director in 2004 – years before either the CNA or CWA began organizing at FMC. [RT 239-41, 575-76, 624, 942-47, 1232-33, 2090-91, 2099-2100, 2133-34.] In fact, the CGC’s own witnesses testified that Drake regularly solicited their grievances prior to the CWA’s organizing in their department (often in a one-on-one setting). In particular, Souers testified that over the three or four years that she worked at FMC, Drake “rounded” with her by asking “what are we doing right, what can we improve, who should we recognize, issues and concerns. . . .” [RT 779.] Heather Craig also testified that since she began working at FMC in May 2006, Drake personally rounded with her “quite a few times” and asked for employees’ issues and concerns during department meetings. [RT 838-39.] As the CGC acknowledges [Brief 29], a past practice of soliciting grievances privileges a continuation of that practice during union organizing. *See, e.g., Waste Mgmt. of Santa Clara Co.*, 308 NLRB 50, 56 (1992) (no solicitation violation where the employer’s ombudsman had a past practice of actively soliciting complaints and grievances from employees in group meetings and during one-on-one conversations as he toured the facility, told employees he would look into complaints, and occasionally resolved them).

Accordingly, in line with the ALJ’s findings, the Board should find that Drake did not unlawfully solicit grievances from Sandoval and dismiss this allegation.

X. THE ALJ CORRECTLY FOUND THAT KASEY DID NOT ENGAGE IN UNLAWFUL SURVEILLANCE OF MESA.

Complaint Allegation ¶ 5(c) alleges that EVS director Vivian Kasey engaged in the unlawful surveillance of Barbara Mesa in the cafeteria. The ALJ properly dismissed that

allegation, concluding that: “Although I credit Mesa’s testimony, I am unable to conclude that Kasey’s preoccupation with Mesa was, under the circumstances, union-related rather than work-related.” [ALJD 32.]

The ALJ specifically found that Mesa was an outspoken union advocate, who “would conspicuously spend her 30-minute lunch period and two 15-minute breaks every day at a table in the cafeteria, socializing and engaging in union-related business with Union Organizer Scott Barnes and other employees.” [ALJD 31; RT 1609-10, 1613, 1685-86, 1696-97.] According to the ALJ, Mesa testified “that one day while she was with Barnes at the union table in the cafeteria, she observed . . . Kasey [her housekeeping supervisor], who was some 20 feet away from Mesa’s table, standing with her arms crossed, looking at Mesa with an ‘I see you’ expression on her face” [ALJD 31.] Mesa testified that this unnerved her “to the point that Mesa moved to the other side of the table so that her back was turned toward Kasey and she wouldn’t see her watching.” [*Id.*] Kasey also knew that the union supporters sat at a table near the cafeteria entrance with the Union representatives because Barnes had introduced himself to her, offered her donuts, and told her that he represented the Union during one of her regular visits to the cafeteria to eat or get a cup of coffee. [*Id.*; R Ex. 54 at p. 1, ¶ 3.] Notably, Mesa testified that Kasey was standing at the edge of the cafeteria with her Boss, Sodexo District Manager Rock Jensen, who came to FMC every month or two to inspect Kasey’s operations. [RT 1611-14; R Ex. 54 at p.1, ¶ 3.]

Based on Mesa’s own testimony, the ALJ found that “the personal and/or working relationship between Kasey and Mesa, at least from Mesa’s perspective, was strained” and that “Mesa had recently stepped down from the position of supervisory lead housekeeper because of a disagreement with Kasey who, according to Mesa, waived her badge in Mesa’s face and asserted her authority of Mesa, saying, ‘That is why I am the director and you are not.’” [ALJD 31-32; RT 1608, 1683-84.] In particular, Mesa challenged Kasey over her decision to give another employee every weekend off to accommodate that employee’s personal situation. [RT 1608, 1683-84.]

The CGC argues that Kasey engaged in conduct that was out of the ordinary 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 Kasey. [Brief 30 n.8.] The CGC further argues that the ALJ's dismissal of this allegation was inconsistent with another finding the ALJ made that Kasey created an impression of surveillance involving Mesa. [Brief 30.] The CGC's arguments fail for several reasons.

First, as a matter of law, Kasey's conduct was not out of the ordinary. According to Mesa's own account, Kasey did no more than look at Mesa for a few moments on one occasion in a public cafeteria at a table where Mesa routinely sat with other union supporters, including a union organizer who had previously introduced himself to Kasey. According to Mesa, Kasey was in the cafeteria with her District Manager, which explains any serious expression on Kasey's face and why Kasey might not engage Mesa in casual conversation as she passed. It is also undisputed that Kasey routinely ate in the cafeteria. Under well-established Board law, Kasey's observation of Mesa under those circumstances was entirely lawful.¹⁸ Mesa's subjective perceptions that Kasey's facial expression indicated "I see you;" that Mesa had not previously seen Kasey with her arms crossed; or that Kasey (standing with her Boss) did not speak to Mesa as she left the cafeteria do not constitute objectively "suspicious behavior" or "untoward conduct." As the ALJ correctly understood, the test is "objective" not subjective. Moreover, Mesa's subjective perceptions of Kasey were likely colored by her recent clash with Kasey regarding scheduling issues.¹⁹

¹⁸ See *Aladdin Gaming*, 345 NLRB 585, 585-87 (2005) (managers do not violate the Act by simply observing employees soliciting for a union in an open dining area); see also *Airport 2000 Concessions, LLC*, 346 NLRB 958, 958-59 (2006) (no surveillance when manager approached employee talking with union representative in open dining room); *Contempora Fabrics, Inc.*, 344 NLRB at 865 (supervisors did not engage in unlawful surveillance where they are regularly in the inspection area and production floor as part of their duties); *WestPac Elec.*, 321 NLRB 1322, 1380-81 (1996) (no unlawful surveillance where employees met openly and in plain view on employer's property and supervisor did not engage in "suspicious behavior" or "untoward conduct").

¹⁹ The CGC's authorities are distinguishable. Compare *Parsippany Hotel Mgt. Co.*, 319 NLRB 114 (1995) (unfamiliar security officers assigned to watch a union supporter for 3½ hours while he worked a buffet, came out to a dock where employees gathered between working periods and stood near union supporters, and followed union supporters as they walked around the hotel grounds (stopping and continuing as did the employees)); *Southern Maryland Hosp. Ctr.*, 293 NLRB 1209 (1989) (supervisor with no legitimate reason for being in the cafeteria

(Continued ...)

Second, the ALJ's dismissal of the instant surveillance allegation is not inconsistent with his subsequent finding that Kasey created an impression of surveillance a few weeks *later* when she directed lead housekeeper Bernice Valencia to tell Mesa that "you are exceeding your breaks in the cafeteria, it was along the lines, with the Union people." [ALJD 32.] Mesa admittedly spent all of her lunches and breaks with the union organizers in the cafeteria, and Kasey merely referenced this when she gave her directive to Valencia. The record contains no evidence that Kasey gained any knowledge that Mesa spent time in the cafeteria with the union organizers through unlawful means. Kasey's subsequent directive about the duration of Mesa's breaks does not alter the objective evidence demonstrating that, on this particular occasion, Kasey did not engage in any untoward or out of the ordinary conduct in the cafeteria constituting unlawful surveillance. Accordingly, the ALJ's findings are not inconsistent, and the Board should affirm the ALJ's dismissal of this allegation.

XI. THE ALJ CORRECTLY FOUND THAT DOMINGUEZ DID NOT UNLAWFULLY THREATEN THE LOSS OF SCHEDULING FLEXIBILITY.

Complaint Allegation ¶ 5(j) alleges that supervisor Lisa Dominguez threatened employees in June 2007, when employee Craig and several other nutrition assistants were working in the dietary office with her, talking about non-work-related topics, and "Craig mentioned the Union, and said she thought it would be beneficial for the Union to come in and represent the employees. [ALJD 18-19.] As found by the ALJ, Dominguez replied "that she had just gotten out of a meeting with [director] Jeanine [Drake] and that Jeanine had told her 'if we got the Union in that *we* [the employees] would no longer be able to switch shifts and that *our* schedules would be set.'" [*Id.* at 19 (emphasis added).] "Craig said, 'Oh, my gosh. Are you serious?'" [*Id.*]

remained and watched the union's organizers visiting the cafeteria throughout their entire stay and came and remained at their table under the false pretext of checking their passes for two successive days); *Montgomery Ward & Co. v. NLRB*, 692 F.2d 1115, 1122 (7th Cir. 1982) (supervisors interrupted union organizer-employee meetings in a public cafeteria, continually surveiled the organizers during their entire stay in the cafeteria, and threatened police action if they didn't leave). Kasey's looking towards Mesa on one occasion for a few moments in the cafeteria cannot compare to the egregious conduct found in the CGC's cited authority.

The ALJ properly dismissed that allegation, concluding that: “I find that the employees could have reasonably understood that the statement, ‘if we got the Union in that we would no longer be able to switch shifts and that our schedule would be set,’ was intended to relate *what the Union would do* to scheduling flexibility, not what FMC would unilaterally do. The practice of employees switching shifts among themselves, which insofar as the record shows occurred on a regular basis, was obviously advantageous for both the employees, who could find a substitute when they needed time off, as well as for FMC, as the practice would minimize scheduling difficulties; *clearly the employees recognized that FMC would be reluctant to unilaterally change a practice that benefited itself*. I find that the employees could have reasonably understood that the statement did not imply that FMC ‘may or may not take action solely on [its] own initiative,’ but rather conveyed Drake’s assessment of working conditions under a union contract. Accordingly, I find the statement did not constitute a threat to retaliate against employees if they brought in the Union, and I shall dismiss this allegation of the complaint.” [ALJD 18-19 (emphasis added).]

Maestro Café Associates, Ltd., 270 NLRB 106, 108 (1984), cited by the ALJ, closely tracks the facts of this case and supports the ALJ’s decision. In that case, a restaurant supervisor told an employee waitress during a union campaign “that the Union, being an organization for professionals, would seek to impose a uniform work schedule and that this *would result* in less flexibility for the aspiring actors on the staff. [The supervisor] *did not* tell [the employee] that [the employer] would unilaterally deprive employees of the benefits of its present flexible scheduling. Instead, he predicted *that the Union would* seek uniformity and seniority in scheduling and that this would be to the disadvantage of the present staff.” *Id.* (emphasis added). The ALJ found, and the Board affirmed, that the supervisor’s statement did not constitute a threat of loss of flexibility because the supervisor did not state that *the employer* would initiate an adverse action in the event of unionization, but predicted what *the union* would do. *Id.* (emphasis added) (citing *Wed-Tex of Headland*, 236 NLRB 1001, 1004 (1978); *Ludwig Motor Corp.*, 222 NLRB 635, 636 (1976)). That is the same situation here. Dominquez responded to

Craig's comment that the Union would be beneficial, with her understanding *that the Union* – like in *Maestro* – would impact “our” scheduling flexibility. Dominguez's reference to “our” flexibility demonstrates that Dominguez thought the union would impact her too and that she was talking about what a union would do to *the group*, not what she – as a supervisor – would be doing.

The CGC argues that the Board should disregard *Maestro* and that *Exelon Generation, LLC*, 347 NLRB 815, 826 (2006), should guide the analysis. [Brief 31.] But that case is not analogous. In *Exelon*, a shift superintendent called 12 employees together with an outside management consultant for a “captive audience” meeting before a representation election. *Id.* The shift superintendent “told the employees that if the Union was elected, everyone would have to work the same amount of overtime.” *Id.* “He also told them that management flexibility would be lost and *supervisors would no longer be able to* let an employee leave work early or come in late.” *Id.* The ALJ found, and the Board affirmed, that the shift superintendent's statement about what the *supervisors* would do or not do constituted an unlawful threat. *Id.* Here, there was no pending election. Here, Dominguez did not call employees into a pre-election captive-audience meeting with an outside management consultant. And here, Dominguez did not say that supervisors would refuse to allow scheduling swaps if the union came in.

To the contrary, here, Dominguez was working side-by-side with her team, when one of them said the Union would be beneficial, and Dominguez responded with a single, brief, “off the cuff” response that she understood a union would limit their ability to switch shifts among themselves. She made no prediction or statement of what supervisors would do (she was concerned about what the union would do to “our” schedules). Under those “chatting with friends” circumstances, Dominguez responsive comment would not be perceived by a reasonable employee to communicate “an adverse consequence within the employer's control if the employee engages in protected activity.” *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). Accordingly, the Board should affirm the ALJ's dismissal.

XII. THE ALJ MADE A WELL-SUPPORTED CREDIBILITY DETERMINATION THAT FMC UPDATED ITS PORTABLE ELECTRONIC EQUIPMENT POLICY FOR LAWFUL BUSINESS REASONS.

Complaint Allegations ¶¶ 5(bb) and (cc) allege that FMC’s portable electronic equipment policy is overly broad and limits employees’ Section 7 rights and that FMC banned the use of cell phone cameras at work for discriminatory reasons. The ALJ properly dismissed both allegations, concluding that: “It does not appear that the policy, on its face, would likely have a chilling effect on employees’ Section 7 rights, as 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.] According to the ALJ, “it is clear that FMC may not utilize this policy, specifically designed to protect patient privacy, for purposes inimical to the Act ... unless patient privacy is compromised.” [Id.] The ALJ also concluded that: “[c]ontrary to the contention of the General Counsel, there is no evidence the old policy was revised because of Mesa’s activities.” [Id.] The ALJ found “Mesa’s testimony that she took a photo of [Schuler] at a group meeting, or her uncertainty regarding whether or not she showed a photo of her locker to hospital security personnel to document that someone had been rummaging through her locker [‘Mesa testified she ‘may’ have done so’], is *insufficient* to show FMC was aware that Mesa used her cell phone to take photos in or around the hospital.” [Id. at 20 & n.29 (emphasis added); 1672-74.] As the ALJ found, “assuming *arguendo* the Respondent was aware of Mesa’s photo-taking activities, and further, assuming *arguendo* that such photo-taking constituted union or concerted activities, the evidence does not show the revised policy was in response to such activities. Rather, I find, the revised policy was motivated by lawful business considerations designed to resolve the legitimate patient privacy concerns described by Crofford.” [Id.]

The ALJ specifically found that in April [2007], three months before an updated portable electronic equipment policy was issued, vice president of Human Resources Patsy Crofford and other Northern Arizona Healthcare personnel began a review of existing policy for FMC and another NAH hospital regarding patient privacy matters. [ALJD 19; RT 1949-51, 2260; R Ex.

41, GC Ex. 52.] The ALJ found that “[t]his review was precipitated by an incident in one of the critical care units: a visitor had taken photos with a cell phone camera of a patient, other visitors in the patient’s room, and some FMC staff.” [*Id.*] The ALJ also found that “[t]he prior policy did not address the use of cell phone cameras or certain unrelated concerns, namely, that certain other portable equipment could present safety issues if used by hospital staff during work time.” [ALJD 19; RT 1952-53, 2261-62, 2283-84; GC Ex. 52.] As the ALJ found, “[r]egarding the use of cameras, Crofford testified that inpatients and outpatients move throughout the hospital campus, inside and outside of campus buildings, often wearing only street clothes, and it can not be determined whether a person is a patient, family member, or visitor.” [ALJD 19; RT 2264, 2293-94.] As the ALJ found, “[t]he updated policy, according to Crofford, that simply prohibits photography in general anywhere on hospital premises, was designed to assure that “we never had a picture taken that had a patient inadvertently or consciously walking by and included in that picture.” [ALJD at 19-20; GC Ex. 52.] The ALJ *credited* Patsy Crofford’s testimony. The CGC presented no contrary evidence.

The CGC’s challenges to the ALJ’s well-supported credibility determination fail under the Board’s *Standard Dry Wall* test as follows.

First, the CGC argues that the ALJ “summarily dismissed” the allegation that the policy is overly broad and illegally limits employees’ Section 7 rights. [Brief 33.] The CGC claims that “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” and that the “ALJ is mistaken in believing the Act is so limited.” [*Id.*] The CGC misstates the ALJ’s conclusion. The ALJ did not summarily dismiss the allegation. Instead, he made well-reasoned findings and conclusions that the policy was lawful based on well-established Board law, citing to *Lutheran Heritage Village-*

Livonia, 343 NLRB 646, 646-47 (2004), and *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). [ALJD 20.] Those cases fully support the ALJ’s findings.²⁰

FMC’s policy on its face does not explicitly restrict employees in the exercise of their Section 7 rights. A prohibition on recording images of patients or hospital equipment, property, or facilities does not facially interfere with an employee’s right under Section 7 to support a labor organization or engage in protected, concerted activity. Indeed, the Board has long held that an employer may lawfully prohibit the use of recording devices in the workplace. *See, e.g., Sams Club*, 342 NLRB 620, 621 (2004) (“Had the Respondent produced a rule or policy prohibiting taping or similar conduct, Peto’s discipline might have been explained as merely an instance of the Respondent following its own guidelines”); *Opryland Hotel*, 323 NLRB 723, 723 n.3, 728 (1997) (a discharged employee can be ineligible for reinstatement remedies if the employee engaged in disqualifying acts such as the use or possession of a tape recorder at work if the employer has a rule prohibiting such conduct).

In addition, contrary to the CGC’s argument, employees would not reasonably construe the prohibition on using cell phone cameras to take pictures of patients or property as restricting or relating to Section 7 activity. Indeed, FMC employees are well aware of patient privacy and confidentiality rights and the need to protect those rights as required by law. *Lafayette Park Hotel* is directly on point. There, the employer maintained a rule in its employee handbook that prohibited employees from “[d]ivulging Hotel-private information to employee or other individuals or entities that are not authorized to receive that information.” 326 NLRB at 824. In finding that the policy did not violate the Act, the Board found that employees *would not* reasonably read the policy as prohibiting discussion of wages or other terms and conditions of

²⁰ In *Lutheran Heritage*, 343 NLRB at 646-47, the Board affirmed an ALJ’s determination that an employer’s rules prohibiting ‘abusive and profane language,’ ‘harassment,’ and ‘verbal, mental and physical abuse’ were lawful because they were intended to maintain order in the employer’s workplace and did not explicitly or implicitly prohibit Section 7 activity.” *Id.* at 646. The Board affirmed the ALJ for several reasons: (1) the rule did not explicitly restrict Section 7 activity; (2) employees would not reasonably construe the language to prohibit Section 7 activity; (3) the rule was not promulgated in response to union activity; and (4) the rule had not been applied to restrict the exercise of Section 7 rights. *Id.* at 646-49.

employment. *Id.* Rather, employees reasonably would understand that the policy was designed to protect the employer's legitimate interests in the confidentiality of its private information, such as hotel guest information, trade secrets, and contracts with suppliers. *Id.* The same logic and conclusion applies here.

Additionally, as the ALJ further found, FMC did not promulgate the policy in response to union activity (this is discussed in more detail below as it relates to the next allegation). Rather, the compelling and expressly credited evidence demonstrated that FMC updated the policy to comply with privacy laws. Moreover, FMC has not applied the policy to restrict the exercise of Section 7 rights.

Second, the CGC's argument that the ALJ mistakenly "believes that employees would not consider it a right to document their employer's unlawful acts" is unfounded. The ALJ recognized that FMC's employees have such rights under Section 7, but that the policy as written does not violate those rights. In fact, in concluding that the policy was not overly broad or unlawful, the ALJ expressly stated that "FMC may not utilize this policy, specifically designed to protect patient privacy, for purposes inimical to the Act. Thus, FMC may not interpret the policy to prohibit employees from engaging in legitimate union-related activity such as, for example, taking photos of hospital bulletin boards, or unsafe working conditions, or a gathering of employees at the union table in the cafeteria, unless patient privacy is compromised." [ALJD 20.] The record evidence shows that FMC has never interpreted or applied the policy in such a manner.

Third, the CGC next argues that ALJ erred in crediting FMC's explanation for updating its portable electronic equipment policy because the "record is utterly devoid of any evidence to suggest why [the] new rule was implemented, except for Respondents' awareness that employees were using cell phone cameras to document its anti-Union campaign." [Brief 33.] Again, the CGC misstates the record. The record contains overwhelming evidence (cited above) that FMC updated its portable electronic equipment policy to address patient privacy concerns in conjunction with the demands of increasing technology (FMC also added prohibitions regarding

the use of iPods, MP3 players, and CD players), and that it did not update the policy in response to union activity.

Fourth, the CGC argues that FMC “already had a policy to address these concerns.” [Brief 33-34.] The CGC misstates the record. At the time FMC decided to update its “portable electronic equipment” policy in response to the incident in which a visitor used a cell phone camera to photograph patients, other visitors, and hospital staff in early April 2007, FMC *did not* have any policy that addressed cell phone camera usage. [RT 1949-51, 2260-61.] Contrary to the CGC’s claim, FMC’s “Hospital Guidelines of Practice” regarding “Photographing Patients” did not address FMC’s specific concerns about individuals using “cell phone cameras” in a manner that could contravene patient privacy. As Crofford testified, the Guidelines only discuss HIPAA standards relating to photographs being considered protected health information and when it is proper to take photos of patients (such as for treatment purposes). [RT 2278-79.] But, as Crofford recognized, the Guidelines do not specifically address cell phone camera usage. [R Ex. 53.]

Fifth, the CGC argues that “[t]he 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.” [Brief 33-34.] Again, the CGC misstates the record. Most significantly, there was no evidence of anyone “retaliating” against Mesa “for her union activities.” Someone apparently rifled through her locker, but there was no evidence of who or why and no connection to her union activity. [RT 1671-73.] Indeed, as Mesa testified, the pro-union flyer in her locker is “still there,” contrary to the CGC’s claim that it was removed. [RT 1672.] Next, Mesa only *thinks* she reported the vandalism incident to the security department. [RT 1672-73.] And Mesa admitted that she did not show anyone the photo she took of her locker. [*Id.*] Thus, Crofford and other senior management would not have known she took any photo when they first began discussing updating the policy. [RT 1672-73, 1953, 2264.] In addition, Mesa did not testify as to the specific day in April when she *may have* reported the incident to security. [RT 1672-73.]

Consequently, there is no evidence that her alleged report occurred before the senior management team met and first discussed the policy on April 10, 2007. [R Ex. 41.] As Crofford testified without dispute, the union was not discussed whatsoever during Senior Management Team meetings dealing with updating the policy. [RT 2263.] President Bradel also testified without dispute that they did not update the policy language to discourage union activity, but rather to protect patient confidentiality. [RT 1448-49, 1953.]

Sixth, the CGC next misstates the record in trying to claim that Crofford testified that the policy, “as drafted, prohibits photography that implicates no HIPAA or other privacy interest.” [Brief 32.] Crofford acknowledged in response to the CGC’s hypothetical scenarios that there would be no HIPAA violation where an individual took a photograph of a person wearing union insignia or carrying a picket sign on hospital property or in a non-patient area if there was no patient in the photograph, but Crofford credibly explained that when she crafted the policy that prohibits photography of patients, equipment, property, and facilities, she could not assume that there are never patients around when photography takes place on the hospital’s campus. [RT 2285-86, 2293-94.] The evidence is undisputed that FMC’s patients (both in-patients and out-patients) have wide-access to the hospital both inside and out. [RT 2294.] As Crofford further testified, it is FMC’s “responsibility to ensure that patients, who are roaming freely within or outside the hospital, that we do our best to protect them and protect their privacy.” [*Id.*]

Seventh, contrary to the CGC’s claims, there is no evidence that vice president Schuler knew Mesa used her cell phone at FMC because she said she photographed him at a retirement party sometime “in 2007.” [RT 1673-74.] Even if he did, it proves nothing because of the temporal disconnect and an executive’s participation in a retirement party does not implicate protected activity.

Based on the foregoing analysis, the ALJ had ample evidence to conclude that FMC did not violate the Act when it updated its portable electronic equipment policy and that the policy is not overly broad. In addition, the CGC has not demonstrated that the ALJ’s credibility

determinations were incorrect by “the clear preponderance of all the relevant evidence,” and the Board should affirm the ALJ’s findings.²¹

XIII. THE ALJ MADE WELL-FOUNDED FACTUAL, LEGAL, AND CREDIBILITY DETERMINATIONS THAT BRADEL AND SCHULER DID NOT VIOLATE THE ACT AS ALLEGED.

A. The Record Fully Supports The ALJ’s Factual Findings, Legal Conclusions, And Credibility Determination.

Complaint Allegations ¶¶ 5(l)(1), (3), 5(n)(1), (2), (3), and 6(a) allege that: (1) during a June 29, 2007 staff meeting with Nutrition Services employees, FMC vice president for ancillary services Roger Schuler (not Bradel) unlawfully solicited grievances and promised benefits, and FMC president Bill Bradel suggested futility by saying “he would not be negotiating with the union”; and (2) Schuler (not Bradel) subsequently violated the Act by further soliciting grievances, promising benefits, and telling employees that he had resolved grievances raised at the July 29 meeting.²² The ALJ properly dismissed the solicitation/promise/remedy allegations against Schuler concluding that: (1) “I find that the format of the June 29 meeting was no different tha[n] the format of the numerous meetings with staff, including ancillary services employees, which occurred well prior to the instant union activity”; (2) “the follow-up process during the July 6 meeting was similarly consistent with FMC’s practice of providing answers and resolutions to employees’ concerns that could not be immediately addressed at the June 29 meeting”; (3) “[t]herefore, as there is no evidence that the Respondent initiated the practice of soliciting and attempting to resolve employee concerns in response to its employees’ union activity, the fact that it continued this past practice during the course of the union activity is not

²¹ The CGC’s reliance on *Dillon Companies, Inc.*, 340 NLRB 1260 (2003) is misplaced. [Brief 33.] In *Dillon*, the Board found that an employer violated the Act when it resurrected a no-solicitation rule before an upcoming representation election because two employees complained of lawful organizing activities by co-workers. *Id.* Here, FMC introduced – and the ALJ credited – overwhelming evidence that it updated and promulgated the electronic equipment policy for legitimate reasons; none of which involved any protected activity.

²² Contrary to the heading in the CGC’s Brief at 33, the CGC did not take exception to the ALJ’s finding that Bradel *did not* threaten any loss of access to management as pled in ¶ 5(l)(2). [See Exception 54 (omitting any exception to ¶ 5(l)(2)); see also Brief 37 (no argument).]

violative of the Act”; and (4) “under the circumstances, it appears unnecessary to discuss particular matters that were resolved.” [ALJD 11 & n.15.]

On the futility allegation against Bradel, the ALJ concluded: “*I credit* the testimony of Bradel.” [*Id.* at 12 (emphasis added).] Based on that credibility determination, the ALJ found that, “Bradel did not state at that meeting, nor insofar as the record shows did any representative of FMC ever state, that FMC would not negotiate with the CWA or the CNA if either union was selected as the employees’ collective bargaining representative.” [*Id.*] The ALJ found that “the employees could have reasonably understood Bradel to mean what he intended, namely, that although he was personally available to meet with employees at such departmental meetings, he would not be one of FMC’s representatives at the negotiating table.” [*Id.*]

The ALJ described the specific evidentiary details on which he based his factual and legal findings and credibility determinations at length in his decision at 9-12. Uncontradicted record evidence fully supports the ALJ’s decision. [RT 63-72, 85, 88-91, 133-36, 149, 158-73, 176-77, 180, 202, 206, 209, 239-41, 392-93, 398-99, 408, 737-38, 779, 789, 838, 942-44, 1194, 1230, 1233, 1279, 1282-87, 1321, 1381-82, 1568-73, 1795, 1928-45, 1973-77, GC Ex. 4.] Of particular note, the ALJ found – and the record fully supports – that “the June 29 meeting was a department staff meeting with dietary employees, that in the four and a half years [Schuler] ha[d] been vice president of ancillary services he ha[d] attended and participated in approximately 10 such meetings with dietary employees, and ha[d] attended and participated in approximately 50 to 70 similar meetings among ancillary services employees,” including “introduc[ing] Bradel to ancillary services employees at four other meetings” in the month prior. [ALJD 10-11; RT 166-71.] The ALJ found “Schuler’s testimony stands un rebutted, and there is no contrary evidence.” [ALJD 11.] Indeed, the CGC’s own witnesses testified that the June 29 meeting was not the first meeting they attended where Bradel spoke to them and management invited employees to share their concerns. [RT 392 (Shawn White), 789-91 (Paula Souers), 1279-80 (Dale Mackey), 1321 (Michael Conant).]

B. The CGC's Solicit/Promise/Remedy Argument Fails Because Schuler Had An Uncontradicted Past Practice Of Doing So.

The CGC argues that the record does not demonstrate that Schuler regularly solicited, promised to fix, or remedied grievances in a similar department meeting format (with high ranking and HR management present, and with Bradel leading the meeting) before the CWA campaign. [Brief 37.] Citing to *Southern Maryland Hospital*, 276 NLRB 1349 (1985), the CGC claims that “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.” [*Id.*] The CGC misstates the record, and the CGC’s arguments fail as follows.

First, Schuler testified without contradiction that he attended and participated in 50-70 similar solicit/promise/remedy department meetings in the prior four and one-half years (long pre-dating the CWA campaign). [RT 166.] Bradel testified that from April 2006 (long before the CWA campaign went public in March 2007) through June 29, 2007, he held approximately 30-plus similar meetings with the pertinent vice president in different departments throughout the hospital, with the same solicit/promise/remedy format. [RT 1929-30.] Human Resources director and then vice-president Crofford testified that from April 2006 to the then-present, she attended close to 60 department, open forum, and Bagels-with-Bill meetings with Bradel and employees. [RT 1568.] At all of those meetings, Bradel met with the employees and the relevant vice president and used the same format. [RT 1568-69, 1930-31.] Bradel and the vice president who oversaw each particular department *conducted the meeting*. [RT 1929.] Bradel first introduced himself, talked a little bit about what’s was going on with the hospital, and then asked the employees about their issues and concerns. [RT 1569-70, 1928-31.] Bradel testified that “the key was to hear from the employees, again about what’s working well and what’s not working well: and on the things that aren’t working well where we need to make changes or follow through on pay practice issues or work environment issues or staffing issues. It was the responsibility of the vice president for that department to take notes and then follow up.” [RT 1928-31.] “If it was a Human Resource issue [Bradel and the vice President] would get [HR] involved or that department director would work directly with the vice president to follow up on

those issues.” [RT 1570, 1928-31.] Bradel also responded to employees’ issues and concerns during the meeting, but if he did not have an answer for the employee, he would tell them that he would check into their issues and get back to them. [RT 1570-71.] During Bradel’s meeting with the vice presidents each week, he checks to *ensure that they follow up* with the employees’ issues raised during the previous department meetings. [RT 1931.] No witness or document contradicts the foregoing “past practice” evidence. To the contrary, as cited above, the CGC’s witnesses corroborated Schuler, Bradel, and Crofford.

Second, as noted above in the preceding section [RT 1029], the CGC misstates the record when she claims that “Respondents’ witnesses” testified that, “neither Bradel nor the prior Hospital president had ever led [a department staff] meeting.” [Brief 34.] In fact, Robledo (the *only* Respondent witness the CGC cites although the CGC suggests *multiple* witnesses), actually testified that Bradel previously led a dietary staff meeting and that the prior president attended dietary staff meetings in McGee Auditorium, where the June and July 2007 meetings were held. [RT 1044-45.]

Third, the CGC’s argument that the subject of unions never came up at dietary staff meetings “for at least the past 11 years” is of no moment. [Brief 34.] Over that time period, no unions attempted to organize the dietary department until the CWA appeared in March 2007, thus, there would be no impetus for any mention of a union during those meetings. In any event, Schuler and Bradel’s solicitation of grievances at the June 29 meeting occurred at the beginning of the meeting – just like every other departmental meeting – and the employees shared their concerns and Schuler and Bradel responded to those concerns *before* anyone said anything about the union. [RT 63-72, 133-36, 161-64, 202, 1937-41, 1945, 1977; GC Ex. 4.] The subsequent exchange about union issues fails to demonstrate that the June and July meetings were inconsistent with FMC’s past practice of soliciting and remedying grievances. *See Wal-Mart Stores, Inc.*, 352 NLRB 815, 825-26 (2008) (management’s solicitation of grievances along with discussions about union issues in employee meetings during an organizing campaign was not

inconsistent with its longstanding and well-established past practice of soliciting employee grievances).

Fourth, the CGC's argument that Drake's absence from the June 29 meeting undermines Schuler's past practice fails [Brief 37], because Bradel testified without dispute that fifty percent of the time when he met with an entire department of employees, the department heads did not attend the meetings because they needed to stay back and run the department. [RT 1973-74.] Likewise, whether Bradel referred to the union organizer or not during the meeting [Brief 34] is irrelevant as such a comment has nothing to do with whether Schuler or Bradel had a past practice of soliciting and resolving grievances. In any event, the alleged reference about the organizer occurred *after* Schuler and Bradel solicited and responded to the employee grievances. [RT 63-72, 133-36, 161-64, 202, 357-62, 739-42, 795, 797, 1194-96, 1229, 1381-82, 1937-41, 1945, 1977.]

Fifth, contrary to the CGC's argument that the ALJ relied "on apparently no case law whatsoever," well-established Board authority that Respondents cited in their Post-Hearing Brief supports the ALJ's past-practice finding. See *Kingsboro Med. Group*, 270 NLRB 962, 963 (1984) (finding no violation of the Act occurred when the respondent reminded employees of its past practice of listening to employee suggestions and grievances); see also *Wal-Mart Stores, Inc.*, 348 NLRB 274, 281-82 (2006) (no violation where employer has longstanding "open door" policy of "encouraging its employees to seek out its managers and supervisors whenever they have questions, concerns, ideas, suggestions, and yes, problems"); *MacDonald Mach.*, 335 at 320 (noting that, prior to the onset of the union campaign and after, the respondent was willing to listen to the complaints of its employees and respond to them).

As for the CGC's citation to *Southern Maryland Hospital*, that case is distinguishable – as the ALJ correctly found. [ALJD 11.] Unlike here, where the record shows that Schuler and Bradel conducted numerous department meetings with employees in which they solicited and remedied employee grievances long before the CWA arrived at FMC, in *Southern Maryland Hospital*, 276 NLRB at 1354-55, the evidence showed that the supervisor had not conducted any

meetings with the laboratory personnel or with other departments to solicit employee grievances until after the Union began its organizing campaign.²³

C. The CGC's Futility Argument Fails Because The ALJ Credited Bradel And Discredited The CGC Witnesses.

On the futility issue, the CGC argues that the ALJ erred in finding that an employee would reasonably understand Bradel's remark that "he" would not be negotiating with the union "to mean what he intended, namely that although he was personally available to meet with employees at such departmental meetings, he would not be one of FMC's representatives at the negotiating table." [Brief 37-38.] In support of that argument, the CGC cites the testimony of one employee, Dale Mackey (a person with memory and other disabilities related to a stroke [ALJD 29; RT 993]). [*Id.*] The CGC asserts that Mackey's testimony – "that it seemed 'very strange' that Bradel, as the head executive of FMC, would refuse to bargain with the Union" – shows Bradel made an unlawful statement of futility. [Brief 37.] However, Mackey never testified that Bradel stated that he "would *refuse to bargain* with the Union." [See RT 1281.] Instead, Mackey testified that Bradel said that "he would not attend a meeting" with union representatives and that he thought it was "a little strange that he wouldn't be there as the head of the company to talk with the union." [*Id.*] Mackey further testified that "He said that if the union got in that *he* wouldn't talk to them. That doesn't make sense. Because you've got to let people come in when their [sic] working and you're not going to know what they're doing. That struck me as very strange." [*Id.* (emphasis added).] At no time did Mackey testify that he believed Bradel to be saying that selecting a union representative was futile, as the CGC

²³ Although the CGC does not argue the issue in the CGC's Brief, the CGC complains that the ALJ failed "to address the allegations contained within ¶ 6(a) of the Complaint." [See Exception 13.] As noted in the CGC's Brief at 33 (heading "G"), and 35-36, that allegation relates to the "follow up" Schuler and Drake did in response to the issues raised at the June 29 meeting (allegedly "granting wage increases and other benefits" per ¶ 6(a)). As discussed extensively in the record, Schuler and Drake did not grant anyone a wage increase or other benefit in response to the June 29 meeting. [RT 69-70, 73-75, 133-35, 183-85, 615-17, 800-01, 1200-01, 1381-83, 2094-97, 2257, 2259; GC Ex. 4.] But even if they had, the ALJ squarely addressed that allegation and dismissed it, crediting Schuler's un rebutted testimony and finding "that the follow-up process during the July 6 meeting was similarly consistent with FMC's practice of providing answers and resolutions to employees' concerns that could not be immediately addressed at the June 29 meeting." [ALJD 10-11; RT 167-72, 1131-33.]

inaccurately asserts. Even if he had, the ALJ credited Bradel, and the CGC does not meet the *Standard Dry Wall* test to find otherwise.

Additionally, the CGC's cited authority, *Albert Einstein Medical Center*, 316 NLRB 1040 (1995), is not on point. There a supervisor approached an employee and told him "that the Union could not help a recently discharged employee get his job back because it was too weak; it had no money and it had a lawyer with Alzheimer's disease and that the employees should have listened to management and not voted for the Union." *Id.* at 1040. The Board agreed with the ALJ that the supervisor's comments violated 8(a)(1) "because it effectively conveyed the position that it was futile to support or remain a member of the Union." *Id.* Unlike the supervisor's comments, Bradel's statement did not suggest futility here. He simply said he personally would not be responsible for negotiating.

For the reasons stated above, the ALJ properly found that Bradel and Schuler did not violate the Act as alleged, and the Board should affirm the ALJ's decision.

XIV. THE ALJ MADE WELL-SUPPORTED CREDIBILITY DETERMINATIONS THAT OTERO AND DRAKE DEALT LAWFULLY WITH SOUERS.

Complaint Allegations ¶¶ 5(o)(1) and (2) involve an incident in which lead cook Frances Otero admonished Paula Souers for engaging in extended union solicitation in the kitchen. Complaint Allegations ¶¶ 5(p) and 6(m) allege that director Jeanine Drake issued Souers an unwarranted negative appraisal and restricted her from speaking with coworkers. The ALJ properly dismissed those allegations. The ALJ concluded: "I find that Souers was disrupting the work of the kitchen employees for an extended period of time and that Otero admonished her for doing so."²⁴ [ALJD 21-22.]

Regarding Souers' appraisal, the ALJ, concluded: "I find the negative appraisal issued by Drake to Souers was warranted as a result of Souers's disregard for well-established and lawful

²⁴ The CGC erroneously identifies the allegation as ¶ 6(c), which involves an unrelated incident involving Barbara Mesa. It is believed that the CGC means ¶ 6(m), which involves Souers' performance appraisal and directly relates to the allegations in ¶ 5(p). The CGC raises no argument in her Brief regarding the ALJ's findings and conclusions regarding ¶ 6(c).

work rules that limited kitchen conversation between on-duty and off-duty kitchen employees to relatively brief exchanges. I do not find, as the General Counsel contends, that by counseling Souers to ‘conduct off work business in public places and not interfere with employees during their shifts,’ Drake was referring solely to union solicitation. Rather, I conclude that Drake was referring to the 30-minutes Souers spent in the kitchen during which time, regardless of the nature of Souers’ ‘off work business,’ Souers was interfering with the work of kitchen employees. I further find that Drake did not impose other restrictions on Souers or tell her she could not speak to other employees who worked in the cafeteria.” [Id. at 31.]

The ALJ described the specific evidentiary details on which he based his credibility determinations at length in his decision at 21-22 and 30-31. Uncontradicted record evidence fully supports those credibility determinations. [RT 595-97, 606-07, 609-10, 679, 694-700, 716, 804-06, 836, 2068, 2105-06, 2151-53, 2155-56, 2158-59, 2161-63, 2167, 2172; R Exs. 15, 48; GC Ex.18.]

Of particular note – as the record fully supports – the ALJ *expressly credited* Otero’s testimony that “. . . *she never permitted an on-duty employee to stop working and talk to a non-working employee for an extended period of time, such as 15 minutes, because employees need to be working.*” [ALJD 21 (emphasis added); RT 2068.] As the ALJ found, “Otero had observed Souers in the kitchen area off and on over this period of time, but, believing that the conversations would be brief, did not tell Souers to leave the kitchen because chatting for a minute or two is permitted.” [ALJD 21; RT 679-701, 716.] The ALJ noted that “[c]urrent off-duty dietary employees, but not other employees, were permitted to come into the kitchen area to check their mail, pick up their paycheck, and briefly exchange pleasantries with on-duty employees.” [Id. at 21 n.32.] Souers admitted that she could have been in the kitchen where food is prepared while she was off-duty and talking with employees for approximately 30 minutes. [ALJD 22; RT 805.]

Approximately ten days later, Drake presented Souers with her annual job performance evaluation. [ALJD 30.] Otero had reported to Drake that Souers came into the kitchen on her

off-duty time and talked with working employees for an extensive amount of time, such that those employees stopped working to interact with her. [RT 606-07, 609.] Concerned about the disruption of the kitchen staff, Drake decided to include a comment about it in Souers' evaluation. [RT 610-11, 2105-06.] The ALJ *credited* Drake's testimony that: "In this instance, it was an extensive amount of time, and disrupted the kitchen where Frances [Otero] was having a hard time getting everybody to get their work done that day, and both Auggie [Robledo] and [Otero] had reported it or discussed it with me, after the incident." [ALJD 22; RT 607-08.] In pertinent part, Drake wrote "You need to conduct off work business in public areas and not interfere with employees during their shift." [ALJD 30; RT 595-97; GC Ex. 18.] Souers testified that she asked Drake the meaning of the comment, and Drake told her that means you cannot come into the kitchen when you are not scheduled to work, that she was not permitted in the cafeteria on her days off, and that Drake didn't want her talking to Shawn White or Richard, both union supporters who work in the cafeteria. [ALJD 31; RT 755-58, 812.] Of particular note, the ALJ *expressly credited* Drake's and Walsh's testimony "that Drake did not make the forgoing remarks attributed to her by Souers." [ALJD 31.] As the ALJ found, "Both Drake and Walsh appeared to be forthright witnesses with clear recollections of the 30-minute meeting. Further, it is highly unlikely that Drake, who knew Souers to be one of the Union's most active proponents, would have formulated special exclusionary and no-talking rules, applicable only to Souers and no other employees, that are patently contrary to the established work rules for kitchen employees." [ALJD 31; RT 595-97, 2105, 2155-56, 2162-63, 2172; R Ex.48.]

The CGC challenges to the ALJ's well-supported credibility determinations fail under the Board's *Standard Dry Wall* test as follows.

First, the CGC argues that "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.'" [Brief 38 (emphasis in original).] This, the CGC contends, is the same amount of time that Otero testified off-duty employees who visit the kitchen to pick up their paychecks and check their schedules,

regularly spend chatting with on-duty co-workers during. [*Id.*] The CGC misstates Otero's testimony. In fact, Otero testified multiple times that as she moved throughout the kitchen preparing food, Souers was in the kitchen talking to those on-duty employees for a *total* of 30 minutes. [RT 678-79, 699.] In fact, Souers own testimony contradicts the CGC's argument. Souers admitted that she could have been in the kitchen 30 minutes talking to the on-duty employees. [RT 805.] Although Otero testified that off-duty kitchen employees sometimes come into the kitchen to pick up their paychecks or check their schedule and may chat with an on-duty employee for a "short amount of time, one or two minutes," Otero testified without dispute that she has never "allowed any off-duty employees to stop and talk with working employees, for more than five minutes." [RT 696-700.]

Second, the CGC argues that an e-mail from Drake to Crofford, McNeese, and Schuler shows FMC's true interest in silencing Souers. [Brief 38.] The CGC mischaracterizes the evidence. The e-mail's subject line is "Update" and talks about Shawn White and Paula Souers trying to get employees to sign something and it talks about the incident in which Souers spent an extensive amount of time in the kitchen disrupting on-duty employees while she was off-duty. [RT 601-02; GC Ex. 19.] Drake testified she sent the e-mail as an update about her department to her supervisor Roger Schuler. [*Id.*] As Drake further testified, she periodically updates Schuler on important issues in her department. [RT 602.] In fact, the morning of her testimony, Drake sent Schuler an e-mail update on the installation of steamers in the kitchen. [*Id.*] Drake's thought that it was important to inform her supervisor about Souers disrupting employees and other potential union activity in her department is not evidence that Souers's appraisal was unwarranted or that Drake tried to "silence" her. The ALJ heard the CGC's same argument and rejected it. Indeed, Shawn White, who is also named in the e-mail, and who is also another open and active union supporter, did not receive any negative appraisal, nor was he "silenced." Unlike Souers, who disrupted working employees in a "working" area while she was off-duty, White was in a public, non-working area. Indeed, Drake did not mention in Souers appraisal anything

about her being with White on the patio and in the cafeteria. Notably, White testified he had “no problems” with anyone after he began openly advocating for the union. [RT 397.]

Third, the CGC argues that the ALJ ignored evidence that Drake had never put a similar comment in another employee’s appraisal. [Brief 39.] The ALJ did not ignore any evidence. In direct response to the ALJ’s question about why Drake included the comment in the Souers’ appraisal when she had not included it in other employees’ appraisal, Drake testified that in this instance Souers had spent an excessive amount of time disrupting employees, who were having a hard time getting their work done that day – the ALJ did not ignore this evidence, but rather *expressly credited* this testimony. [ALJD 22; RT 607-08.]. In an effort to discredit Drake, the CGC claims that Drake “was 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.” [Brief 40.] Again, the CGC misstates the record. While Drake did not give a set period of time that she considered excessive and acknowledged that the issue is about disrupting people’s work, she clearly described what she considered permissible, not excessive, and not disruptive such as when “employees pick up paychecks when they are off work and they talk to people in the kitchen, trade shifts, look at schedules, things like that.” [RT 2106.] In comparison, Drake testified that Souers “talked with employees for long periods of time at their workstations” and that the employees had stopped working to talk with her. [RT 609.] Souers did not dispute this.

Fourth, the CGC argues that the ALJ ignored evidence that Souers openly organized in the cafeteria, in which both Drake and Otero witnessed, which suggests that FMC’s actions were aimed at her union activities. [Brief 39.] Again, the ALJ did not ignore this evidence. In fact, a review of the ALJ’s decision indicates that he fully understood that Souers openly and actively supported the union. However, the ALJ found her testimony not credible in comparison to other witnesses. As discussed above, Shawn White openly supported the union, and Drake and Otero did not give him a negative appraisal.

Fifth, the CGC argues that the ALJ ignored that “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.” [Brief 39-40.] Again, the ALJ did not ignore this evidence. As the ALJ correctly recognized, FMC “may permit such charitable solicitations on an *ad hoc* basis without negating an otherwise legitimate exclusionary rule.” [ALJD 22.] *See Hammary Mfg. Corp.*, 265 NLRB 57 (1982); *see also Zurn/N.E.P.C.O.*, 345 NLRB 12, 14 (2005). Moreover, as Souers admitted, her solicitations as the United Way representative were brief, at most lasting five minutes when an employee wanted to make a donation. [RT 745-46.]

Sixth, the CGC misstates the record in claiming that non-dietary employees commonly visit the kitchen while off-duty to visit employees and that “all of this occurs with the knowledge of Respondent.” [Brief 40.] Although, Heather Craig testified that she saw Robledo’s girlfriend in the kitchen “yesterday” and Shawn White testified that he had seen her “once in awhile” for a “minute or two,” Otero testified without dispute that she had never seen such a visit. [RT 403, 676, 837.] In addition, Otero testified without dispute that she has never allowed any of the nearly 2000 *non-kitchen* employees to be in the kitchen for non-work related reasons. [RT 675-76, 2045.] Nor did Drake testify that Robledo’s girlfriend has been in the kitchen. Notably, the CGC never asked Drake nor Robledo any questions about her presence or non-presence in the kitchen. As for off-duty kitchen employees, Otero testified without dispute that she does not allow them to stop and talk with working employees for more than five minutes. [RT 699-700.]

Seventh, in attempting to show that Otero (and/or Drake) discriminatorily applied the work-stoppage rule, the CGC mischaracterizes the record in claiming that “[p]rior to July, dietary department employees had never been instructed not to talk about non-work subjects at work, and had never been told that doing so could pose a safety issue.” [Brief 40.] The CGC cites to Heather Craig’s testimony for support. [*Id.*] Craig’s testimony is not helpful. Craig testified that in her nutrition aide department (not the kitchen), she and other employees talked about “boyfriends and non-work things” while they were all on working time and that her supervisor Dominguez never instructed them that they were not allowed to do so because it

posed some kind of safety issue. [RT 832-33.] But Craig said nothing about whether the non-work-related talking in the nutrition aide department disrupted work. Craig did not work around boiling liquids, flame broilers, or cutting saws. And Craig did not work for Otero. The CGC failed to present any evidence that Otero discriminatorily applied her five-minute rule to Souers.

Eighth, on its face, Drake's statement in Souers' appraisal that "You need to conduct off work business in public areas and not interfere with employee [sic] during their shifts" did not unlawfully deny Souers access to the kitchen or instruct her not to talk with employees. Drake's admonition simply reinforced Otero's work-stoppage rule: don't conduct business in work areas where it will interfere with working employees' ability to work. Drake's admonition, like Otero's rule, was union-neutral and focused on production discipline because it spoke in the conjunctive, connecting off work business and interference. The ALJ's cited authority supports such evidence. *See Brigadier Indus.*, 271 NLRB 656, 657 (1984) ("During the union campaign, an employer maintains a legitimate interest in preserving production and discipline. If the employer has acted for legitimate, business interests – rather than for union reasons – its promulgation of a rule cannot be deemed unlawful."); *see also C. Factotum, Inc.*, 334 NLRB 189, 193 (2001) (affirming ALJ's finding that employer lawfully imposed a complete ban on talking because "employees were stopping work for 10-15 minutes at a time to discuss [union] issues" and "it was the frequent work stoppages, and not the talking that prompted . . . the no talking rule.")

Based on the foregoing analysis, the ALJ had ample evidence before him to conclude that Otero lawfully admonished Souers for disrupting the work of kitchen employees while they worked, that Drake properly reminded Souers about the issue in her appraisal, and they did not impose other restrictions on her or tell her she could not speak to employees who worked in the cafeteria. The CGC has not demonstrated that the ALJ's credibility determinations were

incorrect by “the clear preponderance of all of the relevant evidence,” and the Board should affirm the ALJ’s dismissals.²⁵

XV. THE ALJ CORRECTLY FOUND THAT OTERO LAWFULLY INSTRUCTED NON-KITCHEN EMPLOYEE MESA TO LEAVE THE KITCHEN BECAUSE SHE WAS DISRUPTING AN ON-DUTY KITCHEN EMPLOYEE.

Complaint Allegations ¶¶ 5(q)(1) and (2) allege that Otero unlawfully banned Mesa from the kitchen and from speaking to kitchen employees during their working time. The ALJ properly dismissed those allegations, concluding that: “Regardless of the words Otero may have used in requesting Mesa to leave the kitchen, it is clear that non-kitchen employees are not permitted in the kitchen area for any reason. Employees are aware of this rule. Further, there is no evidence the rule was designed to exclude employees for other than legitimate business reasons, as it makes sense that to indiscriminately permit any of FMC’s several thousand employees to enter the kitchen and converse with kitchen employees would not be conducive to the efficient operation of the kitchen. The General Counsel maintains that Otero has made exceptions to this rule in certain instances, for example, permitting Mesa to be in the kitchen to solicit for the United Way campaign, or permitting Robledo’s girlfriend, a nurse, to visit with Robledo in the kitchen area. Regarding visits by Robledo’s girlfriend, Otero testified she was not aware of such visits. Regarding Mesa’s soliciting for the United Way campaign in the kitchen or elsewhere, the employer may permit such charitable solicitations on an *ad hoc* basis

²⁵ The CGC’s cited authorities are inapplicable: *Republic Aviation Corp.*, 324 U.S. 793, 803 n.10 (1945) (states that an employer cannot promulgate a rule prohibiting union solicitation by an employee outside of work hours although on company property – but making it clear that an employer can promulgate a rule prohibiting union solicitation during working time); *Opryland Hotel*, 323 NLRB 723, 729 (1997) (record contained uncontradicted evidence that the employer did not apply its no-solicitation rule consistently to nonunion solicitations; it allowed sports pools, schools, Girl Scouts, fund-raisers); *Selwyn Shoe Mfg. Co.*, 172 NLRB 674, 676 (1968), *enf. denied on other grounds* 428 F.2d 217 (8th Cir. 1970) (in the absence of a valid no-solicitation rule, there must be a showing that the employee’s discharge flowed from the abdication of work duties rather than from the fact that she engaged in solicitation for the union). *Republic Aviation* is inapplicable as Otero’s work-stoppage rule does not prohibit union solicitation by an employee outside of working time, but instead prohibits off-duty employees from disrupting working employees in the kitchen regardless of the solicitation. *Opryland* is inapplicable because the uncontradicted record here demonstrates that Otero consistently applies the rule. *Selwyn Shoe* is inapplicable because the work-stoppage rule is a valid rule and Otero and Drake enforce it consistently regardless of whether it is a union or non-union solicitation.

without negating an otherwise legitimate exclusionary rule. Accordingly, I shall dismiss this allegation of the complaint.”²⁶ [ALJD 22 (citations omitted).]

As the ALJ found, “Otero, encountering Mesa, a housekeeping department employee, talking in the kitchen to an on-duty kitchen employee, told Mesa she could not be there as she had no business in the kitchen, and walked Mesa out of the department. According to the ALJ, Otero testified “she has never permitted any non-kitchen employee to be in the kitchen, because, “I don’t think that any non-kitchen employee has any business in the kitchen because they could be a distraction or disruption to the other employees if people are just coming in and out of the kitchen at freewill.” [Id.; RT 675, 2043-45, 2066.] As the ALJ found, “[c]ontrary to the testimony of Mesa, Otero testified she instructed Mesa to leave the kitchen because she should not be there, and did not say, ‘You are not allowed in here to talk to those employees.’” [ALJD 22; RT 674-75, 2046.] The ALJ found that “Shawn White, a union supporter, admitted that non-kitchen employees or employees who have no business in the kitchen are not allowed in the main kitchen area.” [ALJD 22; RT 387-89.] White also testified that he works at the grill in the café, *which is open to the public* and that he and the customer can talk about any subject they like – which they often do – while White prepares the customer’s order. [RT 363, 384-85.] Conversely, White testified that the general public does not have access to the main kitchen, where food is prepared for patients. [RT 385.]

The CGC challenges the ALJ’s well-supported credibility determination fail under the Board’s *Standard Dry Wall* test as follows.

First, the CGC argues that although Otero “tried to claim that Mesa’s presence constituted a threat to employee safety” and “asserted that, if ‘several people’ were to walk into the kitchen without warning, ‘someone could get hurt,’” “she never explained why this would justify asking a single employee to leave, nor how disaster was averted despite the frequent presence of . . . Robledo’s nurse-girlfriend.” [Brief 42.] The CGC minces Otero’s testimony in

²⁶ The ALJ inadvertently refers to “Mesa” as soliciting for the United Way, when it actually was Souers.

an effort to assert that Otero stated that there is only a threat to safety when “several” non-kitchen people come into the kitchen versus a “single” person, such as Mesa. Otero made no such distinction. Contrary to the CGC’s argument, Otero testified in great detail why non-kitchen employees do not have “any business in the kitchen because they could be a distraction or disruption to the other employees if people are just coming in and out of the kitchen at freewill.” [RT 2044.] As Otero explained, kitchen employees are “always slicing or chopping or . . . cooking stuff on the stove” and the kitchen area is “very cramped for the amount of people we have working there,” which on a daily basis is “20 to 30 people working throughout the main kitchen area.” [RT 2044-45; R Exs. 43, 44, 45, 46.] As Otero further explained, “[e]verybody works within an aisle-way where you’d have to pass behind somebody’s working station to get from one point to the other.” [*Id.*] Nevertheless, the CGC asserts that Otero fabricated the safety concern because “kitchen” employees may chat about non-work subjects while they work. However, that assertion overlooks the fact that while kitchen employees may chat throughout their day as they work, they are familiar with their surroundings and well-aware of the dangers in the kitchen. In addition, they are not dealing with non-kitchen employees blocking their access.

Second, as for Robledo’s girlfriend visiting him in the kitchen, Otero testified without dispute that she never saw her in the kitchen area, and the ALJ credited that testimony. [RT 676.] Otero testified without dispute that she has never allowed any of the nearly 2000 non-kitchen employees to be in the kitchen for non-work related reasons. [RT 675-76, 2045.] Indeed, Mesa was the only non-kitchen employee Otero had seen in the kitchen for non-work related reasons, and thus the only non-kitchen employee she ever had to ask to leave the kitchen. [RT 675, 2066.] Mesa admitted that she was not assigned any duties that would cause her to have business in the kitchen, was in the kitchen for non-work related reasons, and was talking to an employee who was on working time. [RT 1662, 1703-04.]

Third, contrary to the CGC’s claim, the ALJ did not ignore “substantial record evidence” that *off-duty employees* frequented the kitchen on a regular basis. The CGC misstates the issue. There is no dispute that FMC permits off-duty “kitchen” employees in the kitchen for specific

work-related reasons. As CGC witness White testified, those reasons include to briefly “pass through” to pick up paychecks or check schedules. [RT 388.] Otero gave similar testimony. [RT 2062.] Otero also testified that FMC permitted off-duty “kitchen” employees in the kitchen to solicit for the United Way (a work-sponsored charity). [RT 2062-63.] The ALJ did not ignore this evidence, specifically finding that FMC “may permit such charitable solicitations on an *ad hoc* basis without negating an otherwise legitimate exclusionary rule.” [ALJD 22, citing to *Hammary Mfg. Corp.*, 265 NLRB 57 (1982); *Zurn/N.E.P.C.O.*, 345 NLRB 12, 14 (2005).] However, there is no evidence that off-duty “*non-kitchen*” employees are permitted in the kitchen, which is the issue here. In fact, CGC witness White’s testimony demonstrated that “non-kitchen employees or employees who have no business in the kitchen are not allowed in the main kitchen area” – White “knew this” and other “employees know this” because as Otero credibly testified, other than Mesa, she has not seen any other non-kitchen employees in the kitchen for non-work related reasons. The CGC’s claim that Robledo’s girlfriend had a “frequent presence” in the kitchen is not supported by the record. In fact, CGC witness White testified that he has seen her “once in awhile” visit Robledo for “a minute or two” and although Craig testified that she saw her yesterday, she did not provide any further information on any frequency. [RT 403, 837.] Otero, who is alleged to have promulgated and enforced the discriminatory rule, as the ALJ found, “testified she was not aware of such visits,” thus, she did not apply the rule in a discriminatory manner.

Fourth, As the ALJ recognized, *Brigadier Indus. Corp.*, 271 NLRB 656 (1984) is on point in this matter. In that case, the employer adopted a no-solicitation/no-distribution rule because it had been informed that production problems were being caused by employees leaving their worksites to talk with other employees during production time. *Id.* at 657. In finding that the rule was lawful, the Board held that “during the union campaign, an employer maintains a legitimate interest in preserving production and discipline” and may promulgate a no-solicitation/no-distribution rule if it acts for legitimate interests rather than for union reasons. *Id.*

Similarly, here, Otero's ban of non-kitchen employees from the kitchen for legitimate safety and production reasons is lawful.

Contrary to the CGC's claim that the ALJ "failed to engage in any critical analysis of Respondents' obviously pretextual reason for prohibiting Mesa from remaining in the kitchen," the ALJ's findings and conclusion and the foregoing analysis demonstrates the ALJ had ample evidence to conclude that FMC did not violate the Act as alleged. In addition, the CGC has not demonstrated that the ALJ's credibility determination was incorrect by the "clear preponderance of all the relevant evidence," and the Board should affirm the ALJ's dismissals.²⁷

XVI. THE ALJ MADE A WELL-SUPPORTED CREDIBILITY DETERMINATION THAT OTERO DID NOT CREATE AN IMPRESSION OF SURVEILLANCE OF SOUERS, MESA AND BOARDWELL AND DID NOT DISPARAGE THEM.

Complaint Allegations ¶¶ 5(r)(2) and (3) allege that during a conversation in the cafeteria, Otero threatened employees, gave the impression she was engaging in surveillance of their union activities, and disparaged the Union. The ALJ properly dismissed those allegations, concluding that: "I find that Otero, realizing her utterance about cockroaches could be deemed offensive, pointedly told the employees her reference to cockroaches was not personal or intended as an insult. I shall dismiss these allegations of the complaint." [*Id.*; RT 687, 708.]

The ALJ specifically found that while sitting at a table in the cafeteria, Otero had a conversation with Souers, Mesa, and Heather Boardwell, three overtly active union adherents. [ALJD 23.] The ALJ found that "toward the end of the conversation, Boardwell asked why

²⁷ The CGC's citation to *Cast-Matic Corp*, 350 NLRB 1349 (2007) [Brief 43], as the ALJ found, is inapposite. [ALJD 21.] In that case, the ALJ found that prior to the organizing campaign, employees bought and sold candy and other items before and after their shift in both working and non-working areas, no one had been disciplined for staying in the plant after their shift, and Respondent's witness testified that he never paid attention to whether anyone stayed in the plant after their shift. *Id.* at 1354. In addition, when the employee went to his manager to discuss the incident, the manager expressly stated that due to vandalism and the union organizing campaign, "the Respondent was watching people, and that employees had to be out of the plant at the end of their shift." *Id.* The Board affirmed the ALJ's findings that the "Respondent's shop rule prohibiting employees 'from being present in the facility during non-working hours without good cause' was seldom enforced, and that the real reason for prohibiting [the employee] from being in the plant after his shift ended was because of the union campaign." *Id.* at 1354. Here, unlike in *Cast-Matic*, the overwhelming evidence shows that Otero consistently enforced the rule banning non-kitchen employees from the kitchen and did not tell Mesa that she was excluding her from the kitchen because of her union activities.

management assumed everything the three employees were doing was union business, as they could in fact just be talking about the Arizona Diamondbacks.” [ALJD 23; RT 686.] According to the ALJ, Otero testified that she replied “I think you are discussing things that you shouldn’t be discussing, because every time I come around the corner you scatter like cockroaches.” [ALJD 23; RT 686-87, 704, 708.] The ALJ found that Otero then added, “Don’t get me wrong. I am not saying that you are like cockroaches,” and she said to Heather, I am not calling you cockroaches.” [Id.] As the ALJ found, “Boardwell, according to Otero, acknowledged this disclaimer, saying ‘I know.’” [ALJD 23; RT 686-87.] According to the ALJ, “Boardwell did not testify, and neither Mesa nor Souers denied that Otero said she was not calling them cockroaches.” [ALJD 23; RT 687.] As the ALJ found, Otero testified “that she was merely using this phrase as a descriptive figure of speech, rather than as a personal reference, and her disclaimer to the employees supports her testimony.” [ALJD 23; RT 716-17.] The ALJ expressly credited Otero’s testimony and expressly discredited Souers’ and Mesa’s testimony. [ALJD 23.]

The CGC’s challenges to the ALJ’s well-supported credibility determinations fall under the Board’s *Standard Dry Wall* test as follows.

First, the CGC argues that “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.’” [Brief 44.] The CGC further argues that “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.” [Id.] The CGC mischaracterizes the conversation between Otero, Souers, Mesa, and Boardwell, as well as Otero’s intentions, and misstates the record. Otero’s comment did not indicate that she was “looking out for” or trying to “identify” employees engaging in protected activities. She did not have to – Boardwell, Mesa, and Souers are all ardent union supporters, who conducted their union activity openly, on FMC property,

and during their working time. Moreover, on its face, Otero's comment fails to give the impression that she was spying, monitoring, or eavesdropping on their protected activity, but rather she simply answered Boardwell's question. In fact, in response to the ALJ's questions about whether the employees engaged in this activity on working time, Otero explained that they would be "huddled up talking" at one of their work stations and Otero "would go to get a pot or pan, to the dish room, or to get some canned goods out of the dry storage, and if [she] would come, they would scatter" back to their own workstations. [RT 705-06.] When a manager's comment to an employee who is an ardent and open union supporter references the employee's open union activity, the manager does not create an impression of unlawful surveillance. See *Kathleen's Bakeshop, LLC*, 337 NLRB 1081, 1081 (2002) (open union supporter could not reasonably assume supervisor's statement that union supporter had "started the union" was "based on surveillance of his union activities"); see also *Sunshine Piping, Inc.*, 350 NLRB 1186, 1186 (2007) (employer's statement regarding open union activity on its property did not suggest employer was "closely" monitoring the degree and extent of [the employees'] organizing efforts). Moreover, contrary to the CGC's argument, Otero did not "gloat" about her ability to "root out" union supporters. Otero merely responded to a direct question from Boardwell about why their working-time "huddles/scatter" conduct might suggest something other than baseball.²⁸

Second, the CGC also argues that "Otero's 'cockroach' remarks were additionally intended to cast aspersions on the Union supporters, by suggesting they were weak and scared of management" and "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

²⁸ *Link Manufacturing Co.*, 281 NLRB 294, 300 (1986), which the CGC cites [Brief 44.] is distinguishable. There, the company owner called an employee into his office, who had attended a union meeting the previous day, and asked how the meeting went and that "he knew that some 36 employees had signed union cards and asked [the employee] the identity of the union organizers." *Id.* Reversing the ALJ, the Board held that the owner violated the Act by unlawfully creating the impression of surveillance. *Id.* at 294. Unlike in *Link*, where the owner's comments suggested that he was monitoring or spying on employees attending a non-public meeting, Otero's comments did not suggest that she was monitoring or spying on Boardwell, Mesa, Souers or any other employees.

protect them or stand up to management.” [Brief 44.] Again, the CGC mischaracterizes Otero’s comment and intentions, and misstates the record. At no time did Otero express or imply that Boardwell, Mesa, or Souers were weak and scared of management or that the Union is unable to protect them. Rather, Otero merely responded to Boardwell’s direct question. As Otero testified without dispute, she used the phrase “scatter like cockroaches” as a common descriptive analogy, which she had heard in school and from her mother. [RT 705, 717.] Contrary to the CGC’s assertion, while the term may have had a special significance to Mesa who said she had heard it during a labor relations consultant meeting, Otero testified without dispute that she never heard the term used at any meetings. [RT 717.] Moreover, Otero’s disclaimer to Boardwell that she was not calling them cockroaches and Boardwell’s acceptance of the disclaimer further evidences that Otero’s comment could not be understood as disparaging. The CGC presented no contrary evidence.

Third, Board law supports the ALJ’s findings that Otero’s comment was not disparaging. *See Trailmobile Trailer*, 343 NLRB 95, 95 (2004) (managers’ comments that they “could teach monkeys to weld” and “that people in the Union are stupid” not unlawful; “flip and intemperate” remarks merely expressed opinion and did not: (1) suggest employees’ union activity was futile; (2) reasonably convey any explicit or implicit threats; or (3) constitute harassment that would reasonably interfere with Section 7 rights); *Forrest City Grocery*, 306 NLRB 723, 727 (1992) (finding that an employer’s insulting but non-threatening remarks made to an outspoken union adherent during robust and freewheeling argument about the union not unlawful); *DeSoto, Inc.*, 278 NLRB 788, 800 (1986) (manager’s comment to an employee that “the cockroaches upstairs are causing me trouble” not unlawful; ALJ was “unwilling to ascribe the sinister meaning requested by the General Counsel to show animus and unlawful motivation). Here, there is no evidence that Otero’s comment suggested the employees’ union activity was futile, conveyed an explicit or implicit threat, or constituted harassment that would tend to interfere with the employees’ Section 7 rights.

Based on the foregoing analysis, the ALJ had ample evidence to conclude that Otero did not unlawfully engage in surveillance or disparage employees. In addition, the CGC has not demonstrated that the ALJ's credibility determinations were incorrect by the "clear preponderance of all the relevant evidence," and the Board should affirm the ALJ's dismissals.²⁹

XVII. THE ALJ MADE A WELL-SUPPORTED CREDIBILITY DETERMINATION THAT FMC AND SODEXO DO NOT JOINTLY EMPLOY EVS EMPLOYEES.

The CGC argues under Complaint Allegations ¶¶ 2(j), (k), and (l), that FMC and Sodexo jointly employ the EVS housekeepers because FMC leases three subject-matter experts (a director and two managers) from Sodexo to manage its EVS employees. The ALJ rejected that argument based on the credited testimony of Roger Schuler, FMC vice president of ancillary services (which includes EVS). [ALJD 4.] The ALJ expressly credited Schuler's testimony that: (1) "FMC has contracted with Sodexo to provide leased managers and supervisors for the EVS department"; (2) "These managers and supervisors, according to Schuler, play no role in formulating policy as it relates to hiring criteria, terms and conditions of employment, rates of pay, performance appraisal criteria and raises, and discharge and disciplinary criteria"; (3) "[a]ll these matters are dictated to Sodexo's managers and supervisors through FMC's policy manual which Sodexo has no input in formulating"; (4) "upon the recommended discharge of an EVS employee by a Sodexo manager, Schuler has final authority to determine whether the employee

²⁹ The CGC's authorities are distinguishable for several reasons. First, the CGC cites two cases in which the term "cockroach" is mentioned to support her claim that the term historically has been used to threaten union supporters and/or to refer to them in a derogatory manner: *Jorgensen's Inn*, 227 NLRB 1500 (1977) and *The Tetrad Co., Inc.*, 125 NLRB 466, 475 (1959). [Brief 44 n.15.] However, neither case alleged that management used the term in an unlawfully threatening or disparaging manner, nor was the comment found to be unlawful. The CGC's other authorities are even less helpful. In *Albert Einstein Medical Center*, a supervisor told an employee that the Union could not help a recently discharged employee get his job back because it is too weak, it had no money, and its lawyer had Alzheimer's disease. 316 NLRB at 1040. Affirming the ALJ, the Board found that the employer's "attempt to denigrate the Union violated Section 8(a)(1) because it effectively conveyed the position that it was futile to support or remain a member of the Union." *Id.* Unlike that case, Otero did not denigrate the union, did not convey that the union (or the employees) were weak, and never conveyed the position that it was futile to support the union. In *Sportee Corp.*, 176 NLRB 1055 (1969), the plant manager gave a speech to employees in which, he accused persons soliciting for the Union to be "cowardly doing it at night for a fee." *Id.* at 1060. As the ALJ found, the manager had a legal right to make the speech and the employee had a right to resent it; however, the ALJ did not find that the manager's comment violated the Act. *Id.* at 1061 n.7. Unlike there, Otero did not directly call the employees cockroaches, and, in fact, disclaimed that she was calling them that.

should be discharged, and exercises the same authority over Sodexo managers that he exercises over FMC managers”; and (5) “FMC requires strict conformity by Sodexo with all FMC policies and guidelines pertaining to the employer-employee relationship, and Sodexo has no independent authority to modify or deviate from the parameters established by FMC.” [ALJD 4; RT 51-52, 60-62, 77-78, 186-90.] As found by the ALJ, “There is no contrary record evidence that is inconsistent with Schuler’s testimony.” [ALJD 4.]

Given those undisputed facts, the ALJ found analogous and controlling the Board’s decisions in *Lee Hospital*, 300 NLRB 947 (1990) (finding no joint employer relationship where the hospital employer (like here) leased a subject-matter expert to manage the hospital’s employee in a specific department, but (like here) the hospital controlled labor policy and set core terms and conditions of employment), and *Richmond Convalescent Hospital, Inc.*, 313 NLRB 1247, 1260-61 (1994) (no joint employer relationship between nursing home and company it contracted with to provide managers to supervise nursing home employees). [ALJD 4-5.]

The CGC’s attempts to undermine the ALJ’s finding fail for the following reasons.

First, the fact that the Sodexo leased managers “have actual authority to direct the work of, and issue discipline [subject to FMC review] to” the housekeepers [Brief 45] does not make Sodexo a joint employer. *See Lee Hosp.*, 300 NLRB at 950 (finding no joint employer relationship where the leased manager (1) supplied daily supervision and direction related to the physician-nurse relationship and patient care issues, but not core “terms and conditions” issues; and (2) had some disciplinary authority, but lacked the ability to independently fire anyone).

Second, contrary to the CGC’s assertion, Schuler did not testify that Sodexo leased managers “participate in the discussion and setting of Hospital policies.” [Brief 45.] Schuler, Bradel, and Crofford all testified that Sodexo has no input, has never been authorized to give input – and has never given any input – into the formulation of FMC’s labor policies affecting EVS employees. [RT 189-90, 1458-59, 1916, 1921, 1971, 2274.] Moreover, under the contract between FMC and Sodexo, Sodexo managers “supervise, manage, and direct” EVS employees

“in accordance with [FMC’s] employment (hiring, discharging, and disciplinary) practices.” [RT 77-78, 1917; GC Ex. 56 ¶ 4.1.]

Third, contrary to the CGC’s assertion, Sodexo managers may not “seriously discipline or discharge an EVS employee without FMC management being consulted.” [Brief 45.] Schuler, Bradel, HR manager Dawn Gibson, and Crofford all testified without contradiction that FMC reviews, approves, and has the final say on all disciplinary actions affecting EVS employees. [RT 189-90, 1458-49, 1916, 1971, 2176-81, 2187-88, 2273-76.]

Fourth, contrary to the CGC’s assertion, Sodexo managers may not “make final hiring decisions.” [Brief 45.] Bradel and Crofford testified without contradiction that FMC performs the hiring function for all EVS employees, including determining staffing needs, establishing hiring criteria, publishing job advertisements, screening applicants, conducting the initial job interview, and making the final decisions on hiring. [RT 1920-21, 2275-76.]

Fifth, that fact that the three EVS Sodexo managers wore the same name tag as FMC managers is of no moment [Brief 45] because the key inquiry focuses on whether Sodexo jointly controlled labor relations policy and core terms and conditions of employment. As found by the ALJ based on uncontradicted evidence, Sodexo has no input on policy or core terms. [ALJD 4; RT 77-78, 186-90.] Indeed, EVS housekeeper Begay testified that, although Sodexo manager Keeler would tell the housekeepers which rooms to clean in the morning, she “would not answer any questions about your work or anything. She would just go to someone else and then come back and tell you whatever the Employer’s policy or rule was, on that topic.” [RT 1601-02.] Begay further testified that Keeler had previously given her a copy of FMC’s attendance policy. [RT 1602.] EVS housekeeper Barb Mesa also testified that, if a Sodexo EVS manager had a human resource type issue related to an FMC employee, the manager would deal with it through the FMC Human Resources department. [RT 1701.]

Sixth, Contrary to the CGC’s assertion, FMC *did* retain its authority over EVS employees. [Brief 46.] Although the FMC/Sodexo manager-leasing contract allowed the Sodexo leased managers to “request” personnel actions, the contract gave FMC authority to

reject such requests if not “in accordance with [FMC’s] employment policies and procedures.” [GC Ex. 56.]

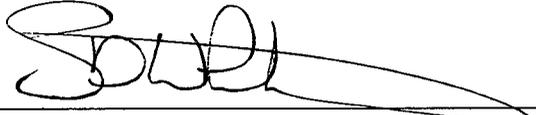
Seventh, Contrary to the CGC’s assertion, FMC and Sodexo did not agree to indemnify each other for “employment related liabilities.” [Brief 46.] Rather, they indemnified each other for “sole negligence, misconduct, or other fault.” [GC Ex. 56 ¶ 6.6.] That indemnification provision says nothing about joint control over labor policies or core employment terms.³⁰

CONCLUSION

For the foregoing reasons, the CGC does not demonstrate a factual or legal basis to disturb the ALJ’s findings. The Board should affirm the ALJ’s decision to dismiss the pertinent Complaint allegations.

RESPECTFULLY SUBMITTED July 29, 2009.

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³⁰ *Computer Associates. Int’l, Inc.*, 332 NLRB 1166, 1167 (2000), cited by the CGC (Brief 46), confirms that the Board will not find joint employer status absent shared control over “essential terms and conditions of employment”; factors not present here. Notably, the CGC does not mention that the two employers at issue in *Computer Associates* had a “management agreement [that] provided joint authority over these employees”; a major factor not present here. *Id.* Also of note, the CGC does not mention that the Second Circuit denied enforcement on the joint-employer finding. *Computer Assocs. Int’l, Inc. v. NLRB*, 282 F.3d 849, 850 (2d Cir. 2002) (“We conclude the Board’s joint employer finding is not supported by substantial evidence.”).

CERTIFICATE OF SERVICE

The undersigned certifies that I filed an electronic copy of the foregoing via the Board's electronic filing service on July 29, 2009, to:

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The undersigned certifies that I served a copy of the foregoing via e-mail on July 29, 2009, to:

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