

**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 (NNOC/CNA)**

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

and

Case 28-CA-21704

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

**GENERAL COUNSEL'S REPLY BRIEF
IN FURTHER SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Mara-Louise Anzalone
Counsel for the General Counsel
National Labor Relations Board
Region 28 – Phoenix Regional Office
2600 N. Central Avenue, Suite 1800
Phoenix, Arizona 85004
Telephone: (602) 640-2134

**GENERAL COUNSEL’S REPLY BRIEF
IN FURTHER SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to § 102.46(h) of the Board’s Rules and Regulations, the General Counsel respectfully files its reply brief in further support of its Exceptions in the above-referenced case. Respondents Flagstaff Medical Center, Inc. (FMC or the Hospital) and Sodexho America, LLC (Sodexho) (collectively, Respondents) argue that Administrative Law Judge Wacknov correctly found that Respondents did not violate the Act as alleged by the General Counsel. In so doing, they accuse the General Counsel of misciting and mistating record evidence and repeatedly attacking the ALJ’s “judicial abilities.” (Resp. Br. at 2) Respondents’ vituperative colloquy does nothing to shore up the ALJ’s analysis or his reading of the record. The fact remains that the ALJ’s recommendation of dismissal was premised on his *ignoring* large portions of the record. Rather than address evidence that the ALJ expediently side-stepped, Respondents baldly claim that, by crediting certain of Respondents’ witnesses, the ALJ implicitly discredited contrary evidence offered by the General Counsel. As set forth below, nothing in Respondents’ opposition rationalizes the ALJ’s ignoring – as opposed to discrediting – substantial and compelling evidence that Respondents violated the Act in numerous respects, including by subcontracting work performed by FMC’s patient transport department to chill its employees’ unionizing efforts. Simply stated, Respondent cannot make violations disappear by pretending the record evidence does not exist.

I. RESPONDENTS CANNOT EXPLAIN THE ALJ’S FAILURE TO ACKNOWLEDGE GENERAL COUNSEL’S UNREBUTTED RECORD EVIDENCE OF RESPONDENTS’ ANTI-UNION BIAS.

As set forth in General Counsel’s Exceptions Brief, the ALJ’s Decision is hallmarked by a selective recollection of record evidence tailored to fit his conclusions. Although

Respondents try to “explain away” some of the inconvenient, contrary evidence the ALJ carefully ignored, their efforts are neither persuasive nor supported by the record as a whole.

A significant number of the ALJ’s conclusions are expressly based on his conclusion that nothing in the record suggested an untoward motivation behind the actions of Respondents’ supervisors or managers. To make such a sweeping conclusion required the ALJ to ignore undisputed evidence that:

- Respondents reacted to a prior organizing campaign in 2006 by planning a wage freeze and reduction in benefits if the Hospital’s nurses won the right to union representation. (Tr. 1565-66, 1101-02, 1107);
- In response to the CWA campaign, Respondents hired professional anti-union consultants, called “GLES,” who took residence at the Hospital and worked with its management to weed out pro-Union employees. (Tr. 93-94, 440-43, 1476, 1486, 1566, 2250-51);
- As early as December 2006, GLES representatives referred to pro-Union employees as “cockroaches”¹ and told Respondents’ supervisors to “keep an eye on the employees, to see who is talking.” (Tr. 1720-21);
- Respondents’ managers complied with enthusiasm and held meetings with employees to determine their level of Union support. (Tr. 648-50; GC 24) Department Head Drake characterized her reporting pro-Union employees: “I would just say if I *got some* or not.” (Tr. 621-22, 2144) (emphasis added);
- GLES retained lists of employees’ names and consulted with individual leads and managers about each individual’s Union proclivities, and this information was relayed to the Hospital’s Human Resources Department. (Tr. 918, 1486, 1501; GC 24); and
- *After* FMC had been served with unfair labor practice charges, GLES shredded “lists and other sensitive info” regarding the union organizing campaign. FMC’s President and Chief Human Resources executive were made aware of this, but took no action to retrieve or preserve any documents that may have been relevant to the Board’s investigation. (GC 38, 39; Tr. 1481, 1488, 1500-03).

¹ The term “cockroach” has historically been used to threaten union supporters and/or refer to them in a derogatory manner. See, e.g., *Jorgensen’s Inn v. Bartenders, Culinary Workers and Motel Employees Union Local 158, AFL-CIO*, 227 NLRB 1500, 1501 (1977) (supervisor threatened that [h]e would stomp on these people [who work for the Union] like they were cockroaches”), *enfd.* 588 F.2d 822 (1978) (table); *Tetrad Co., Inc.*, 125 NLRB 466, 475 (1959) (manager referred to union representatives as “cockroaches and communists”).

Respondents attempt to downplay the ALJ's apparent disinterest in such evidence. For example, Respondents argue that the written evidence of their plan to freeze wages and reduce benefits in the event of a union victory is unreliable, even though it was discovered on a white board in the Hospital's executive suite. (Resp. Br. at 11) Likewise, Respondents would have the Board discount the fact that Respondents took absolutely no action when they learned that their union-avoidance consultants, GLES, had literally shredded information crucial to an ongoing unfair labor practice investigation. (Id. at 12) To read such evidence out of the record, as did the ALJ, however, would be a grave mistake. See *Great Lakes Screw Corp.*, 164 NLRB 149 (1967) (finding critical evidence to unfair labor practice charge in attempted destruction, by respondent's agent, of evidence relevant to such charge); see also *Sunshine Piping, Inc.*, 351 NLRB 1371, 1380 (2007) (Member Liebman, dissenting in part) (finding litigation costs appropriate where respondent altered records knowing they were relevant to matters before the Board).

II. RESPONDENTS CANNOT RECUCITATE THE ALJ'S FLAWED SUBCONTRACTING ANALYSIS.

The majority of Respondents' opposition to General Counsel's Exceptions is devoted to an attempt to salvage the ALJ's analysis of General Counsel's subcontracting allegation. (See Resp. Br. at 4-16) Certain of Respondents' arguments, including their contention that they are privileged to subcontract jobs in order to chill union activity (see Resp. Br. at 8-9), do not merit rebuttal. Other aspects of Respondent's opposition, however, cloud the record evidence sufficiently to warrant clarification. In any event, as set forth below, as well as in General Counsel's Exceptions and Exceptions Brief, Respondents' effort to substantiate the ALJ's findings and conclusions simply falls short.

A. Respondents Cannot Explain Why the ALJ Ignored Direct Evidence of Anti-Union Motivation in Respondents' Subcontracting.

The ALJ ignored key record evidence that FMC employed blatant *threats* of subcontracting as a prominent feature of its anti-Union campaign. Respondents understandably have difficulty attempting to “explain away” such damaging evidence. For example, un rebutted record testimony established that EVS Department Head Kasey unequivocally threatened employees with subcontracting if the Union came in. Kasey told employees:

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

(Tr. 1093-95, 1103, 1132-33) Respondents now claim that Kasey's statement was “ambiguous” and cannot be given any credence because Kasey subsequently left her employment with the Hospital. (Resp. Br. at 13) Respondents likewise attempt to undercut the significance of a similar statement made by Dietary Department Head Drake, who told employees that, if they brought the Union in, management would freeze their wages. Drake added:

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

(Tr. 1123) While Respondents claim the record contains conflicting testimony on Drake's statement, the fact remains that the ALJ ignored it completely.

Similarly, Respondents' own witness, Human Resources Director Crofford, testified that Respondents distributed and posted fliers throughout the Hospital, warning employees that management was free to subcontract their jobs without consulting any union they might select as their bargaining representative. (GC 43; Tr. 1533-35, 2269, 2289) According to Crofford,

the fact that FMC could potentially subcontract without bargaining with a union was a message she wanted to ensure was communicated to the employees. (Tr. 1534, 2291) As the Board has noted, such threats are an “insidious reminder to employees every time they come to work that any effort on their part to improve their working conditions may be met with complete destruction of their livelihood.” *ElectroVoice, Inc.*, 320 NLRB 1094, 1095 (1996).

Finally, the ALJ ignored un rebutted evidence that, during the process of considering whether to use Sodexo for the transport function, Respondents also discussed the possibility of subcontracting out the work of the *EVS employees* as well. (Tr. 1864) Respondents’ explanation for the ALJ ignoring this evidence is “even if true, it proves nothing.” (Resp. Br. at 12) Board law disagrees. See, e.g., *American Directional Boring, Inc.*, 353 NLRB No. 21, *43 (2008) (threats of subcontracting constitute “hallmark violations,” having lasting effects on bargaining-unit employees that cannot be underestimated”) (citations omitted); *Bronson Company*, 349 NLRB 512, 539 (2007) (finding animus where employer “decided to use its subcontracting decision as a means of dramatically illustrating one of the principal themes of its [antiunion] campaign”).

B. Respondents’ Attempt to “Revamp” the ALJ’s Analysis Under *Darlington* is Unsupported by the Record Evidence.

The record evidence in this case establishes that, under the Board’s *Darlington* analysis, FMC violated the Act by subcontracting its patient transport function. First, there was contemporaneous union activity within the Hospital on two fronts: (a) a rerun election among the Hospital’s nurses, who greatly disliked transporting patients themselves; and (b) an organizing campaign among the Hospital’s Ancillary Services staff. Second, the transporters remained geographically close to all of the Hospital’s other employees. Indeed, by virtue of their function -- to transport patients between and among FMC’s various departments -- the

Sodexo transporters constantly interacted with the other staff and, thus formed the perfect vessel for carrying Respondents' anti-Union message. Third, FMC made sure every Hospital employee was informed about the change by announcing the subcontracting to employees via e-mail and postings throughout the facility, and by making the Sodexo transporters wear a new, conspicuous uniform as they performed their duties. Fourth, as described above, the record contains dire and explicit threats to Ancillary Services employees by both Drake and Kasey that their continued organizing efforts would result in their own jobs being lost to subcontracting. This, coupled with the conspicuous overstaffing of the new transport function with Sodexo employees, sent a powerful message to the remaining employees that they should be concerned for their jobs.

Unable to argue with the textbook violation presented by this case, Respondents urge the Board to condone the ALJ's finding that, contrary to a mountain of documentary record evidence, as well as testimony from Respondents' own witnesses, that FMC's decision to subcontract preceded the Union's organizing campaign. Respondent's entire defense, in fact, hinges on its assertion that FMC President Bradel *alone* determined that FMC would subcontract out to Sodexo, and that he made this decision in the fall of 2006 before the advent of the Union campaign (and almost two full years before the subcontracting was actually implemented). (See Resp. Br. at 6-8) This conclusion is flawed on two fronts. First, while FMC's witnesses were not exactly lining up to take credit for the subcontracting decision, the record is clear that it was a group decision, and not Bradel's alone. (Tr. 1963-64)

Second, Respondents' own records establish that FMC was still considering whether to subcontract in *April of 2007*. Indeed, according to FMC's official meeting minutes, FMC's

Senior Management Team, including Schuler, Crofford, Bradel and Dean, met on April 24, 2007, and decided to support subcontracting. That the issue had not yet been decided is evidenced by the meeting minutes themselves, which indicate that a discussion was had about the future of the transport function, including the “pros and cons of outsourcing.” (GC 36) Indeed, according to Crofford, there had been, prior to this meeting, “debates back and forth about the pros and cons” of this course of action. (Tr. 1468; GC 36) In other words, regardless of what the ALJ may have found regarding Bradel’s personal conclusions in the fall of 2006, the record evidence, ignored by the ALJ, establishes that *Respondent FMC* made the institutional decision to subcontract only *after* the Union organizing campaign had begun.

Respondents additionally urge the Board to repeat the ALJ’s misstep in overlooking the evidence of pretext in the subcontracting decision. The ALJ glossed over in his opinion the conspicuous lack of rational explanation as to why FMC insisted on taking patient transport duties away from its own employees and instead hired Sodexho to staff the function (just as Kasey had alluded to in her threat to EVS employees). Respondents accuse General Counsel of misstating the record facts in this regard, but the simple reality is that Respondents’ witnesses contradicted each other on this critical point. Respondents’ witness Umlah testified that an expert, professional transport manager was necessary to head up the new department, but Fitzhenry, the very “expert” Sodexho manager tapped to head the transport team, admitted that he had no prior experience managing a transport department. (Tr. 1808, 2029) Umlah also claimed that he was inspired to subcontract patient transport after seeing Sodexho’s program in action at other hospitals and concluded that FMC simply did not have the “expertise to pull this off in-house.” He later admitted, however, that FMC could have done so, if it had so chosen. (Tr. 1839, 1843)

Respondents have likewise failed to steady the ALJ's shaky reasoning on an additionally proffered explanation for subcontracting the patient transport duty to Sodexho workers: a need for increased efficiency. This conclusion by the ALJ was based on testimony by Bradel that was, despite Respondents' characterization, directly contradicted by Fitzhenry, the Sodexho transporters' direct supervisor. Fitzhenry testified that transporting required no special certifications beyond basic CPR, and required no special expertise. (Tr. 2030) Moreover, Umlah testified that anyone who could operate a beeper and phone to respond to the automated system was qualified. (Tr. 1856-57) Using Sodexho employees, in other words, was unnecessary, i.e., "gratuitous." That the ALJ chose to ignore this evidence evinces his desire to reach just the result he did; by their opposition, Respondents have added absolutely no ballast to his decision making in this regard.

III. CONCLUSION

Based upon the above facts and legal analysis, in addition to that set forth in General Counsel's Exceptions Brief, General Counsel submits that the ALJ erred by failing to find that Respondents engaged in numerous violations of the Act. General Counsel asks that the Board find that Respondents engaged in these unfair labor practices and issue an appropriate order remedying them.

Dated at Phoenix, Arizona this 12th day of August 2009.

Respectfully submitted,

/s/ Mara-Louise Anzalone
Mara-Louise Anzalone
Counsel for the General Counsel
National Labor Relations Board
Region 28 – Phoenix Regional Office
2600 N. Central Avenue, Suite 1800
Phoenix, Arizona 85004
Telephone: (602) 640-2134

CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S REPLY BRIEF IN FURTHER SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in FLAGSTAFF MEDICAL CENTER, INC., Cases 28-CA-21509 et al., was served by E-Gov, E-Filing and by E-mail, on this 12th day of August 2009, on the following:

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

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

Via E-mail on the following:

Alan Feldman, Attorney at Law
Steven D. Wheelless, Attorney at Law
Steptoe and Johnson, LLP
Collier Center
201 East Washington Street, Suite 1600
Phoenix, AZ 85004-2382
E-Mail: afeldman@steptoe.com
E-Mail: swheelless@steptoe.com

Linda M. Shipley, Attorney at Law
National Nurses Organizing
Committee/California Nurses Association
(NNOC/CNA)
2000 Franklin Street, Suite 300
Oakland, CA 94612
E-Mail: lshipley@calnurses.org

Stanley D. Gosch, Attorney at Law
Richard Rosenblatt & Associates, LLC
8085 East Prentice Avenue
Greenwood Village, CO 80111-2705
E-Mail: sgosch@cwa-union.org

/s/Mara-Louise Anzalone

Mara-Louise Anzalone
Counsel for the General Counsel
National Labor Relations Board
Region 28 – Phoenix Regional Office
2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004
Telephone: (602) 640-2134
Facsimile: (602) 640-2178
Email: Mara-Louise.Anzalone@nrlrb.gov