

**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  
SODEXO, AMERICA, LLC, as Joint Employers**

**and**

**Cases 28-CA-21704  
28-CA-21728**

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

**FLAGSTAFF MEDICAL CENTER'S  
REPLY IN SUPPORT OF EXCEPTIONS  
TO THE MAY 20, 2009 DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

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**I. DRAKE DID NOT COERCE SANDOVAL BY A SINGLE UNION-RELATED QUESTION DURING A 20-25 MINUTE FRIENDLY CONVERSATION.**

**A. The CGC Misstates The ALJ's Findings Of Fact.**

The CGC exaggerates and mischaracterizes the exchange between Drake and Sandoval to introduce an atmosphere of “coercion” not supported by the facts found by the ALJ. For example, the CGC claims that “Drake engaged [Sandoval] *in a conversation* about the Nurses’ organizing campaign.” [Answer at 7 (emphasis added).] But the ALJ found and the CGC does not dispute that “[d]uring the intermittent, ongoing conversation lasting off and on some *20 to 25 minutes*,” Drake made *one* brief comment about “the nurses’ union (CNA).” [ALJD at 14 (emphasis added).] Next, the CGC claims that Drake told Sandoval “how foolish she thought the *Nurses’ organizing campaign* was.” [Answer at 7-8 (emphasis added).] But the ALJ found and the CGC does not dispute that Drake said nothing about the “Nurses” and nothing about the nurses’ “organizing campaign.” [ALJD at 14.] Rather, the ALJ found that Drake said the CNA “*union*” was foolish. [*Id.*] As found by the ALJ, Drake said nothing derogatory about the hospital’s nurse-employees or their organizing efforts.

Next, the CGC claims that Drake “*began* her interrogation by announcing how ‘foolish’ she thought a prior organizing campaign was.” [Answer at 8 (emphasis added).] But the ALJ found and the CGC does not dispute that “It is *unclear* whether Drake made the statement and asked the question at the same time *or at different times* during the running conversation.” [ALJD at 14 (emphasis added).] Finally, the CGC claims that Drake “asked Sandoval two questions.” [Answer at 7.] But the ALJ found that Drake asked a single question about “what I thought the union [the CWA] could do for us that FMC couldn’t or wasn’t already doing.” [ALJD at 14; RT at 1186.] Sandoval’s testimony expressly supports the ALJ’s finding. [RT at 1227-28 (“Q: And that was the only question she posed to you, right? What do you think a union could do that FMC isn’t already doing or couldn’t do? A: For its employees, yes.”)] Notably, the CGC does not dispute that after Sandoval explained her support for the union in

response to Drake's single, brief question, Drake did not ask any follow-up questions and said nothing negative about Sandoval's or any other employee's union support.

**B. Calling A Union "Foolish" Does Not Constitute Coercion.**

The CGC argues that Drake's single question during a "cordial and friendly" conversation [ALJD at 14] constituted coercion because Drake purportedly prefaced the question by stating that the *Nurses'* organizing campaign was foolish. The CGC appears to argue that Drake coerced Sandoval by impliedly communicating to Sandoval that Sandoval would be foolish to organize for the CWA in the same way the nurses were foolish to organize for the nurses' union. However, that argument fails factually because Drake said nothing about the employee-nurses or the nurses' organizing campaign. Drake said only that she thought the nurses' "*union*" was foolish and the record does not reflect that Drake's comment about the nurses' union came close in time to Drake's single union-related question to Sandoval. The CGC argument also fails legally because expressing one's opinion that a union is "foolish" does not constitute coercion. *See, e.g., Trailmobile Trailer, LLC*, 343 NLRB 95, 95-96 (2004) (supervisor did not violate the Act by calling a union representative "stupid"); *Sears, Roebuck & Co.*, 305 NLRB 193, 193-94 (1991) (holding that "[w]ords of disparagement alone concerning a union or its officials are insufficient" to violate the Act because such remarks, while "flip and intemperate," were merely "expressions of [the employer's] personal opinion protected by the free speech provisions of Section 8 of the Act" as they were not accompanied by any unlawful threats).

Notably, the ALJ did not conclude that Drake's opinion about the CNA made the single union-related question coercive. Rather, the ALJ found Drake's single union-related question unlawful because "Drake's inquiry was calculated to discern whether Sandoval supported the Union." As discussed in FMC's Exceptions Brief, the ALJ's *per se* standard for unlawful interrogation does not correctly state or apply United States Supreme Court and Board law, which require a showing of threats or promises under the "totality of the circumstances" test. [FMC Exception Brief at 3.]

C. **The Case Cited By The CGC Demonstrates Why Drake’s Single, Brief Question During A Friendly Conversation Did Not Violate The Act.**

The CGC cites *Research Management Corp.*, 302 NLRB 627, 648 (1991). The extended questioning and hostile, angry statements in that case distinguish it significantly from this case. There, two supervisors approached an employee. *Id.* One of the supervisors “was *upset* about a union newsletter article involving [himself and the second supervisor]. [The first supervisor] was *angry* about the article and said that the Company was definitely against the Union. He asked [the employee] why he supported the Union and what good did he feel that the Union would do. [The first supervisor] said that he would never support the Union and that the Union was wrong and was not in the employees’ best interest. [The second supervisor] asked [the employee] what could the Union do for him that the Company could not do.” *Id.* (emphasis added). The ALJ concluded: “I find this interrogation, especially in the context of [the first supervisor] *exhibiting anger over a report in the union newsletter*, to be coercive and in violation of the Act.” *Id.* (emphasis added). That angry – and by extension threatening – confrontation with two supervisors castigating a lone employee could not be more different than the situation here where Drake and Sandoval chatted with each other for 20-25 minutes in a “cordial and friendly” manner while serving customers and Drake made one brief comment about the CNA and asked Sandoval one question about her opinion on the CWA without any follow-up questions or comments.<sup>1</sup>

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<sup>1</sup> The CGC argues that *Bates Nitewear Co.*, 283 NLRB 1128, 1128 (1987), does not apply here because a first-line supervisor posed the union-related question at issue there. [Answer at 8.] But the supervisor’s position in the chain of command constitutes only one aspect of the context-inquiry, and the Board found in *Sunnyvale Medical Clinic, Inc.*, 277 NLRB 1217, 1218 (1985), that union-related questions by a “director” did not constitute coercive questioning in light of the director’s “friendly” relationship with the employee and the “causal” nature of the questioning. Drake and Sandoval likewise had a friendly relationship, and Drake likewise asked a single, casual question here.

**D. Drake’s Question Contained No Threat Of Reprisal Or Force.**

The CGC does not argue in support of the ALJ’s *per se* standard that the NLRA prohibits any question that could reveal whether an employee supports the union. As cited in FMC’s Exceptions Brief, the ALJ’s *per se* rule contradicts well-established Board law. See *Sunnyvale Medical Clinic, Inc.*, 277 NLRB 1217, 1218 (1985) (lawful to ask an employee why she joined a union); *Bates Nitewear Co.*, 283 NLRB 1128, 1128 (1987) (lawful to ask an employee “what [she] thought about the Union”); *Color Tech Corp.*, 286 NLRB 476, 476 (1987) (lawful to ask an employee “why the employees had gone to the Union”). In each of those cases, the Board found no unlawful interrogation because the question at issue did not contain any threat of reprisal and was not accompanied by any other coercive words or conduct. Likewise, under the Board’s totality-of-the-circumstances test, Drake’s single, brief question about what Sandoval thought the union could do that FMC wasn’t already doing or couldn’t do contained no threat or any suggestion of coercion.

**II. ROBLEDO DID NOT COERCE SANDOVAL SIMPLY BY ASKING HER IF SHE FELT IT WAS NECESSARY TO BRING IN A UNION.**

**A. The CGC’s Authority Confirms That Robledo Did Not Violate The Act.**

The CGC cites the ALJ’s decision in *Hospital Serv. Corp.*, 219 NLRB 1, 12 (1975), for the proposition that “supervisor’s [sic] asking employees why they thought a union was necessary violated § 8(a)(1) of the Act.” [Answer at 9.] However, the CGC apparently overlooked the Board’s decision expressly rejecting that finding. *Id.* at 1. As the ALJ noted, the question at issue – nearly identical to the one at issue here – was “why [the employees] thought a union was necessary.” *Id.* at 12. In fact, the ALJ found that the supervisor asked the “why do you think a union is necessary” questions of two employees “in the context of other unfair labor practices and were for the clear purpose of eliciting information in aid of the Respondent’s antiunion campaign.” *Id.* at 12 n.35. But the Board rejected the ALJ’s analysis.

The Board held that “[a]t most the record shows that [the supervisor], after being told by one employee that she would vote for the union and by another employee that she wanted the Union ‘for better pay,’ asked each employee if she thought a union was ‘necessary’ to achieve

her goals.” *Id.* at 1 n.6. The Board found those questions did not constitute coercive interrogation. *Id.* at 1. That situation mirrors the one here with Robledo and Sandoval, where: (1) Sandoval told Robledo how the union had helped employees at a prior employer; (2) Sandoval told Robledo about a situation at FMC where she wished she had union support; and, in response, (3) Robledo asked “if [Sandoval] felt it was necessary to bring in a union to the hospital, if we had that many problems or whatever.” Thus, the Board’s decision in *Hospital Serv. Corp.*, should control the decision here.

**B. The CGC Further Misstates The Law.**

The CGC characterizes Robledo’s conversation with Sandoval as a “soft touch.” [Answer at 7.] The CGC also acknowledges that the conversation “occurred outside of any other coercive conduct” by Robledo, and that Sandoval affectionately referred to Robledo as “my son.” [Answer at 9.] Yet the CGC argues that Robledo’s single question about whether Sandoval thought a union was necessary constituted unlawful interrogation because: (1) Sandoval had “just been interrogated by Drake, who characterized unions as ‘foolish’”; (2) the conversation took place in Robledo’s office during work time; and (3) Robledo initiated the conversation. [*Id.*] Notably missing from the CGC’s recitation is any evidence of *coercion*. Indeed, the CGC seems to equate interrogation (*i.e.*, asking a question) with *unlawful* interrogation (*i.e.*, threatening questioning). That is not the law.

As discussed above, Drake’s comment that she thought the CNA foolish did not constitute an unfair labor practice or establish a generalized hostility towards union supporters; particularly where: Drake made the CNA comment, not Robledo; no evidence connected Drake’s question to Robledo’s; and no evidence supports any close temporal proximity between the two questions, which could have been nearly two months apart. [ALJD at 14-15 (Drake/Sandoval conversation occurred in “early March,” and the Robledo/Sandoval conversation happened sometime “in March or April”).] Moreover, the fact that the conversation took place in Robledo’s office does not suggest coercion because *Sandoval* went there to ask

Robledo a work-related question. Robledo did not call her in to his office to ask her the question (like being called to the principal's office for discipline).

Finally, Board law firmly establishes that a supervisor does not violate the Act simply by initiating a union-related question. There must be some words or conduct that a reasonable employee would perceive as coercive. *Sunnyvale Medical Clinic, Inc.*, 277 NLRB 1217, 1218 (1985) (lawful for a supervisor to initiate question as to why employee joined a union); *Bates Nitewear Co.*, 283 NLRB 1128, 1128 (1987) (lawful for a supervisor to initiate question as to “what [the employee] thought about the Union”); *Color Tech Corp.*, 286 NLRB 476, 476 (1987) (lawful for a supervisor to initiate question as to “why the employees had gone to the Union”). Robledo did not say or do anything remotely coercive here.

**C. A Question That Could Cause An Employee To Reveal The Employee's Union Sentiments Does Not Per Se Constitute Unlawful Interrogation.**

The CGC acknowledges that the Board analyzes unlawful interrogation allegations under the “totality of the circumstances” test. [Answer at 15 (citing *Abramson, LLC*, 345 NLRB 171, 172-73 (2005), which applies the totality-of-the-circumstances test).] Under that “context” test, and as discussed above, the Board has repeatedly held that a supervisor's question that could cause an employee to reveal his or her union sentiments does not – standing alone – constitute coercive interrogation. *Abramson, LLC*, 345 NLRB at 172-73 (finding under the *Rossmore House*, 269 NLRB 1176 (1984), totality-of-the-circumstances test, that a supervisor lawfully asked an employee, “What about this Union?”, because the supervisor did not make any threats or promises).

**III. DRAKE DID NOT UNLAWFULLY INTERROGATE MARTINEZ BY ASKING DURING ORIENTATION IF ANYONE TALKED TO HER ABOUT THE UNION.**

The ALJ found, and the CGC does not dispute, that when Drake asked Martinez “if anyone had talked to me about the union at all there”: (1) Martinez was going through her initial orientation training; (2) Drake was showing Martinez around the dietary office as part of that orientation; (3) the CWA was actively trying to organize dietary office employees at that time; (4) Drake was showing Martinez the dietary-area bulletin boards, which had union organizing

information on them; and (5) part of Martinez' orientation scheduled for that same day included separate union-related presentations by the hospital's president and the head of orientation. [ALJD at 24; RT at 857-59.] In that context, Drake – the person responsible for ensuring that Martinez got all the orientation training – had a legitimate business reason to ask Martinez if anyone had yet talked to her about the union. *Cf. The Loft*, 277 NLRB 1444, 1457 (1986) (noting that “the Board has held that in certain circumstances employers may have a legitimate purpose for making a particular inquiry of employees which may involve, to some limited extent, union and/or protected concerted activities”).

It is true that Drake did not specifically ask whether a “member of management” had talked to Martinez about the union. But neither did Drake ask whether a non-supervisor co-worker had talked to her about the union. In the context here, with union organizing materials in front of them at the bulletin boards and with union-related orientation meetings scheduled that same day, Drake's question did not have a “natural tendency” to instill fear of discrimination in the mind of a reasonable employee.

The cases cited by the CGC do not hold to the contrary. [Answer at 5-6.] For example, in *Medcare Assoc., Inc.*, 330 NLRB 935, 941-42 (2000), the Board found that supervisors engaged in coercive interrogation involving four separate rounds of questioning by multiple managers aimed at forcing the employee to choose sides in a union organizing campaign. Here, Drake's brief question in front of the employee bulletin boards did not suggest or imply that Martinez needed to choose sides or that anything bad would happen to Martinez or anyone else. Similarly, in *The Loft*, 277 NLRB 1444, 1457 (1986), a supervisor unlawfully interrogated employees by asking them who attended off-site union meetings, implying in the context presented there that the employer would retaliate against employees who attended the union meetings. Here, Drake did not ask any questions about any union meetings and did not ask about other employees. Finally, in *Sunshine Piping, Inc.*, 350 NLRB 1186, 1193 (2007), the ALJ found and the Board affirmed that a supervisor engaged in unlawful interrogation where the supervisor told a new employee that the owner did not like unions, that the new employee

should not mention unions to the owner, and then asked if the employee was a union member. Nothing like that happened here where Drake simply asked Martinez in the context of union-related orientation issues whether anyone had talked to her about the union. Nothing in Drake's question suggested that something bad would happen to anyone who had told Martinez about the union.

#### **IV. DRAKE DID NOT THREATEN MARTINEZ.**

The CGC does not dispute that Martinez testified unequivocally on cross-examination that Drake "said it was possible that people could get a raise" and that "[s]imilarly, [Drake] told [her] that there was only a certain budget and that if people got a raise on one hand that it was possible that [others] could be let go." [RT at 855:14-25 (emphasis added).] The CGC asked re-direct questions, but did not ask any follow up questions about the raise/layoff issue. [RT at 860-61.] Additionally, the CGC does not dispute that if Drake said that unionization could possibly lead to raises, which could possibly lead to layoffs, such statements of possibility do not violate the Act. [See cases cited in FMC's Exceptions Brief at 12.]

#### **V. THE ALJ DID NOT ENTER A NARROWLY TAILORED REMEDIAL ORDER.**

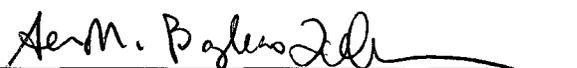
The CGC argues that the Board's "practices" require a remedial order applicable to 2000-plus employees where the ALJ's adverse findings involve only eight employees. But the CGC does not actually cite any Board case, rule, regulation, or practice for that proposition. The CGC certainly does not distinguish the United States Supreme Court authority, which holds that a remedial order must restrain only the violations actually found. *Communications Workers of America v. NLRB*, 362 U.S. 479, 480-81 (1960) (holding that "it would seem clear that the authority conferred on the Board to restrain the practice which it has found . . . to have [been] committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct"). The Board should tailor the remedial order here to either apply to the affected employees or "the Environmental Services and Nutrition Services employees," which includes the affected employees and the departments targeted for organizing by the CWA.

**Conclusion**

For the reasons stated above and in FMC's Brief in Support of Exceptions, the Board should dismiss the Third Consolidated Complaint allegations found in ¶¶ 5(b)(1), 5(d), 5(s)(1), and 5(x) and should narrow the ALJ's Cease and Desist Order and accompanying Notice To Employees accordingly.

RESPECTFULLY SUBMITTED August 12, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that I filed an electronic copy of the foregoing via the Board's electronic filing service on August 12, 2009, to:

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The undersigned certifies that I served a copy of the foregoing via e-mail on August 12, 2009, to:

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