

Nos. 09-2953 & 09-3485

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

COMMUNITY MEDICAL CENTER, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the petition of Community Medical Center, Inc. (“the Center”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order issued against the Center. The Board’s Order, which issued on May 29, 2009, and is reported at 354 NLRB No. 26, is final under Section 10(e) and (f) of the National Labor Relations

Act (29 U.S.C. § 160(e) and (f)) (“the Act”). The Board’s Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. §153(b)).¹

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is appropriate because the unfair labor practices occurred in New Jersey.

¹ The First, Second, Fourth, and Seventh Circuits have upheld the authority of this two-member quorum to issue decisions. *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *Narricot Indus., L.P. v. NLRB*, __F.3d__, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted* __S.Ct.__, 2009 WL 1468482 (U.S. Nov. 2, 2009). The D.C. Circuit has issued the only contrary decision. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377). The Supreme Court has agreed to resolve the split in circuits by granting certiorari in the Seventh Circuit case, and briefing should be completed by February 2010. The issue also has been briefed to this Court in *J.S. Carambola LLP v. NLRB*, Nos. 08-4729 and 09-1035, *St. George Warehouse, Inc. v. NLRB*, Nos. 08-4875 and 09-1269, *Racetrack Food Services, Inc. v. NLRB*, Nos. 09-1090 and 09-1509, and *NLRB v. Windstream Corp.*, Nos. 09-2207, 09-2208, 09-22394 and 09-2395.

The Center filed its petition for review on July 6, 2009, and the Board filed its cross-application for enforcement on August 14, 2009. Both were timely filed; the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Center violated Section 8(a)(1) of the Act by directing union representatives to retrieve their vehicles from its parking garage and leave the parking garage.

2. Whether substantial evidence supports the Board's finding that the Center violated Section 8(a)(1) of the Act by promising employees improved terms and conditions of employment through a "shared governance" initiative in order to discourage them from selecting the Union as their collective-bargaining representative.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint against the Center. The complaint alleged that the Center violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) in several respects. (A 3a.)²

² "A" refers to the Joint Appendix filed by the Center. "Br" refers to the Center's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Following a hearing, an administrative law judge found merit to three of the unfair labor practice allegations, including the allegations that the Center violated Section 8(a)(1) by directing Union representatives to retrieve their vehicles from the Center's parking garage and leave the garage; and offering employees improved terms and conditions of employment through a "shared governance" initiative in order to dissuade them from supporting the Union. (A 3a-22.) The Center filed exceptions with the Board, and the General Counsel filed a limited cross-exception. (A 1.)

On review, the Board reversed one of the judge's unfair labor practice findings, but affirmed his findings that the Center violated Section 8(a)(1) by directing union representatives to retrieve their vehicles from the Center's parking garage and leave the garage; and offering employees improved terms and conditions of employment through a "shared governance" initiative in order to dissuade them from supporting the Union. (A 1-3.) Those two unfair labor practice findings are at issue in the instant proceeding.

STATEMENT OF FACTS

I. THE BOARD'S FINDING OF FACT

A. Background; the Center's Operations and Organization

The Center, which is affiliated with the St. Barnabas Health Care system of medical facilities, is a 600-bed acute care hospital in Toms River, New Jersey. (A

2, 3a; A 142, 203, 342.) The Center's facilities consist of a main medical building and several auxiliary buildings, including a 400-space parking garage for visitors. (A 3a, 4; A 142, 211.)

The Center's operations are organized into eight multi-department divisions. (A 3a; A 68, 532.) The Center is overseen by an extensive hierarchy of managers and supervisors. (A 3a; A 532.) A vice president is in charge of each division. Departmental directors within each division report to their respective vice president. (A 3a, 4; A 68, 204, 532.) Vice presidents, in turn, report to Executive Director Mark Pilla, who is the Center's highest-ranking official. (A 3a; A 68.)

The Center employs about 2,800 individuals, including more than 800 registered nurses. (A 3a; A 142-43.) The majority of the registered nurses work in the Patient Care Services division. (A 3a; A 68, 143.) Lauren Burke is the vice president of the Patient Care Services division; she essentially functions as the director of nursing, and oversees all employees in her division. (A 3a; A 316.)

B. In March 2006, the Union Launches an Organizing Campaign at the Center, with the Goal of Representing the Registered Nurses for Purposes of Collective Bargaining; the Center Opposes the Campaign

In March 2006, the Union began an organizing campaign at the Center, with the goal of representing the registered nurses for purposes of collective

bargaining.³ (A 2, 4; A 121, 123, 145-46.) Union organizer Barbara Conklin was responsible for planning the campaign. (A 4; A 136, 282.) Another union organizer, Lisa Ruiz, was in charge of forming, and then directing, an in-house organizing committee at the Center. (A 4; A 121, 136.) The organizing committee consisted of Conklin, Ruiz, and other union organizers, including Keith Peraino and Sonny Berana. The organizing committee also included approximately 10 registered nurses employed by the Center. (A 4; A 123, 145, 154.)

Members of the organizing committee led the campaign. With the assistance of numerous prounion registered nurses, they took various actions to publicize the campaign and obtain enough support to file a representation election petition. Campaign supporters provided registered nurses with campaign literature, union paraphernalia, and authorization cards. (A 4; A 123, 125-34, 177.) In addition, campaign supporters frequently spoke with their colleagues about the benefits of obtaining union representation. (A 4; A 154.)

Organizing committee members regularly met with registered nurses in the Center's coffee shop—which was open to the general public around the clock—to discuss the progress of the campaign and related matters. (A 4; A 124, 137, 159.) The organizing committee also convened on a regular basis at off-site locations.

³ The Union sought to represent the following unit of employees at the Center: “All full time, regular part time, and per-diem Registered Nurses, including Charge Nurses” (A 115.)

And, on some occasions, organizers held general membership meetings to discuss the campaign. (A 6; A 121, 123, 147, 283.)

The Center was aware of the union campaign, including particular details such as the identities of the individuals who served on the organizing committee. (A 4; A 123, 145, 147, 207.) The Center sought to defeat the campaign. (A 1-22.)

To achieve that end, the Center utilized a wide range of tactics. Among other things, the Center hired two of the Union's organizers, Peraino and Susan Rosen, with the purpose of having them serve as key players in its attempt to counter the campaign. (A 4 & n.3, 6-7; A 204-07, 226, 540-41.) Peraino had served on the Union's organizing committee since its inception in March, and had been intimately involved in all aspects of the campaign, including strategizing and collecting signed authorization cards. (A 1-2, 4 & n.3, 5-7; A 161, 234.) Rosen had participated in the Union's prior organizing campaign at the Center, and had experience working with Peraino on several other union campaigns. (A 4; A 204, 234.)

In the summer, Rosen and Peraino resigned their union positions and assumed new jobs as labor relations consultants at the Center. (A 4 & n.3, 6, 21; A 540-41; A 204.) In concert with the Center's managers, they actively sought to convince registered nurses that they did not need a union to obtain better terms and conditions of employment. (A 2, 4 & n.3, 6-7; 179-80, 235-37.)

**C. On the Day that the Union Files an Election Petition,
the Center Orders Union Organizers To Remove Their Vehicles
from the Visitors Parking Garage**

As noted above, the Center has a visitors parking garage (“the garage”) on its grounds. (A 4-5; A 169, 211.) No Center rules, policies, or practices prohibit or limit visitors from parking in the garage even if the purpose of their visit is to just use the Center’s coffee shop, which, as noted above, is open to the public around the clock. (A 5, 6; A 195, 215, 363.)

During the previous campaign, union organizers parked in the garage without incident. (A 4; A 189, 191.) During the campaign at issue, union organizers Conklin and Ruiz regularly parked their cars in the garage without incident from March until the end of August. (A 4, 6; A 189, 192-93.)

On August 30, the Union, having obtained the necessary showing of interest from registered nurses, filed a representation election petition with the Board. (A 4, 6; A 115, 189, 191.) That same day, Ruiz arrived at the Center to distribute flyers announcing that the Union had filed the petition. (A 4, 6; A 191, 202.) As was her custom, Ruiz parked in the garage. (A 4; A 191, 202.) Peraino and former union organizer Rosen, who was also working for the Center, knew which union organizers parked in the garage. They also knew which types of cars the organizers drove. (A 4, 6; A 194, 234, 287.) Rosen shared this information with

Vice President of Operations Frank Gelormini, the Center's long-serving official in charge of parking facilities. (A 6; A 217.)

After distributing the flyers, Ruiz went to the coffee shop to meet with her fellow organizers. (A 4, 6; A 191.) Registered nurses were also inside the coffee shop. (A 192.) A Center security guard entered the coffee shop, approached Ruiz, and asked her if she was with the Union. Ruiz answered affirmatively. (A 4, 6; A 191.) The security guard then told Ruiz that she had to move her car out of the garage and that she could no longer park in the garage. (A 4, 6; A 191-92.) The security guard told Ruiz that someone in "administration" had instructed him to deliver the directive to the organizers. (A 4, 6; A 191-92.)

Soon thereafter, Gelormini and Assistant Director of Security Moore, accompanied by the same security guard, went to the coffee shop to further warn Ruiz about the importance of moving her car out of the garage. (A 4, 6; A 192.) Gelormini emphasized to Ruiz that if she refused to move her car out of the garage, one of two things would happen: the Center would either tow her car, or the Center would notify the police, who would give her a ticket. (A 4, 6; A 192.) Numerous registered nurses were present in the coffee shop. (A 192.) Ruiz removed her car from the garage. (A 4, 6; A 192.) Prior to August 30, Vice President of Operations Gelormini had never asked any visitors to remove their vehicles from the garage. (A 4, 6; A 216.)

The next day, registered nurses on the organizing committee distributed union flyers. (A 4; A 193.) One of the flyers referred to the upcoming election. (A 4, 6; A 193, 516.) A number of registered nurse organizers, including Linda Gural, met with Ruiz and Conklin in the coffee shop. (A 5; A 193.) Gural saw former union organizer Rosen and two security guards walking in the direction of the garage. (A 4-5; A 164.) A short time later, Gural noticed that Rosen and the security guards were walking back in the direction of the Center's main building. (A 4, 6; A 164.)

One of the security guards who had accompanied Rosen as they walked toward the garage entered the coffee shop and asked the organizers if they were "those Union people." (A 4; A 193.) The security guard then asked Conklin if she drove a white Solara. (A 4; 193.) Conklin stated that the Solara belonged to her. (A 4, 6; A 193.) The security guard told Conklin that the union organizers were no longer allowed to park in the garage, and that if Conklin did not remove her car, the Center would have it towed. (A 4, 6; 193, 286.) The security guard added that all union cars had to be removed from the garage or they would be towed. (A 4, 6; A 286.) As Conklin left the coffee shop to retrieve her car from the garage, she noticed Rosen sitting in a security vehicle next to the garage entrance. (A 4; A 286.) Several registered nurses in the coffee shop witnessed the exchange between the security guard and Conklin. (A 4, 6; A 193.)

D. On October 18, the Center Introduces a New Initiative Called “Shared Governance”; Through “Shared Governance,” the Center Promises Registered Nurses Improved Terms and Conditions of Employment

In 2002, Burke’s predecessor as vice president of patient operations had introduced a “councilor” model at the Center. Some registered nurses voluntarily served on some of the councils, which primarily dealt with clinical issues. (A 21; A 174, 221, 291-92, 334.) At no time did the Center refer to the “councilor” model as a “shared governance” system, or say anything to registered nurses about “shared governance.” (A 21; A 168, 237-38.) In 2003, the Center, without mentioning the term “shared governance”—or implementing a “shared governance” system—applied for and was awarded “Magnet Status” from a nursing association. “Shared governance” was not part of the application process. (A 21; A 196, 200, 268-69, 277-78, 304.)

In the summer during the union campaign, Peraino, who at that point was in his final days as a member of the organizing committee, told his fellow committee members that the only way the Center could defeat the campaign was by implementing “shared governance.” (A 9; A 183, 235.) He stated that, through “shared governance,” registered nurses would have a greater say over their working conditions, and would feel that they no longer needed to seek union representation. (A 20; A 183, 235, 260-61.) Upon joining the Center’s antiunion campaign, Peraino—and former organizer Rosen—helped introduce the concept of

“shared governance” to registered nurses. (A 20; A 159, 162, 174, 178-80, 237-38, 263.)

On October 18, the Center introduced and implemented “shared governance” as a new management model designed to give registered nurses significantly-expanded input into decision-making at the Center. Vice President of Patient Care Services Burke, who lead the rollout, held a “lunch and learn” meeting with registered nurses and departmental directors and assistant directors to introduce and explain the “shared governance” system to them. (A 21-22; A 250, 267-68.) She also held additional meetings to give presentations about “shared governance” and answer questions registered nurses had about “shared governance.” (A 324.) Burke urged registered nurses to volunteer on a “shared governance” committee, but further stated that if nurses did not volunteer, the Center would request that they serve. (A 20; A 294.) Prior to October 18, Burke had not distributed any materials about “shared governance,” or held any meetings about the topic. (A 20; A 168, 180, 237-38, 294, 331.)

In documents and presentations relating to the rollout of “shared governance,” the Center described “shared governance” as an innovative concept that would enable registered nurses to work collaboratively with managers to develop better working conditions and practices for the registered nurses, and to improve patient care. (A 20-21; A 365-500, 501-03, 520-31.) The Center stated

that “shared governance” would empower registered nurses, and would give them new decision-making authority. (A 20; A 502, 523.) It would also give registered nurses greater control over their “practice” and extended their “influence into administrative areas previously controlled only by managers.” (A 502.) Among other things, the Center’s “shared governance” system would empower registered nurses by allowing them to have a greater say in matters such as scheduling and staffing, as well as other terms and conditions of employment. (A 20, 21 & n.7; A 250, 293-94, 502.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Liebman) found that the Center violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by directing union organizers to retrieve their vehicles from the Center’s visitors parking garage and to leave the garage; and by promising employees improved terms and conditions of employment through a “shared governance” initiative in order to discourage employees from selecting the Union as their collective-bargaining representative. (A 1, 3.)

The Board’s Order requires the Center to cease and desist from engaging in the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights

guaranteed in Section 7 of the Act (29 U.S.C. § 157). (A 3.) Affirmatively, the Board's Order requires the Center to post a remedial notice. (A 3.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. Board counsel are not aware of any related case or proceeding that is completed, pending, or about to be presented to this Court, or any other court, or any state or federal agency.

STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

The Board's findings of fact are conclusive if they are supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e); *See Universal Camera Corp. v. NLRB*, 304 U.S. 474, 487-88 (1951); *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1151-52 (3d Cir. 1993).

Moreover, the Board's factual inferences are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it de novo. *See Universal Camera Corp.*, 340 U.S. at 488; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 231 (3d Cir. 2001). Finally, as the Court has repeatedly stated, "[t]he resolution of issues of credibility is clearly not for the Court." *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 171 (3d Cir. 1962). Accordingly, "great deference" should be given to the affirmed credibility determinations of the administrative law judge, who conducted the hearing and observed the witnesses. *ABC Trans-National Transp. v. NLRB*, 642 F.2d 675, 684-86 (3d Cir. 1981).

SUMMARY OF ARGUMENT

Following the advent of an organizing campaign, the Center took unlawful actions to dissuade employees from supporting the Union in the January 2007 election.

First, substantial evidence supports the Board's finding that the Center violated Section 8(a)(1) of the Act by directing Union representatives to retrieve their vehicles from the parking garage and leave the garage. Undisputed facts establish that, although Union organizers had parked in the garage without incident since the start of the campaign, the Center brought this practice to an abrupt halt on August 30, the very date on which the Union filed a representation election petition and publicized that event to registered nurses. On August 30 and 31, the Center, in front of registered nurses, ordered key Union organizers to remove their cars from the garage under threat of being towed or ticketed by the police. The Board reasonably found that the Center's edict was an opening salvo in the "critical period" leading up to the election, and conveyed the coercive message that registered nurses could also face retaliatory action if they continued to support the Union. The Center's action came quickly on the heels of the filing of the representation petition. The action was also quite extraordinary. The Center's vice president of operations had never asked any other visitors to remove their vehicles

from the garage. And the Center offered no credible explanation for its unexpected edict.

The Board also reasonably found that the Center unlawfully promised registered nurses improved terms and conditions of employment through a “shared governance” initiative, in order to discourage them from voting for the Union in the upcoming election. During a series of one-on-one meetings with influential registered nurses who were members of the organizing committee, former union organizer Rosen tried to get them to buy into “shared governance” as a better alternative than unionizing, and to go and spread the word to their co-workers. On October 18, with the election soon approaching, the Center introduced and implemented “shared governance.” Through this new system, the Center promised registered nurses unprecedented say in decision-making, and better working conditions.

The Center tries to overcome the Board’s finding by arguing that “shared governance” was either the continuation of an existing practice called “councils” or, in any event, a necessary component of achieving an award called “Magnet Status.” The Board, noting, among other things, that the Center’s position on “Magnet Status” had shifted, reasonably rejected these arguments, and found, instead, that “shared governance,” as introduced by the Center during the campaign, was a new management model designed to give registered nurses an

unprecedented say over their working conditions. Indeed, prior to October 18, the Center *never* distributed any materials, held plenary meetings, or made presentations about “shared governance.” As the Board explained, the Center’s effort to bootstrap its suspicious introduction of “shared governance” onto the council model or “Magnet Status” was unpersuasive.

ARGUMENT⁴**I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE CENTER VIOLATED SECTION 8(a)(1) OF THE ACT BY DIRECTING UNION REPRESENTATIVES TO RETRIEVE THEIR VEHICLES FROM THE VISITORS' PARKING GARAGE****A. Applicable Principles and Standard of Review**

Section 7 of the Act (29 U.S.C. § 157) guarantees employees “the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” Those rights are enforced through Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for employers

⁴ As a preliminary matter, the Center argues (Br 30-32, 51-52) that, in this proceeding, it can also overturn the Board’s direction of a rerun election if it can either reverse the Board’s unfair labor practice findings or persuade the Court that the violations were de minimis. The Center is simply wrong about this. Under settled law, the Board’s decision to direct a rerun election is not a final order. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964). It becomes ripe for review only if and when the Center loses a rerun election and is found, in an ensuing unfair labor practice decision, to have breached its duty to bargain by failing to honor the results of that election. *See Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534, 543 (3d Cir. 1983); *NLRB v. Low Kit Mining Co.*, 3 F.3d 720, 729-30 (4th Cir. 1993); *NLRB v. Intertherm*, 596 F.2d 267, 278 (8th Cir. 1979).

It should also be noted that if the Court in this case were to reverse the Board’s unfair labor practice findings, the Board still retains jurisdiction to rule on Election Objections 1 through 5. In its decision, the Board found it unnecessary to pass on these objections (A 1 n.4), given that the unfair labor practice violations alone supported the decision to order a rerun election. If the Board were to find merit to any of these election objections, that finding could become a new and independent basis for ordering a rerun election.

to “interfere with, restrain, or coerce employees in the exercise of [their Section 7] rights.”

To establish a violation of Section 8(a)(1), “it need only be shown that under the circumstances existing [the employer’s conduct] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.” *United Parcel Service, Inc. v. NLRB*, 706 F.2d 972, 978 (3d Cir. 1983). Further, an employer’s conduct must be viewed “in the context of its labor relations setting.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Thus, the Board must take into account “the economic dependence of the employees on their employers, and the necessary tendency of the former, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *Id.*

Whether an employer’s conduct is coercive within the meaning of Section 8(a)(1) of the Act is a factual question for the specialized expertise of the Board. *See generally Gissel Packing Co.*, 395 U.S. at 620; *Consolidated Diesel Co. v. NLRB*, 263 F.3d 345, 352(4th Cir. 2001). The Board’s findings of fact are conclusive if they are supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)). *See Universal Camera Corp. v. NLRB*, 304 U.S. 474, 487-88 (1951); *St. Margaret Mem’l Hosp. v. NLRB*, 991 F.2d 1146, 1151-52 (3d Cir. 1993). Moreover, the Board’s factual findings and inferences are not to be disturbed, even if the reviewing court would have made a

contrary determination had the matter been before it de novo. *See Universal Camera Corp.*, 340 U.S. at 488; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001); *Quick v. NLRB*, 245 F.3d 231, 240 (3d Cir. 2001). As this Court has recognized, under the substantial evidence standard of review, the Board's findings, inferences, and conclusions receive considerable deference. *St. Margaret Mem'l Hosp.* 991 F.2d at 1151-52; *accord Hedstrom Co. v. NLRB*, 629 F.2d 305, 313-14, 316 (3d Cir. 1980).

With respect to credibility issues in particular, this Court has long emphasized that “[t]he resolution of issues of credibility is clearly not for the Court.” *NLRB v. Butoni Foods Corp.*, 298 F.2d 169, 171 (3d Cir. 1962). Accordingly, “great deference” should be given to the affirmed credibility determinations of the administrative law judge, who conducted the hearing and observed the witnesses. *ABC Trans-National Transp. v. NLRB*, 642 F.2d 675, 684-86 (3d Cir. 1981). *See also Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001) (credibility determinations should not be reversed unless “inherently incredible or patently unreasonable”).

**B. Substantial Evidence Supports the Board's Finding
that the Center Violated Section 8(a)(1) by Directing
Union Representatives To Remove their Cars from
the Garage**

The Board reasonably found (A 2, 6) that the Center violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by directing union representatives to remove

their vehicles from the garage and leave the garage. As we show below, this action, which immediately followed the Union's filing of a representation petition, was an opening salvo in the "critical period" leading up to the election, and conveyed the coercive message that registered nurses also could face retaliatory action if they supported the Union.

It is undisputed that, for almost 6 months, nonemployee union organizers regularly parked their vehicles in the Center's garage during their visits to the public coffee shop, and that no rules prohibited visitors from parking in the garage even if their only purpose was to visit the coffee shop. (A 6; A 189.) The Center was aware that these union organizers were parking in the garage. Indeed, during a previous organizing campaign in 2004-2005, the Center had also permitted organizers to park in its garage. (A 6; A 189.) Further, Vice President of Operations Gelormini, who had served in that position since 1999, admitted that, prior to August 30, 2006, he had never asked anyone to remove his or her car from the garage. (A 6; A 210.)

On August 30, however, the day on which the Union took the significant step of filing a representation election petition, the Center ordered Ruiz, a lead union organizer, who had parked in the garage without incident on numerous occasions, to remove her car from the garage. (A 6; A 115 191-92.) Earlier that day, Ruiz had distributed union flyers announcing the election to registered nurses.

(A 6; A 192.) The next day, union supporters distributed more flyers about the election, and the Center ordered another key organizer, Conklin, to remove her car from the garage. On both occasions, and in front of registered nurses, Center officials made it clear that union organizers were no longer allowed to park in the garage. (A 5-6; A 192-93.)

As the Board found (A 6), the Center's actions, viewed in the totality of the circumstances, could reasonably be seen as retaliatory and coercive. The timing of the Center's actions alone was very significant. As noted above, the Center's about-face was right on the heels of the Union's filing a petition for an election, making it apparent to all that the two events were related. As the Board concluded (A 6), "it was more than a coincidence that the union organizers were directed to remove their vehicles on the same date that the representation petition was filed[,] and a flyer announcing the event was widely distributed at the [Center]." And, as the Board found (A 6), it was revealing that the Center provided no credible explanation for why it ordered the union organizers, out of the blue, to remove their vehicles from the garage. The Center's inability to come up with a credible explanation is hardly surprising, because the Center has no policies prohibiting visitors—such as union organizers—from parking in the garage, even if their only purpose for being at the Center is to visit the coffee shop. (A 6.)

Further, the Center's action was quite extraordinary. It was unprecedented, as far as Vice President of Operations Gelormini was aware. (A 6; A 216.) Gelormini admitted that since he assumed his position in 1999, the Center *had never before* asked anyone to remove his or her vehicle from the garage. (A 6; A 216.) In these circumstances, the Board reasonably concluded that the Center's action was a quick strike against the registered nurses' organizing campaign, which, by August 30, had succeeded in obtaining enough support to warrant an election. (A 6; A 189, 191.) The Center's retaliatory measure was, in effect, a warning to registered nurses—a warning that conveyed the message that retaliatory measures could be meted out against other and future manifestations of union support.

Notably, the Center does not challenge any of the Board's factual findings relating to this violation. In this regard, the Center leaves unchallenged, among other things, the Board's finding that a) there was a clear and significant nexus between the filing of the petition and the timing of the Center's edict; b) that it failed to provide any credible justification for its edict; c) that its edict was unprecedented; and d) that it had no rules prohibiting visitors from parking in the garage even if their only purpose was to use the coffee shop. Instead, relying on *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992) ("*Lechmere*"), it appears to argue that, notwithstanding the uncontested facts, its conduct could not have been

coercive, because the union organizers, as nonemployees, had a limited right of access to employers' facilities in the first place. (Br 29-30.) The short answer to the Center's argument is that it did not raise this argument in its exceptions to the judge's decision. Its exceptions are also totally devoid of any reference to *Lechmere*, or any argument based on that case or its progeny. Accordingly, Section 10(e) of the Act (29 U.S.C. § 160(e)) bars the Court from considering a challenge that the Center had not raised before the Board.⁵

In any event, the Center's reliance on *Lechmere* is misplaced. *Lechmere*, and its discussion of varying rights of access to an employer's property, has nothing to do with the undisputed edict that the Center gave to the Union's officials on August 30 and 31. Property rights are not at issue, nor are they relevant to the analysis. Thus, there is no dispute that the Center willingly permitted union organizers access to its property, and that it was aware that those organizers parked in its garage and frequented its coffee shop to carry out their organizing activities. The relevant question, contrary to the Center's suggestion, is the legal significance of what the Center did on August 30 and 31. As shown

⁵ Section 10(e) of the Act (29 U.S.C. § 160(e)) provides in relevant part that “[n]o objection that has not been urged before the Board . . . shall be considered by the [reviewing] court” absent “extraordinary circumstances” not present here. Application of Section 10(e) is mandatory, not discretionary. *Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 341 (3d Cir. 1984). *See also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982).

above, the Board reasonably found (A 6) that the Center's conduct on those dates constituted an abrupt, unexplained, and coercive change in its approach toward the organizers and, by extension, the campaign as a whole. By taking this action, the Center was sending a message to registered nurses that they, too, could expect retaliation if they chose to support the Union.

The Center also argues (Br 30) that the violation involved nothing more than discontinuing the parking "privileges" of organizers "who continued to enjoy unrestricted access to their on-site campaign headquarters at the [Center]." The Center's characterization ignores that fact that garage parking cannot really be termed a "privilege" when everyone who wants to visit the Center's coffee shop and who is not a union organizer, enjoys it. And the Center's contention that the union campaign went on despite this "minor inconvenience" (Br 30) ignores the fact that the test for whether an 8(a)(1) violation was committed is not whether the violations stops a union campaign. But it should be noted that the impact of any 8(a)(1) violation may well be heightened when it is committed soon after a union files the election petition. *See, e.g., Cogburn Healthcare Center*, 335 NLRB 1397, 1400 (2001), *enforced in relevant part*, 437 F.3d 1266 (D.C. Cir. 2006) (coercive nature of conduct beginning shortly after filing of representation petition was "undeniable"); *Creps United Publications*, 228 NLRB 706, 712 (1977).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE CENTER VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMISING EMPLOYEES IMPROVED TERMS AND CONDITIONS OF EMPLOYMENT THROUGH A "SHARED GOVERNANCE" INITIATIVE, IN ORDER TO DISCOURAGE EMPLOYEES FROM SELECTING THE UNION AS THEIR COLLECTIVE-BARGAINING REPRESENTATIVE

A. Applicable Principles and Standard of Review

It is settled that Section 8(a)(1) of the Act prohibits an employer from conferring improvements in terms and conditions of employment while a representation election petition is pending, for the purpose of inducing employees to vote against the union. *See NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944) (“[t]he action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as threats or domination”). Accordingly, an employer violates Section 8(a)(1) by promising to improve employees’ terms and conditions of employment in order to influence their union activities or vote in an upcoming election. *See, e.g., United Dairy Farmers Cooperative Ass’n v. NLRB*, 633 F.2d 1054, 1063 (3d Cir. 1980); *General Electric Co. v. NLRB*, 117 F.3d 627, 636-37 (D.C. Cir. 1997); *Scott v. Stephen Dunn & Associates*, 241 F.3d 652 (9th Cir. 2001) (a grant of benefit “designed to impact the outcome of a [Board] representation election is . . . ‘highly coercive’”) (citation omitted).

In determining whether an employer's announcement or promise of improvements is unlawful, the Board has drawn the inference that benefits granted or announced after a representation petition has been filed are coercive. *See Lampi LLC*, 322 NLRB 502, 502-03 (1996). *See also NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (where an employer announces an unprecedented and unanticipated improvement in employee benefits, the Board and courts will "view with a skeptic's eye" the employer's "deviational larges," because such "unilateral blandishing acts . . . tend to interfere with the exercise of free choice by the employees . . .").

As shown above, the Board's findings of fact are conclusive if they are supported by substantial evidence on the record considered as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951). On review, a court may not displace the Board's choice between fairly conflicting views of the evidence, even if the court justifiably would have made a different choice had the matter been before it de novo. *Universal Camera Corp.*, 340 U.S. at 488; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 231 (3d Cir. 2001); *see cases cited at p. 19*. Further, the Board's adoption of an administrative law judge's credibility determinations are entitled to great deference. *See Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718 (3d Cir. 2001)

(a judge’s “credibility determinations should not be reversed unless inherently incredible or patently unreasonable”).

B. The Center Unlawfully Promised Registered Nurses Improved Terms and Conditions of Employment Through a “Shared Governance” Initiative, in Order To Discourage Them from Selecting the Union as Their Collective-Bargaining Representative

Substantial evidence supports the Board’s finding (A 2, 19-22) that, during the critical period leading up to the election, the Center unlawfully tried to thwart the union campaign by offering registered nurses improved terms and conditions of employment through a “shared governance” initiative. This initiative was announced and implemented on October 18, 7 weeks after the election petition was filed and 11 weeks before the election. As the Board found, the Center’s “shared governance” initiative—which, as explained below in more detail, promised registered nurses unprecedented access to power and control and improved conditions of employment—was a critical component of the Center’s effort to derail the union campaign. (A 21-22.)

As the Board reasonably observed (A 21-22), the Center introduced “shared governance” in response to the union campaign, which had gained momentum and succeeded in garnering enough support to require an election. Thus, during the waning days of his tenure as a member of the organizing committee, Peraino—who became a key player in the Center’s antiunion campaign—told his fellow

organizing committee members that the *only* way the Center could counter union activity was through the introduction of “shared governance.” (A 21; A 183, 260.) As Peraino explained to his then-colleagues, with “shared governance” in place, registered nurses would gain a greater say in their working conditions, and they would no longer feel that they needed a union to represent them; in essence, “shared governance” was a way of organizing without a union. (A 21; A 183, 235.)

Peraino’s warning about “shared governance” was not idle speculation. To the contrary, it turned out to foreshadow the Center’s utilization of *that very tactic* to defeat the union campaign. (A 21.) The Center placed Peraino and Rosen on its payroll, and had them play important roles in its antiunion campaign. (A 21.) Part of their effort included selling the concept of “shared governance” to registered nurses as an alternative to unionization. As the Board explained, the Center’s management embraced “shared governance,” and in pursuit of management’s goal of defeating the campaign, Peraino and Rosen “sought to undermine the Union’s message by inducing employees to buy into shared governance rather than supporting the Union.” (A 21.)

Thus, when Peraino left the Union and began working for the Center, he informed his former colleagues on the organizing committee that his primary job at the Center was to work on special projects, including a “shared governance”

initiative. (A 21; A 150-51, 159-61.) He stated that the Center's top-level managers were highly motivated to implement "shared governance," and that "shared governance" was a better way to proceed than selecting a union. (A 21; A 178, 235.) The Board reasonably found that Peraino's statements sought to induce registered nurses to begin thinking about buying into "shared governance" as a better option than unionizing. (A 21; A 178, 235.)

The Board also found it revealing (A 21) that Rosen was "a pivotal and visible figure [for the Center] in pushing the concept of shared governance[,] and often talked to employees with [Vice President of Patient Care Services] Burke about the program." To further induce registered nurses to support "shared governance" and abandon the Union, Rosen—sometimes accompanied by Burke—met with several influential nurses who served on the organizing committee. (A 21; A 162-63, 237, 263, 283.) As the Board reasonably inferred, their strategic goal was to target key prounion registered nurses for one-on-one meetings and convince them, during these meetings, to embrace the concept of "shared governance"; Rosen and Burke hoped that those registered nurses would, in turn, convince their co-workers that "shared governance" was preferable to bringing in the Union. (A 20-21.)

Rosen and Burke singled out registered-nurse members of the organizing committee, during work hours, for sometimes-lengthy discussions. (A 20-21; A

162-63, 179-80, 237, 263.) During the discussions, Rosen linked “shared governance” to the union campaign by suggesting that registered nurses should view “shared governance” as a better option than unionizing. (A 20-21; A 162-63, 179-80, 263.) Thus, during a meeting with organizing committee member Gural, Rosen noted that Gural was in an influential position, due to her impending elevation to the presidency of the Union. (A 21; A 162.) Rosen told Gural that “shared governance” would be a better way to go than unionizing. (A 21; A 162.) Rosen and Burke also met with organizing committee member Helen Hucker, and told her that a “shared governance” system would involve employees and the administration, and that it would give registered nurses a beneficial voice in practice issues. (A 20-21; A 126, 179-80.) Rosen emphasized that the Center wanted “shared governance” to work. (A 20-21; A 180.) She also urged Hucker to co-chair the planned “shared governance” committee and act as its corporate liaison. (A 20-21; A 180.) Finally, Rosen told Hucker that if the organizing drive succeeded, it could cost Burke her job. (A 20-21; A 179-80.) At another meeting, Burke again tried to get Hucker to serve as co-chair of a future “shared governance” committee. Hucker declined. (A 20-21; A 180-81.)

Rosen also had several meetings about “shared governance” with organizing committee member Regina Smith. (A 21; A 236-37.) Rosen told Smith that “shared governance” would be beneficial to the registered nurses. (A 21; A 236-

37.) She also told Smith that the Union was a bad alternative, and that it would not do anything for the employees. Rosen offered Smith a position on a planned “shared governance” committee, but Smith did not accept the offer. (A 21; A 237.)

Rosen and Burke also met with organizing committee member Teresa Wiencke, and urged Wiencke to become a member of a planned “shared governance” committee; Wiencke declined. (A 4; A 263.) Rosen told Wiencke that “shared governance” would be a type of “democracy,” and would enable registered nurses to solve their own problems. (A 263.)

As the Board observed (A 21), the Center, largely through Peraino and Rosen, had ably prepared the groundwork for registered nurses to see “shared governance” as a potentially-alluring way of obtaining improvements without a union. (A 21; A 162-63, 178-81, 235-37.) Following those efforts, all that was left for the Center to do was follow through and introduce “shared governance” to the general population of registered nurses.

On October 18, it did just that. With the representation election soon approaching, Vice President of Patient Care Services Burke met with registered nurses and introduced and implemented the “shared governance” initiative. The presentation, coupled with the Center’s literature associated with “shared governance,” demonstrates that, with “shared governance,” the Center was taking employee-management relations in a profoundly different direction, and sought to

convince registered nurses that they would benefit as a result from this new workplace democracy. (A 20-21; A 237, 250-51, 501-03, 520-32.) Thus, underscoring that “shared governance” was something new at the Center, the Center described “shared governance” as an innovative concept and vision that would enable registered nurses to have a much greater say in areas that had previously been off-limits to them, such as “administrative areas.” (A 502-03, 520-31.) *See Audubon Regional Medical Center*, 331 NLRB 374, 412 (2000) (the “announcement itself indicates that something new was being proposed”).

The Center further explained that “shared governance” would give registered nurses unprecedented control, power, authority, and influence over matters such as decision-making: “Shared governance” was a managerial “innovation” that extended rule to registered nurses, who would work alongside managers for purposes of decision-making. (A 21; A 502-03.) Moreover, the Center emphasized that “shared governance” is “the [registered nurses] working alongside management to develop better *working conditions and practice[s]*” (A 502 (emphasis added)). As the Board found, the “shared governance” initiative offered registered nurses the real chance to see specific improvements in areas such as staffing, scheduling, hiring, and performance evaluations. (A 21 n.7; A 250, 441-42, 453, 455, 520-31.) Simply put, “shared governance” was a transformation of manager-employee relations at the Center.

In addition, it was unprecedented. Prior to the onset of the union campaign, the Center had never referred to “shared governance” or distributed any literature about the topic. Instead, it utilized councils relating to nursing practice, nursing performance improvement, nursing research, nursing leadership, and, eventually, professional nursing practice. The Center did not describe the councils as a “shared governance” system. And registered nurses did not see them as such. (A 20-21.) There is no evidence that the Center—or registered nurses—viewed the councils as any sort of “powersharing” arrangement between management and registered nurses or, for example as a vehicle that allowed registered nurses to have a say in administrative matters. (A 20.)

In sum, as the Board reasonably found (A 21-22), the Center introduced “shared governance” during the “critical period” leading up to the election as a means of defeating the union campaign. By encouraging registered nurses to support “shared governance,” the Center sought to convince them that, through this initiative, they could obtain significant improvements in their working conditions without a union. The explicit actions of Peraino and Rosen, coupled with the highly-suspicious timing of this new concept, and its unprecedented nature, make this plain. *See, e.g., Audubon Regional Medical Center*, 331 NLRB at 412 (finding unlawful an employer’s announcement during critical period of focus action team composed of nurses and managers who would deal with staff issues); *Beverly*

California Corp., 326 NLRB 153, 154 176-77 (1998), *enforced in relevant part*, 227 F.3d 817 (7th Cir. 2000) (finding unlawful employer’s announcement of the formation of an employee council to resolve workplace issues).

C. The Center’s Challenges to the Board’s Finding Are Without Merit

The Center’s challenges to the Board’s finding are without merit. As we show below, the Center has provided no reason for upending the reasonable findings and inferences upon which the Board based its conclusion that the Center unlawfully promised employees improved terms and conditions of employment through a “shared governance” initiative in order to discourage them from selecting the Union.

The Center first argues (Br 31) that it was “speculat[ive]” for the Board to find that the Center’s introduction of shared governance was connected to the advent of the union campaign. But, as Board found (A 22), long before the Center announced the shared governance initiative to employees on October 18, there were signs that the Center planned to use the initiative to blunt the Union’s campaign.

As shown, former union-organizer Peraino was instrumental in crafting the Center’s shared governance initiative. (A 20; A 207.) Before he left the Union to join the Center’s staff, he told his fellow members of the organizing committee that the Center could defeat the campaign by implementing a “shared governance”

system. He stated “shared governance” was, in essence, a way of organizing without having a union, because registered nurses would have a greater say over their working conditions. (A 20-21; A 178, 183.) And then, as soon as he joined the Center’s staff, he told registered nurses that one of the projects he would be working on was “shared governance” and that “shared governance” was a better way for the nurses to proceed than unionizing. (A 21; 178-79, 235.)

Similarly, Rosen, who like Peraino had joined the Center’s staff directly from the Union’s, had meetings with key registered nurse organizers and linked a proposed “shared governance” system at the Center to the union campaign. (A 21; A 162-63, 175, 237, 263.) The Board credited the testimony of registered nurses Gural, Hucker, Wiencke, and Smith, and reasonably found that, during the meetings, some of which Vice President of Patient Care Services Burke also attended, the Center proposed “shared governance” as an alternative to bringing in a union and urged influential nurses to buy into “shared governance.” (A 20-21; 162-63, 178-79, 237, 263.)

To take one example, Rosen and Burke targeted Gural for a private meeting, because she would soon be elevated to the presidency of the Union. During the meeting, Rosen told Gural that “shared governance” would be a better way to go than unionizing. (A 21; A 162.) To take another example, Rosen told registered nurse Smith, who she had also targeted for a private meeting, that “shared

governance” would be good for registered nurses and the Union was a bad alternative. (A 21; A 237.)

The Center claims (Br 44) that aspects of the Board’s findings about these meetings “departed” from the record. This claim is simply wrong. The Board’s findings are directly supported by the credited testimony, and the Center has provided no basis for disturbing those findings. (A 20-21; A 162-63, 178-79, 237, 263.) *See* cases cited at pp. 19-20. In a related vein, the Center’s attempt to substitute its speculative interpretations of why these meetings occurred is not a basis for disturbing the Board’s finding that the Center targeted these particular nurses as part of its antiunion campaign. (A 21.) In sum, the Board correctly found that these meetings, designed by Rosen and Burke to “flip” influential nurses, also shed important light on what the Center intended to accomplish by introducing “shared governance.” (A 21.)

The Center also gets nowhere in arguing (Br 48) that, contrary to the Board’s finding (A 20-21), “shared governance” was nothing more than a benign method for improving the relationship between nurses and patients, and had nothing to do with improving registered nurses’ terms and conditions of employment. The plain text of documents that the Center used during its rollout of “shared governance,” as well as credited testimony, show otherwise.

As the Board explained (A 20-21), “shared governance,” as envisioned by the Center, was about more than just improving patient care. Based on documentary and testimonial evidence, none of which the Center tries to refute directly, the Board reasonably found that “shared governance” was a transformative management process model designed to give registered nurses an unprecedented say in decision-making. (A 21; A 502-03, 520-31.) “Shared governance” was to allow registered nurses to enter a new realm at the Center—administrative “rule.” (A 502.) And, among other things, “shared governance” would allow registered nurses to work alongside management and achieve improvements in staffing, scheduling, hiring, and evaluations. Those items, of course, are all terms and conditions of employment, and the Center cannot argue otherwise. (A 21 & n.7; A 250, 410, 431, 502.)

The Center’s challenge—that the Board erred in finding that “shared governance” was a new initiative at the Center—is also unpersuasive. Contrary to the Center’s claim (Br 39), “shared governance” had not been part of the Center’s application for “Magnet Status.” As the Board explained (A 20-22), the credited testimony of registered nurses who served on the Magnet Status application committee confirmed that “shared governance” was not part of the application process. (A 268-69, 278.) Nor did the Center say anything to the contrary to the registered nurses. (A 168, 172, 180.) The Center’s effort to disturb this credibility

finding consists of its argument (Br 34) that the registered nurses were unreliable witnesses because they “learned very little” from their experiences on the application committee. But this line of attack does not even address the Board’s separate finding that the Center *never* referred to “shared governance—before, during, and after the application process.”⁶ In sum, the Center obtained “Magnet Status” without relying on the kind of system of “shared governance” that it introduced in October.⁷

Finally, the Center’s argument (Br 36-41) that “shared governance” was simply the continuation of a feature of the preexisting council system is without merit. As the Board found (A 22), the Center’s argument is nothing more than a failed attempt to “bootstrap” its introduction of “shared governance” onto something—the councilor system—that was not “shared governance.” The “shared governance” system that the Center introduced in October was markedly

⁶ Moreover, as the Board noted (A 22 n.8), the Center’s argument is also undermined by its shifting its rationales—at first, the Center claimed that there was no relationship between obtaining “Magnet Status” and “shared governance,” and then later it claimed that it “Magnet Status” required it to continue “shared governance.”

⁷ The Center’s reliance (Br 39) on a document issued by the “Magnet Status” accrediting agency is unpersuasive. That document states, in part, that the Center should continue “implementation of the shared governance structure with special emphasis on the role and function of the Clinical Practice Council.” But the “shared governance” initiative that the Center introduced in October went well beyond the council model, and promised improvements in terms and conditions of employment—not just improved clinical practices. (A 21.)

different from the councilor system. None of the documents establishing or merging the various councils even referred to “shared governance.” (A 21; A 342, 344, 357.) Although a “shared governance” handbook refers to the Councilor model as one *type* of shared governance, this is of no consequence. The Center, based on its own presentation, treated the version of “shared governance” that it rolled out in October as something new and “innovative.” (A 502-03, 520-31.) Something that is “innovative” does not already exist. As noted above, Vice President of Patient Care Services Burke had never before presented any materials on “shared governance” to registered nurses. (A 20.)

In sum, the Board reasonably found that the Center unlawfully promised employees improved terms and conditions of employment through a “shared governance” initiative in order to discourage them from selecting the Union as their collective-bargaining representative. The Center has failed to provide any grounds for disturbing this finding.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Center's petition for review and enforcing the Board's Order in full.

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