UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROFESSIONAL MEDICAL TRANSPORT, INC.

and **Cases 28-CA-22175**
28-CA-22289
28-CA-22338
28-CA-22350
28-CA-22519

INDEPENDENT CERTIFIED EMERGENCY PROFESSIONALS OF ARIZONA, LOCAL #1

GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

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Table of Contents

Table of Authorities

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Counsel for the General Counsel (CGC), pursuant to Section 102.46(e) of the Board's Rules and Regulations, files the following Brief in Support of Cross-Exceptions to the Decision of Administrative Law Judge William G. Kocol [JD(SF) 38-09] (ALJD), issued on November 9, 2009, in the above captioned cases.[1] Under separate cover, CGC also files with the Board on this date an Answering Brief to Respondent's Exceptions. It is respectfully submitted that in all respects, other than what is excepted to herein, the findings of the Administrative Law Judge (ALJ) are appropriate, proper, and fully supported by the credible record evidence.

The ALJ found that Respondent committed numerous and serious unfair labor practices. These violations include the unlawful withdrawal of recognition from the Union, failure and refusal to provide relevant information to the Union, unilateral changes to wages, hours and

[1] Professional Medical Transport, Inc. is referred to as Respondent. The Independent Certified Emergency Professionals of Arizona, Local No. 1 is referred to as Union. References to the ALJD show the applicable page number. "Tr. ___" refers to pages of the transcript from the hearing held July 21 through July 23, 2009. "GCX ___" refers to exhibits introduced by General Counsel at the hearing. "RX___" refers to exhibits introduced by Respondent at the hearing. "UX___" refers to exhibits introduced by the Union at the hearing.

working conditions of bargaining unit employees and direct dealing with employees in violation of Section 8(a)(1) and (5) of the Act. Moreover, the ALJ found that Respondent engaged in threats of termination in violation of Section 8(a)(1) of the Act.

More specifically, the ALJ found that Respondent engaged in violations of Section 8(a)(1) and (5) by making the following unilateral changes without notice and an opportunity to bargain with the Union; (a) assigning unit work to non-unit firefighters (ALJD at 13); (b) placing security cameras in the living quarters of employees at several stations (ALJD at 14); (c) closing two stations; (ALJD at 15); (d) changing healthcare benefits (ALJD at 16); (e) discontinuing Respondent's practice of allowing the Union president or his designee to use Blackberries in accordance with a Memorandum of Understanding (ALJD at 16). The ALJ further found that Respondent violated Section 8(a)(1) and (5) by (a) refusing to provide relevant and necessary information to the Union (ALJD at 9, 13); and (b) dealing directly with employees concerning the information Respondent was required to give to the Union. (ALJD at 9) The ALJ also found that Respondent engaged in independent violations of Section 8(a)(1) by threatening the Union president with removal from active duty for engaging in Union activities. (ALJD at 22)

In addition to the unfair labor practices found by the ALJ in this case, CGC respectfully requests that the Board find and conclude that Respondent's conduct which is the subject of General Counsel's limited cross-exceptions are violations of the Act as alleged.

I. BACKGROUND

A. Respondent's Operations

Respondent is an emergency medical transportation company that provides both emergency and general ambulance transportation services through various contracts with municipalities and private businesses throughout the Phoenix metropolitan area. (Tr. 58-59)

Although Respondent has been in existence since approximately 1958, it was purchased by its current owner and chief executive officer, Bob Ramsey (Ramsey), sometime in 2005. (Tr. 57)

Respondent has two types of operations: 911 Operations and General Transport. (Tr. 59-60) Respondent's 911 Operations, which is managed by 911 Chief Executive Officer Pat Cantelme (Cantelme) (Tr. 192), provides medical transportation and care in emergency situations. General Transport vehicles transport patients in non-emergency situations, intra-facility (Tr. 60), including to hospitals, assisted-living facility, and nursing home clients.

B. Recognition of the Union

The Union was founded by employees of Respondent and is not affiliated with any other union. (Tr. 217, 218) The Union's president, from its founding, has been Joshua Barkley (Barkley), a full-time employee of Respondent. (Tr. 217)

On July 7, 2006, Respondent recognized the Union as the exclusive collective-bargaining representative of the unit (the Unit), described in the recognition agreement as follows. (Tr. 85, GCX 2):

> All full-time paramedics, EMT's, IEMT's, and registered nurses, but excluding administrative staff individuals, support services, personnel not directly operating in the filed as an EMS provider, guards, office clerical and supervisors as defined under the Act.

In March 2007, Ramsey and Barkley met and negotiated a Memorandum of Agreement. (Tr. 229; GCX 5 and 26) In that agreement, Respondent agreed to recognize the Union as the collective-bargaining representative of "all the employees of Professional Medical Transport, Inc." (GCX 5)

II. ANALYSIS

A. The ALJ Erred by Failing to Find that the Transfer of Bargaining Unit Work to Non-Unit Firefighters Was a Violation of Section 8(a)(3) of the Act

1. Allegations

The Complaint alleges that Respondent not only transferred bargaining unit work to non-Unit firefighters in violation of Section 8(a)(5) of the Act but also that this transfer was motivated by union animus in violation of Section 8(a)(3). The ALJ found that the transfer of the work was a violation of Section 8(a)(5) of the Act, but failed to render a decision on the Section 8(a) (3) violation. (ALJD at 11, fn. 4) By not addressing the Section 8(a)(3) violation, the ALJ also does not resolve Respondent's argument that the Section 8(a)(3) allegation is barred by Section 10(b).

a. The Record Evidence Concerning the Transfer of Unit Work to Non-Unit Firefighters

The record evidence supports a finding the transfer of unit work to non-unit firefighters is both a Section 8(a)(5) violation by not bargaining with the Union over the transfer, and was motivated by union animus in violation of Section 8(a)(3) of the Act.

More specifically, when Ramsey originally bought Respondent, it utilized a small number of part-time employees who were employed by other entities on a full-time basis in firefighting positions (non-Unit firefighters). (Tr. 65) Respondent offered hours of work as EMTs, from time to time, to these non-Unit firefighters to cover shifts that could not be filled by full-time or non-firefighter part-time employees.

Barkley, whom the ALJ found to be a credible witness (ALJD at 12), testified that there were approximately 10 to 20 part-time non-unit firefighters utilized when he first was employed. (Tr. 276) After the Union was recognized by Respondent in July 2006, Respondent continued to

hire non-unit firefighters, and Respondent began to assign hours and shifts previously worked by Unit employees to firefighter employees. (Tr. 277-279) In as early as 2007 and throughout 2008, Barkley sought to bargain with Respondent regarding such hours, but to no avail. (GCX 5, page 11-13, 34; GCX 6; GCX 8)

Significantly, starting in or around September 2008, the number of firefighter employees hired by Respondent, and the resulting negative impact on the hours and shifts available to Unit employees, increased dramatically. Specifically, during September 2008, a company called MedCare ceased operations. (Tr. 116; 291) MedCare, a subsidiary of Southwest Ambulance, employed only firefighters in EMT positions. (Tr. 291) Ramsey admitted that Respondent actively recruited firefighters previously employed by MedCare, which resulted in the hiring by Respondent of a large number of the non-Unit firefighters in September 2008. (Tr. 117)

The ALJ credited the current employees who testified that as a result of the large influx of non-Unit firefighter employees, the unscheduled overtime that full-time Unit employees had been receiving on a fairly consistent basis was suddenly stopped. (Tr. 412, 437, 453-455, 485-486) Respondent informed employees that the unscheduled overtime hours were not available because Respondent had hired a lot of non-Unit part-time firefighters and that overtime was being given to the firefighters. (Tr. 434, 485)

The ALJ did not mince words in his credibility determinations of Respondent's witnesses on the matter of the transfer of the work. The ALJ found Ramsey's testimony to be "wholly incredible; he appeared to fabricating it as he testified." (ALJD at 12) The ALJ went further, finding Human Resources Director Joy Carpenter (Carpenter) and Scheduling Manager Kellie O'Connor's (O'Connor) testimony "so incredible that I am reluctant to credit anything they said without credible corroboration." (ALJD at 13) The ALJ follows with his conclusion that

Respondent reduced the unscheduled overtime hours for Unit employees by assigning that work to non-Unit firefighters. (ALJD at 13)

b. The Transfer of Hours from Unit Employees to Non-Unit Firefighters was in Violation of Section 8(a) (3) of the Act

Respondent was unable to articulate a legitimate business reason for the assignment of Unit hours to non-Unit firefighters. Respondent was only able to provide shifting excuses. On the one hand, Ramsey said it was because the full-time employees could not work too many hours due to safety, though on the other hand Ramsey testified that he allows firefighters, who work a full 56-hour work week as firefighters, to also work up to 40 additional hours for Respondent in the same week. (Tr. 77) Ramsey also asserted that firefighters are better at customer service and mapping, though such an assertion is not supported by the record. (Tr. 72) In fact, in earlier testimony, Ramsey boasted about the excellent training Respondent provides to its Unit employees. (Tr. 70)

On the other hand, O'Connor testified that unscheduled overtime hours are distributed based upon a monthly template and by considering whether full-time employees are low on hours or whether part-time employees need hours. (Tr. 535) O'Connor states she just fills the gaps and that employees can walk in, look at the schedule board, and ask to work a shift that is open. (Tr. 534) Justin Lisonbee (Lisonbee) testified that when he worked in scheduling for a few months, full-time employees would come in and the scheduling department would try to schedule them for open shifts. (Tr. 393) Lisonbee stated that the schedulers would call those employees that had expressed a desire to pick up extra shifts. (Tr. 393) However, contrary to such claims by Respondent, the record establishes that during the August to September 2008 time frame, Respondent scheduled non-Unit firefighters for shifts a month in advance without regard for the needs or desires of full-time unit employees. (Tr. 404)

2. Legal Analysis

a. The Record Evidence was Sufficient for the ALJ to Make a Finding that Respondent Violated Section 8(a)(3) by the Transfer of Unit Hours to Non-Unit Firefighters

CGC presented a strong *prima facie* showing that Respondent violated Section 8(a)(1) and (3) of the Act under *Wright Line*, 251 NLRB 1083, 1089 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), with regard to the transfer of Unit work to the firefighters and the ALJ erred in not ruling on this violation.

Specifically, the record shows that prior to Respondent's significant increase in the use of non-Unit firefighters in September 2008, the Union was pressing Respondent hard to meet its bargaining obligations and to meet and bargain with the Union. Respondent was becoming increasingly hostile to the Unit's collective-bargaining representative. (GCX 9-11, 22) There is no doubt that the Union's actions, through Barkley, were well-known to Respondent, and were viewed as a thorn in its side. Respondent reacted by hiring a significant number of firefighter employees so as to hit the Unit where it counts -- in overtime hours. The connection between the Union's advocacy on behalf of Unit employees, to the frustration of Respondent, and the denial of overtime hours to Unit employees, is palpable.

In its defense, Respondent failed to show that it would have transferred Unit work to the non-Unit firefighters absent the Unit employees' protected conduct, including the Union's asserting itself as the Unit's bargaining representative. To the contrary, even though the non-Unit firefighters may have become more available due to the closure of another employer, Respondent's existing employees continued to seek and make themselves available for overtime work. Moreover, Respondent's response to this allegation is comprised of shifting and

contradictory defenses which make evident that Respondent's asserted grounds for its massive increase in the use of non-Unit firefighters is mere pretext. For example, Ramsey explained the purported need for non-unit firefighter employees by stating that part-time firefighters had to be scheduled on certain vehicles, a claim contradicted by O'Connor, who stated that it did not matter whether it was a firefighter or a non-firefighter when placing employees on the general transport vehicles. In addition, Ramsey stated that firefighters could work more hours because their shifts as firefighters were not as "intense" as those for the full-time employees, though O'Connor testified that she would have normally turned to full-time employees seeking overtime before looking to part-time employees and then, finally, to non-Unit firefighters. The Board has held that "[s]hifting explanations for discharge may, in and of themselves, provide evidence of unlawful motivation." *United States Coachworks, Inc.*, 334 NLRB 118, 122 (2001) quoting *NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990). See also *Abbey's Transportation Services, Inc. v. NLRB*, 837 F 2d. 575, 581 (2d Cir. 1988): (shifting assertions strengthen the inference that the true reason [for an employer's decision to discharge an employee] was for union activity); *Sound One Corp.*, 317 NLRB 854, 858 (1995) , quoting *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985) : (the Board has long expressed the view that "when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for the conduct is not among those asserted.")

Based on the foregoing, it is respectfully submitted that the Board find that Respondent discriminatorily reduced the hours of Unit employees by assigning such hours to casual part-time firefighter employees in violation of Section 8(a)(1) and (3) of the Act.

b. The ALJ Erred when He Determined that He Need Not Resolve the Section 8(a)(3) Allegations

The ALJ found that because he ruled that Respondent had violated Section 8(a)(5) by unilaterally transferring Unit work to non-Unit firefighters, he need not resolve the Section 8(a)(3) allegations. (ALJD at 11, fn. 4) Not only is the legal requirements different for these two separate violations, but there would be language placed in the Notice to Employees that would be different for both violations. Employees have a right to know and receive a remedy if they are being discriminated against by Respondent due to their being members of a bargaining unit, and Respondent should be required to communicate to its employees that it will not discriminate against them in such a fashion.

CGC respectfully requests that the Board find a Section 8(a)(3) violation in Respondent's conduct and fashion an appropriate remedy for the violation.

c. The Section 8(a)(3) Transfer of Unit Work to Non-Unit Firefighters is Not Barred by Section 10(b)

The ALJ did not resolve the question of whether the Section 8(a)(3) violation concerning the transfer of Unit hours to non-Unit firefighters was barred by Section 10(b) of the Act, as contended by Respondent. (ALJD at 11, fn. 3) Respondent argued that the allegation set forth in the amended charge in Case 28-CA-22338 (which was filed on April 30, 2009, and served on Respondent on the same date (GCX 1(s)), i.e., that Respondent violated Section 8(a)(3) by taking overtime shifts away from full-time employees in favor of part-time employees, is barred by Section 10(b). Respondent contends that the original charge (GCX 1(a)), filed on January 29, 2009, and served on Respondent on the same date, failed to specifically allege a violation of Section 8(a)(3), when it charged that Respondent had violated Section 8(a)(5) by subcontracting Unit work to firefighters.

In *National Licorice v. NLRB,* 309 U.S. 350 (1940), and *NLRB v. Fant Milling Co.,* 360 U.S. 301 (1950) , the Supreme Court rejected contentions that the Board is limited in framing complaints to specific matters alleged in a charge. In *Fant Milling,* at 307, the Court stated:

> A charge filed with the Labor Board is not to be measured by the standard applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *Labor Board v. I&M Electric Co.,* 318 U.S. 9, 18 (1943). The responsibility of making that inquiry and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. Quoted at *Wells Fargo Armored Service Corp.,* 290 NLRB 936, 938 (1988).

Additionally, in *NLRB v. Antonio's Restaurant,* 648 F. 2d. 1206 (9th Cir. 1981), the court discussed the sufficiency of a complaint and the applicability of Section 10(b):

> The charge need not be technically precise so long as it generally informs the party charged of the nature of the alleged violations and the general allegations in the charge may later be supplemented or amplified by more specific allegations which relate back to the date the charge was filed. In sum, it is clear that the complaint allegation that respondent unlawfully withdrew recognition from the union on August 11, 1986, is closely related to the allegation in the original charge which asserted that respondent had violated Section 8(a)(1) and (5) by refusing to meet and negotiate a collective-bargaining agreement alleging the Union no longer represents the employees. The more specific allegation related back to the date of the original charge. Accordingly, Section 10(b) of the Act is not applicable here. *Wells Fargo* at 938, citing *Antonio's Restaurant* at 1210.

In the instant case, the conduct of giving overtime hours to part-time firefighters instead of full-time employees is an ongoing violation. Each and every act of a denial of overtime for discriminatory reasons occurring during the Section 10(b) period is a violation of the Act, even if the first such occurrence may fall outside the 10(b) period. As a result, though the Section 10(b) period applicable to the charge of April 30, 2009 (i.e., the six months prior to the filing and service of that charge) may not capture every unlawful denial of work, all such acts within the

Section 10(b) period are timely and warrant a Section 8(a)(3) remedy. CGC does not seek a Section 8(a)(3) remedy for any violations that occurred outside the Section 10(b) time frame, though, as set forth above, Respondent's conduct is also alleged as being violative of Section 8(a)(5). Such allegations are subject to an earlier Section 10(b) period.

B. The ALJ Erred in Failing to Find a Subsequent Movement of Surveillance Cameras Installed in Violation of Section 8(a)(5) was a Violation of the Act and By Not Ordering the Removal of the Cameras

1. Allegations

The Complaint alleges that Respondent, in violation of Section 8(a)(1) and (5), unilaterally installed surveillance cameras into the stations where Unit employees not only perform the functions of their jobs but also use as a rest area, complete with cooking, sleeping and recreational areas. During the hearing, evidence also was presented that the surveillance cameras were moved a second time after the initial installation. The ALJ found that the unilateral installation of security cameras in the living quarters of employees at several stations violated Section 8(a)(5) of the Act. The ALJ failed to order the removal of the cameras, stating that because Respondent relocated the cameras to other areas in the station after the initial installation, that negates the need for him to order removal of the cameras. (ALJD at 14) The sole affirmative remedy provided by the ALJ is to encompass this violation into a general bargaining order, with no specific mention of the violation.

Further, the ALJ failed to find that the unilateral relocation of the cameras to a second location in the stations was a violation as it was not specifically pled in the Complaint. (ALJD at 14, fn. 17) CGC urges the Board to order the removal of the surveillance cameras, returning the job locations to the status quo ante before the unilateral action of placing the cameras in the stations, order that Respondent must specifically bargain over the installation of the cameras and

find that the relocation is closely related to the initial charge, and that the issue was fully litigated, such that the ALJ was obligated to find a violation.

a. The Record Evidence Concerning the Installation of the Surveillance Cameras

In or around January 2009, Respondent began to install surveillance cameras in several of its stations. (Tr. 591) As employees testified, surveillance cameras appeared one day in their stations, and were located near bedrooms, bathroom hallways, and living spaces where employees rest between calls. (Tr. 400-401; 421-422; GCX 42, 43, 49) The ALJ determined and the record shows that at no time did Respondent provide the Union with notice or an opportunity to bargain over the installation of the cameras in stations and living quarters. (Tr. 324; ALJD at 14)

b. The Record Evidence Concerning the Relocation of the Surveillance Cameras

During the hearing, evidence was also presented that after the initial unilateral installation of the surveillance cameras, several of the cameras were unilaterally relocated to different areas in the stations. Employee Todd Wais (Wais) testified that the cameras were initially placed in Station 275 and 601 pointing at the sleeping quarters, the bathrooms and the day room where couches, recliners and TV sets are placed for employees to relax between calls. (Tr. 446-449; GCX 49) Wais testified that after several weeks, the cameras at his station were moved to different locations and appeared to be pointed more towards the entrances and exits of the station. (Tr. 451, GCX 49) Barkley testified that three weeks before the hearing, cameras were relocated in the station out of which he works, Station 604, and that a camera was installed directly over the recliner in the day room that he uses to rest in during downtime. (Tr. 323)

2. Legal Analysis

a. Remedy for Unilateral Placement of Surveillance Cameras

Having found that Respondent unilaterally installed security cameras in the stations, the ALJ was obligated to order an appropriate remedy for the violation. The ALJ states that because the cameras were relocated after the initial installation, that negates the need for an order to remove the cameras. (ALJD at 14) The ALJ does not provide any legal authority for that finding in his decision. In the case cited by the ALJ used as support for his finding of the violation, *Colgate-Palmolive Co.*, 323 NLRB 515(1997), the three cameras at issue were not ordered removed because the record evidence at the hearing established that two of the cameras had already been removed and one camera had been deactivated. Id. at 521-522. In *In re Nortech Waste,* 336 NLRB 554, 562 (2001), the administrative law judge, affirmed by the Board, ordered Respondent to rescind the unilateral changes, including the installing surveillance cameras. In both cases, Respondent's were ordered to bargain over the installation of the cameras. Id.

CGC respectfully requests that the ALJ's recommended order be modified to include that, upon the request of the Union, Respondent remove all security cameras from the stations into which those cameras were unilaterally installed. In the alternative, the ALJ's recommended order should be modified to provide that the parties be required to bargain over the installation of the cameras. The ALJ's order at present contains no specific requirement that the parties bargain over the installation and relocation of the cameras, and does not fully remedy the violations found by the ALJ.

b. The ALJ Erred in Not Finding the Unilateral Relocation of the Cameras to be a Section 8(a)(5) Violation

The record evidence shows that after the initial unilateral installation of the security cameras, Respondent moved several of them and installed further cameras. The ALJ refused to find a violation in this matter, stating that to do so would not provide Respondent due process as the allegations were not plead in the Complaint. The Board and the courts have long held that the Board is entitled, if not affirmatively obligated, to make findings on fully litigated unfair labor practices. *Monroe Feed Store,* 112 NLRB 1336, 1337 (1955); *Owens-Corning Fiberglass v. NLRB,* 407 F.2d 1357, 1361 (4th Cir. 1969). When an issue relating to the subject matter of a complaint is fully litigated, the ALJ and the Board are expected to pass upon it even though it was not specifically alleged to be an unfair labor practice in the complaint. Id. See also, *Enloe Medical Center*, 346 NLRB 854, 854 (2006). "All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put on his defense." *Owens-Corning Fiberglass,* supra. Such a complaint need state only the manner by which the unfair labor practice has been or is being committed, the absence of specifics being tolerated where there has been no specific showing of detriment. Id.

The Complaint in this case, at paragraph 10(b) states "In or about January 2009, a more precise date being unknown to the General Counsel, the Respondent installed surveillance cameras in the living quarters of several stations." Respondent had full notice that the installation and placement of the surveillance cameras was alleged to be a violation of Section 8(a)(5). Respondent presented a vigorous defense of that allegation, including Ramsey's testimony concerning his belief that the Union had been notified of the cameras' installation, and

employees were told that electronic equipment was going to be upgraded (Tr. 142), and that such communications constitute notice to the Union. (Tr. 142) Respondent also presented an email sent by Respondent to employees on February 11, 2009, announcing changes in technology. (RX 13) This email was issued to employees at a time after cameras had already been installed. Respondent was given a full opportunity to litigate the unilateral aspects of the security cameras and Respondent took full advantage of that opportunity. Therefore, the relocation of the security cameras was fully litigated and the ALJ was obligated to find the Section 8(a)(5) violation.

C. The ALJ Erred in Failing to Make a Finding As to Whether Respondent Violated Section 8(a)(3) by Removing a Blackberry Device from the Union President, and Failing to Recommend a Remedy for the Section 8(a)(5) Violation that Was Found

1. Allegations

The ALJ erred when he failed to make a finding concerning whether the removal of the Blackberry from the Union president constituted a violation of Section 8(a)(3) of the Act. The ALJ held that because he concluded that the removal of the electronic communications equipment from Barkley and his designees was a violation of Section 8(a)(5) of the Act, he need not decide the Section 8(a)(3) allegation because the remedies are substantially similar.

Further, the ALJ did not order that the electronic communications equipment be returned to the Barkley for his use. Rather, the ALJ simply provided for a cease and desist order, stating "Respondent is to cease and desist from discontinuing employees' use of PMT's electronic communication devices because employees engaged in union activity" and "unilaterally disallowing the Union president or his designee reasonable access to all PMT's communication and electronic devices." (ALJD at 25) The notice appears to remedy the Section 8(a)(3) violation concerning which the ALJ failed to render a decision but does not fully remedy the

8(a)(5) allegation that the ALJ sustained, which would require the electronic communications equipment to be returned to the Union president and his designees.

CGC respectfully requests that the Board find a Section 8(a)(3) violation, order a full and appropriate remedy, and order Respondent to return the electronic communication equipment, namely the Blackberry as it existed before the change, to the employees who had the ability to use the Blackberries prior to their removal.

2. The Record Evidence Concerning the Use of the Blackberry Device

Since Ramsey purchased Respondent in 2005, Respondent has provided Blackberry-type devices to its employees who work on ambulance crews. (Tr. 136) There are two types of Blackberries used by employees. One type is a device that stays with the vehicle, which employees utilize while they are on duty in that vehicle. (Tr. 140) Employees testified that they have routinely used this device for non-work communications, such as arranging to meet for meals with other employees. (Tr. 401-402; 435) The second type is the Blackberry assigned to all the Field Training Officers (FTOs). (Tr. 136) FTOs are senior, more experienced employees in emergency medical transportation. (Tr. 137) When Respondent issued Blackberries to FTOs, it told them that they could use the Blackberries as their personal phone. (Tr. 463) FTO Linda Combs (Combs) testified that that is exactly how she has utilized her Blackberry during the past several years, including for personal phone calls, internet access, and for whatever she wanted or needed. (Tr. 463) Combs also testified that she stores personal information in the Blackberry, including contact information and email addresses. (Tr. 463)

On May 8, 2009, Barkley sent two very short messages to employees, via FTO Blackberries, announcing the commencement of the Board's unfair labor practice hearing on June 16, 2009, and notifying employees of the new Union website. (Tr. 328-339; GCX 46 and

47) On May 9, 2009, Barkley sent another message, which went out to vehicles operated by Unit employees (where Unit employees receive information on their Blackberries), reminding employees about the hearing date and the new Union website containing Union news and information. (GCX 13) Forty-five minutes after sending this message, Ramsey sent a message to Barkley, via his Blackberry, ordering him to cease using Respondent's communication equipment for "personal communications," and informing Barkley that Ramsey had no recourse but to remove Barkley from active duty "today" until the issue is resolved. (GCX 12) Barkley immediately responded to Ramsey on his Blackberry by sending a message consisting of the word "copy." (GCX 12) Ramsey then countered and Barkley continued on with his work day but discontinued using the Blackberry for Union communications. Starting the next day, Barkley's company-issued Blackberry no longer worked. (Tr. 345)

Respondent failed to show that it had before, or since, issued to other employees a reprimand like that issued to Barkley on May 9, 2009, for using company-issued Blackberries for communications concerning non-work related or personal matters. In fact, Respondent refused to produce at hearing, as sought by CGC's subpoena duces tecum, any of the personal emails sent by employees over company-issued Blackberries within 30 days prior to hearing. (Tr. 22)[2]

Despite Respondent's practice of allowing employees to use company-issued Blackberries for personal use, soon after Barkley sent out the May 8 and 9, 2009, communications informing Unit employees of the unfair labor practice hearing date and Union website (GCX 13, 46 and 47), Combs, with no explanation, was directed by Respondent's Scottsdale regional manager to turn in her FTO Blackberry. (Tr. 464) Moreover, Barkley

[2] The Administrative Law Judge granted CGC request that he draw an adverse inference concerning Respondent's refusal to provide these subpoenaed documents and find that if Respondent had provided them, they would show that employees routinely use company-issued Blackberries for personal communications and that no other employee have been reprimanded as Barkley was reprimanded on May 9, 2009. (ALJD at 17)

testified that on May 10, 2009, service to his FTO Blackberry was shut off by Respondent, without notification, thereby causing Barkley to lose all of the information he had stored on the Blackberry. (Tr. 345)

3. Legal Analysis

a. Removing Blackberry Device from Barkley was a Violation of Section 8(a)(3)

The ALJ erred when he failed to make a finding that the removal of the Blackberry device from Barkley was a violation of Section 8(a)(3). The evidence clearly showed that the removal of the device was motivated by union animus as it was removed immediately after Barkley used the device to engage in union activity. To establish a violation of the Section 8(a)(3) of Act, the General Counsel must make a *prima facie* showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, 251 NLRB 1083, 1089 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). This *prima facie* showing involves four elements: union or protected activity, knowledge, animus, and adverse action. *Roadway Express*, 327 NLRB 25, 26 (1998).[3]

Once a *prima facie* case is established, the "burden will shift to the employer to demonstrate that the same action would have taken place in the absence of the protected

[3] The *Wright Line* burden of proof may be sustained with evidence that is short of direct evidence of motivation, such as inferential evidence arising from a variety of circumstances, including union animus, timing, and pretext. Id.; *Vulcan Waterproofing Co.*, 327 NLRB 1100, 1109-1110 (1999); *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Association Hospital del Maestro*, 291 NLRB 198, 204 (1988); *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). Moreover, "where the Employer's proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation." *Roadway Express*, 327 NLRB at 26. Finally, the Board will infer an unlawful motive where the employer's action is "'baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive.'" *J.S. Troup Elec.*, 344 NLRB No. 125 (June 30, 2005) (citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995); *ADS Electric Co.*, 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (1966). The same facts may establish both employer knowledge and unlawful motive. *NLRB v. Long Island Airport Limousine Service*, 468 F.2d 292 (2d Cir. 1972).

conduct." *Wright Line,* 251 NLRB at 1089. Thus, a respondent can avoid a violation by demonstrating through a "preponderance of the evidence that the worker would have been fired even if he had not been involved with the [u]nion." *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 395 (1993).[4]

If an employer presents such evidence, the General Counsel must then rebut the asserted defense by demonstrating the employer would not have taken the action in the absence of the employee's protected activities. *Operating Engineers Local Union No. 3,* 324 NLRB 1183, 1188 (1997); *Aero Metal Forms*, 310 NLRB 397, 399 n. 14 (1993).[5]

The record shows that a strong *prima facie* showing under *Wright Line* has been established. Barkley is the Union's president. He was engaged in Union activity when he sent the messages to Unit employees on his Blackberry that precipitated the written warning and removal from active duty. The record is replete with examples of Respondent's animus toward the Union and to Barkley's protected conduct in particular (GCX 7,9,10, 11).

Respondent, understandably, was unable to assert any defense to its actions, given the timing of its conduct and the nature of its conduct. Therefore, the ALJ erred in not finding a Section 8(a)(3) violation in this conduct.

[4] An employer must not only establish a legitimate reason for its action, but must persuade by a preponderance of the evidence that it would have taken the same actions even in the absence of the employee's protected activity. *Peter Vitalie Co., Inc.,* 310 NLRB 865, 871 (1993). Where, as here, the General Counsel establishes a strong prima facie case under *Wright Line,* the burden on Respondents is substantial. *Eddyleon Chocolate Co.,* 301 NLRB 887, 890 (1991).

[5] "Where an administrative law judge has evaluated the employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd., 705 F.2d 799 (6th Cir. 1982).

b. The Remedy Should Include Language of a Section 8(a)(3) and (5) Violation as well as an Order Requiring the Return of the Blackberry to Barkley

The ALJ's recommended order is confusing and does not fully remedy the violation he sustained. The ALJ's order contains no language requiring Respondent to specifically bargain with the Union over the use of the electronic communication devices. It further does not order Respondent to allow Barkley to continue to use the Blackberry device. Curiously, the ALJ's Order appears to include language -- discontinuing employees use of …devices because employees engaged in union activity[6] -- appropriate for a Section 8(a)(3) violation, despite not making a finding on the allegation.

CGC requests that the language above remain but that the Board make a specific finding of a Section 8(a)(3) violation. Further, it is respectfully requested that Respondent be ordered to return the Blackberry device to Barkley and to specifically bargain with the Union over the use of electronic communication devices.

D. The ALJ Erred in Not Ruling on Whether Respondent's Posting of a Sign-Up Sheet for Employees to Choose Whether Respondent Could Provide Employee's Information to the Union was Unlawful Interrogation Under Section 8(a)(1) of the Act

1. Allegation

The ALJ refused to make a finding that Respondent's posting of a sign-up sheet for employees to sign if they did not want information about themselves to be provided to the Union (ALJD at 9, fn 3) amounts to unlawful interrogation in violation of Section 8(a)(1) of the Act. Rather, the ALJ found this to be a violation of Section 8(a)(5) of the Act, by dealing directly with employees, and did not resolve the Section 8(a)(1) issue.

[6] (ALJD at 25.)

CGC respectfully requests that the Board make a finding of unlawful interrogation in violation of Section 8(a)(1) of the Act based upon Respondent's conduct, and order an appropriate remedy. Dealing directly with employees in violation of Section 8(a) (5) would not require the remedy that is required and necessary given the facts of this conduct by Respondent.

2. The Record Evidence Regarding the Sign-Up Sheet

The record evidence in this case was provided, in part, by Respondent's Human Resources Director Carpenter who testified that in September 2007, Respondent posted at its Station One location a notice informing employees that Respondent would be providing employees' addresses and phone numbers to the Union and inviting employees who did not want their information given to the Union to complete a "request to withhold personal information" form. (Tr. 179; GCX 15)[7] Barkley credibly testified that at no time did the Union consent to the posting of Respondent's notice, to Respondent's withholding of the information regarding Unit employees, or that employees could opt out by authorizing Respondent to withhold their information from the Union. (Tr. 181; 332)

3. Legal Analysis

The posting of the sign-up sheet, is, in essence, not only chilling in that it calls for employees to declare their sympathies towards the Union, but is also chilling in a broader sense in that it is an overt attempt by Respondent to further undermine the Union in a public way. By asking employees to declare whether they wanted their names and addresses provided to the Union, Respondent is asking employees to declare whether they supported the Union or not. This conduct on the part of Respondent is unlawful in that it interferes with employees' exercise of Section 7 rights and constitutes unlawful interrogation. An interrogation is unlawful if, in

[7] At this point, the Union had not made a formal request for the information, and did not do so until July 25, 2008. (GCX 35)

light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Specifically, applying the *Bourne v NLRB, 332 F.3d 17, 28 (2d Cir. 1964)* factors, one cannot avoid the conclusion that Respondent's conduct amounts to unlawful interrogation.[8] The ALJ erred in not finding and ordering an appropriate remedy. By only ruling on the Section 8(a)(5) violation concerning this conduct, the ALJ has kept from employees Respondent's declaration in a notice posting that it will not ask employees about their union sympathies. Despite Respondent engaging in the violative conduct, Respondent is being let off the hook in having to remedy the Section 8(a)(1) violation. Employees may continue to be in the dark that this conduct of Respondent was illegal. The purpose of a notice posting is to not only inform employees of their rights under the Act but to set forth publicly and in clear language the respondent's remedial obligations. Casehandling Manual, Compliance Procedures, Section 10518 (emphasis added). Respondent's interrogation was public and the remedy for that unlawful interrogation must also be in public.

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[8] In *Westwood Healthcare Center*, 330 NLRB No. 141 (2000), the Board discussed the test to determine whether interrogation is unlawful under Section 8(a)(1) of the Act. In that case, the Board applied the totality of the circumstances test adopted in *Rossmore House*, 269 NLRB 1176 (1984). The Board examines the following five *Bourne* factors to determine whether the questioning of an employee constitutes an unlawful interrogation:

a. The background, i.e., is there a history of employer hostility and discrimination?
b. The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
c. The identity of the questioner, i.e., how high was he in the company hierarchy?
d. Place and method of interrogation, e.g., was employee called from work to the boss's office; was there an atmosphere of unnatural formality?
e. Truthfulness of the reply.

However, the Board in *Westwood* cautioned as follows:

In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood*, supra, 330 NLRB No. 141, slip op. at p. 7 (2000). See also *Rossmore House*, supra, 269 NLRB at 1178, fn. 2. See *Cumberland Farms*, 307 NLRB 1479 (1992).

CGC respectfully requests that the Board find that this conduct, in addition to violating Section 8(a)(5), also violates Section 8(a)(1) and order an appropriate remedy.

E. The ALJ Erred in Failing to Find that by Presenting the Union with a "Take It or Leave It" Contract Proposal, Respondent Engaged in Bad Faith Bargaining In Violation of Section 8(a)(1) and (5)

1. Allegation

The Complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by "on or about June 16, 2008, the Respondent presented a proposed collective-bargaining agreement to the Union and informed the Union that the proposal must be either accepted or rejected in its entirety." (Complaint at paragraph 8(b))

The ALJ determined that this was not a violation of Section 8(a)(5) because after sending this initial communication that the Union had to either accept of reject the contract proposal in its entirety, Respondent did not persist with that position and resumed good faith bargaining shortly after the initial "take it or leave it" approach. (ALJD at 8) The ALJ found this to be simply a bargaining ploy and not violative of the Act.

CGC urges the Board to find that this conduct on the part of Respondent was not merely a bargaining ploy but a violation of Section 8(a) (5) of the Act. This "take it or leave it" attitude is inconsistent with good faith bargaining and Respondent should be held accountable for its conduct.

2. The Record Evidence of the "Take It or Leave It" Proposal

On June 16, 2008, by email, the Union received a contract proposal from Respondent. (Tr. 247; GCX 30) The cover letter accompanying Respondent's proposal was addressed to the Union and Unit employees, and signed by Vice President of Clinical Services Jim Roeder (Roeder) and Carpenter. (GCX 7) Simultaneously, Respondent sent an email to all employees --

though not to the Union -- announcing that it had given a contract proposal to the Union. (GCX 31) Within days, Respondent's cover letter and portions of its take-it-or-leave-it contract proposal were distributed to Unit employees at the focus group meetings, which also involved PowerPoint presentations. (Tr. 573-575 GCX 7, 55)

Respondent's letter advised employees that, "This contract is presented as a package deal and can only be accepted or rejected in its entirety," thereby clearly conveying that it was a take-it-or-leave-it package proposal, allowing no room for negotiations, including on the specific areas of concern listed above. (GCX 6, 7 and 27)

On June 17, 2008, the Union rejected the contract proposal because it was a take-it-or-leave-it proposal which did not allow for bargaining. (GCX 34) On June 18, 2008, the Union sent an email to Carpenter, outlining a few of its concerns with the contract proposal. (GCX 37) The Union also sent counter proposals to Respondent, though its counsel. (RX 10) The emails that were sent back and forth regarding this contract proposal show that the Union sought to engage in further bargaining with Respondent but would not merely accept Respondent's take-it-or-leave-it package in its entirety. (GCX 32, 34, 37; RX 9; RX 11)

3. Legal Analysis

The ALJ erred in not finding that the "take it or leave it" contract proposal constituted bad-faith bargaining on the part of Respondent in violation of Section 8(a)(5). By its conduct, Respondent indicated that it did not intend to enter bargaining with a "give and take" attitude (as opposed to merely being engaged in a "bargaining ploy").

A party must not enter bargaining with a "take it or leave it" attitude, and "must demonstrate a serious intent to adjust differences and to reach an acceptable common ground." *General Electric Co.*, 150 NLRB 192 (1964), enfd. 418 F. 2d 736 (2d. Cir. 1969); *American*

Meat Packing Co., 301 NLRB 835, 836 (1991); *Excelsior Pet Products, Inc.*, 276 NLRB 759, 761-762 (1985). Thus, "the mere pretense of negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirement of the Act." *NLRB V. Wonder State Mfg. Co.*, 344 F. 2d 210 (8th Cir., 1965); *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. sub. nom *NLRB V. Hardesty Co.*, 308 F. 3d 859 (8th Cir. 2002).

By presenting its take-it-or-leave-it complete contract proposal, Respondent failed to bargain in good faith, thereby violating Section 8(a)(1) and (5) of the Act. In *Endo Laboratories, Inc*., 238 NLRB 1074 (1978), the Board found that a respondent failed to bargain in good faith by presenting the union with a "take or leave" package. See also *Borg-Warnber Controls, a Division of Borg-Warner Corporation*, 198 NLRB 726 (1972), citing *Sweeney & Co., Inc.*, 176 NLRB 208 (1969), enfd. in pertinent part 437 F. 2d 1127 (5th Cir. 1971).

The ALJ erred in not finding this allegation to be a violation of Section 8(a)(5) of the Act. Respondent clearly had no initial intent to negotiate over the specific terms within the complete contract. Respondent only finally acquiesced to engage in more specific negotiations after the Union made a firm stand against the "take it or leave it" approach of Respondent. The ALJ erred in finding that the Union's push back against Respondent's unlawful conduct remedied the initial violation. Respondent went to the Union with a "take it or leave it" attitude and that conduct should be found violative of good faith bargaining.

F. The ALJ Erred in Failing to Find that Respondent, By Its Overall Conduct, Engaged in Bad-Faith Bargaining

1. Allegation

The Complaint alleges that, by the overall conduct of Respondent, Respondent engaged in bad faith bargaining. Specifically, the Complaint pleads at paragraph 11(a) and (b) that at various times between February 2007 and February 2009, the Union and the Respondent sought

to meet or met for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment of the employees in the Unit and during that same period, Respondent engaged in the following conduct:

(1) denigrated the Union in the eyes of Unit employees;

(2) bypassed the Union and dealt directly with employees;

(3) submitted "take it or leave it" proposals to the Union;

(4) engaged in surface bargaining with no intention of reaching an agreement;

(5) unlawfully interrogated employees concerning responses to the information requests made by the Union of the Respondent;

(6) refused to provide relevant and necessary information to the Union upon the Union's request;

(7) made unilateral changes to employees' wages, hours and terms and conditions of employment without notice to the Union or an opportunity to bargain about those changes;

(8) discriminatorily gave shifts and overtime hours to part-time employee/firefighters;

(9) undermined the Union;

(10) invited employees to decertify the Union;

(11) withdrew recognition from the Union; and

(12) altered a memorandum of understanding between the Respondent and the Union dated May 15, 2007.

[Complaint paragraph 11(a) and (b)]

The ALJ stated that the issue of whether Respondent engaged in overall bad-faith bargaining is a close one but assessing all the relevant factors, he could not conclude that the General Counsel has met his burden and dismissed the above allegations. (ALJD at 23) The ALJ outlines the bad faith bargaining allegations he sustained in his decision that included Respondent's unlawful refusal to provide the Union relevant and necessary information on two occasions, dealing directly with employees, unilaterally assigning Unit work to non-Unit firefighters, installing security cameras, relocating two stations without bargaining over the effects of the relocation. The ALJ fails to include in this list of violations Respondent's unlawful withdrawal of recognition and Respondent's unilateral changes to healthcare benefits that he found earlier in his decision[9]. (ALJD at 15-16)

The ALJ further states that even though Respondent bears much responsibility for the slow pace of negotiations, the Union also contributed initially. The ALJ points to the signing of the Memorandum of Understanding in March 15, 2007 (GCX 4) as an indication that Respondent and the Union were able to reach some agreements.[10]

The record evidence and the ALJD shows numerous and serious violations of Section 8(a)(5) of the Act by Respondent, spread out over almost a year. These violations show overall bad faith bargaining on the part of Respondent and the ALJ's findings to the contrary should be overruled.

[9] The changes to healthcare were made on or about June 1, 2009. (Tr. 184; GCX 17)

[10] The ALJ does not mention in this section that he found Respondent to have illegally and unilaterally changed the terms of that Memorandum of Understanding. (ALJD at (ALJD at 18)

2. The Record Evidence Concerning Bad-Faith Bargaining

a. Conduct During the First Year of Recognition

The ALJ looked to the conduct in the early stages of the collective-bargaining relationship between the parties in refusing to find an overall bad-faith bargaining violation. Despite the early stages showing some growing pains on the part of both parties, once Respondent discovered that the Union and Barkley would not merely roll over and play dead, its bad faith bargaining went into attack mode.

In February 2007, the Union presented a proposed collective-bargaining agreement to Ramsey. (Tr. 224; GCX 5) Ramsey was upset by the proposal, and called Barkley on the phone, informing him that Respondent did not consider the proposal to be a contract and would not consider it. (Tr. 224-225) Thereafter, in March 2007, Ramsey and Barkley met and negotiated a Memorandum of Agreement. (Tr. 229; GCX 5 and 26) In that agreement, Respondent agreed to recognize the Union as the collective-bargaining representative of "all the employees of Professional Medical Transport, Inc." (GCX 5)

b. Negotiations for a Collective-Bargaining Agreement

After the Union's initial contract proposal was rejected in its entirety by Respondent, on or about March 22, 2007, Barkley sent another proposal to Respondent entitled "Temporary Compromise." (GCX 27) Barkley received no response from Respondent. (Tr. 235). In September 2007, after several emails from the Union to Respondent requesting negotiations, the parties met for negotiations. By this time, both parties had respective negotiating teams in place. (Tr. 236-238)

The bargaining that ensued was not productive. During this period, Respondent's maintained that employees did not have the right to *Weingarten 420 U.S. 251 (1975)*

representatives. The Union became very concerned that Respondent's position on such a fundamental right reflected a broader, bad-faith approach to bargaining on the part of Respondent. (Tr. 239) After several attempts to resolve this and other issues, Barkley threatened to declare impasse. He sent a letter to Respondent setting forth a list of issues the Union wanted to resolve with Respondent before bargaining over the terms of a collective-bargaining agreement. (Tr. 239-240; GCX 6, 28) Barkley also suggested to Respondent that using a Federal Mediation and Conciliation Service (FMCS) mediator would assist the parties in moving forward with negotiations. (GCX 28)

In January 2008, Barkley contacted the FMCS and, as a result, a mediator was assigned to mediate the parties' bargaining. (Tr. 241) Despite Barkley's numerous contacts with the mediator to get negotiations started anew, such efforts were not immediately successful. (Tr. 241-244) Barkley also made attempts directly with Respondent, through phone calls and emails, to schedule negotiations with a mediator, but to no avail. (Tr. 241 - 244; GCX 48) Although Barkley initially called the mediator two or three times a week in attempts to get the parties to meet for negotiations, and then two to three times a month, Respondent still did not agree to meet for negotiations. (Tr. 244)

In May 2008, as a result of Respondent's failure to respond to his overtures to engage in bargaining, the Union filed an unfair labor practice charge. (Tr. 244) Barkley's motivation in filing the charge was to try to get Respondent back to the bargaining table. (Tr. 245) By this time, nearly two years had passed since Respondent recognized the Union, and no meaningful progress in negotiations had been achieved. In fact, the parties had met only five or six times between September and December 2007, with no agreements having been reached. (Tr. 238; GCX 240) In response to the Union's charge, Barkley was assured by Respondent that it would

send a contract proposal to the Union by June 13, 2008. Based upon Respondent's assurances, the Union withdrew its charge. (Tr. 245)

c. Unfair Labor Practices Begin

Starting on June 16, 2008, Respondent began a calculated attack against the Union by many of the acts that have been found by the ALJ to be unfair labor practices.

i. "Take it or Leave It" Contract Proposal

On June 16, 2008, Respondent submitted a "take it or leave it" contract proposal to the Union. The ALJ dismissed this allegation but CGC has taken exception to this dismissal and that exception is fully discussed above.

ii. Direct Dealing and Refusal to Provide Information

Respondent, after dealing directly with Unit employees concerning whether or not employees want their personal information to be given to the Union by posting the sign-up sheet discussed earlier, refused to provide relevant and necessary information to the Union, as found by the ALJ. (ALJD at 9, 13) Those requests were sent on July 25, 2008 and January 15, 2009, and both request the most basic information such as the names, phone numbers, and addresses of Unit employees. Respondent refused to provide any of the requested information. (Tr. 259-260, 308; GCX 35, 39)

iii. Unilateral Removal of Union's Ability to Use Electronic Communication Devices

Respondent also unilaterally took away from the Union president and his designee the ability to use electronic communication devices to communicate with Unit employees. (ALJD at 16) This, coupled with Respondent's refusal to provide the names and contact information of Unit employees made it virtually impossible for the Union to communicate with its Unit members.

iv. Unilateral Closure of Two Stations

During January 2009, Respondent closed two of its stations in Scottsdale, Arizona, i.e., Stations 606 and 607. (Tr. 202. 204; ALJD at 14) There were approximately 12 Unit employees affected by the closing of Stations 606 and 607. (GCX 24) These closures represented material changes to a significant working condition of Unit employees inasmuch as employees report to work at their respective stations, and immediately begin their work duties at those stations. (Tr. 211) Employees perform paperwork, stock their vehicles, clean their vehicles, and use office equipment at the stations, and also use the stations as a place to rest, eat, and shower throughout a 24-hour shift. (Tr. 211-214; GCX 25) Despite having the time to do so prior to the expiration of the leases, Respondent never notified the Union about the closing of the stations nor gave the Union a chance to bargain over the effects of the closing of those stations, including the impact of the closures on those that worked at the closed stations as well as those who would be impacted at the stations to which the Stations 606 and 607 employees would be transferred. (Tr. 205)

v. Unilateral Installation of Security Cameras

Respondent unilaterally installed cameras into stations in or around January 2009, with cameras being located in the living quarters of those stations and as discussed above. (ALJD at 15)

vi. Unilateral Changes to Employees' Healthcare Benefits

Respondent also made unilateral changes to Unit employees' healthcare benefits. Among the changes were an increase to the per-pay period contributions required of employees for health insurance and an increase in out-of-pocket expenses for emergency room visits. (GCX 21 and 22) Basically, employees would be required to pay an additional $5.61 to $14.28 per pay

period for medical benefits and would be responsible for significant out-of-pocket expenses related to certain coverage (including a $250 deductible for emergency room visits and out-of-pocket costs of up to 50% of all emergency room charges). (GCX 19 and 21)

At no time did Respondent notify the Union about these proposed changes. Instead, a few weeks before they were to go into effect on June 1, 2009, Respondent presented the changes directly to employees as a *fait accompli*. (Tr. 189) The ALJ found this to be a violation of Section 8(a)(5) of the Act. (ALJD at 16).

vii. Unilateral Assignment of Bargaining Unit Employees' Hours to Non-Unit Firefighters

Respondent also violated Section 8(a)(5) of the Act when it took away work from a large portion if not the entire Unit by unilaterally taking hours from Unit employees and gave them to non-Unit firefighters. (ALJD at 13)

viii. Unlawful Withdrawal of Recognition

Respondent left no doubt that it did not intend to ever bargain in good faith with the Union when it illegally withdrew recognition from the Union. On or about February 11, 2009, the parties met with the federal mediator for bargaining. (Tr. 312) The Union had come prepared with several proposals to present at the bargaining session, and Barkley understood that several tentative agreements were due to be signed at the meeting (Tr. 314); however, instead of bargaining, Respondent's counsel began the session by asking Barkley how the Union was formed and recognized. (Tr. 314) Barkley began to answer counsel's questions, though he tried to get the parties back to bargaining. (Tr. 314) Despite Barkley's efforts, Respondent's counsel then announced that Respondent did not believe that the Union represented a majority of Unit employees and demanded that the Union prove to Respondent that it continued to enjoy majority status. (Tr. 315) Barkley continued to try to get Respondent's bargaining team back to

bargaining, but Respondent refused and continued to repeat that it did not believe the Union enjoyed the support of a majority of Unit employees. (Tr. 315-316) At that point, Barkley and his team stood up, placed its contract proposals on the table, observed that Respondent was refusing to bargain, and left the room. (Tr. 315-316; GCX 41)

On the same day, Respondent sent an email to all employees via the Blackberry system. (GCX 40) Respondent's email informed employees that, "what started as a well-intentioned management decision has evolved over time into a failed experiment at good labor relations with [Union] leadership" and "the [Union] never gained the confidence of a majority of you who still have not designated the [Union] as your bargaining agent," as well as, "we met with [Barkley] and the [Union]…and insisted that he demonstrate the Union's lawful status as your representative either through a card check by a third party neutral or a secret ballot NLRB election. [Barkley] refused and walked out, ending the meeting." (GCX 40)

Since that date, Respondent has refused to recognize the Union as the exclusive collective-bargaining representative of the Unit. On February 12, 2009, Respondent filed an RM petition in Case 28-RM-616 with Region 28 seeking an election among Unit employees. That petition was dismissed inasmuch as it presented no question concerning representation. (RX 16, RX 15) Respondent's request for review of the dismissal of the petition was denied by the Board on November 2, 2009.

3. Legal Analysis

Respondent's conduct over the entire history of the collective-bargaining relationship with the Union, and especially after the Union rejected Respondent's "take it or leave it" contract proposal, shows that Respondent approached and conducted bargaining with no intention to

bargain in good faith. Rather, Respondent entered into negotiations expecting to make the Union bend to its proposals, and became frustrated when it was unable to do so.

In assessing whether an employer has bargained in bad faith, the Board looks to the totality of Respondent's conduct both at and away from the bargaining table. *Mid-Continent Concrete*, supra; *Overnite Transportation*, 296 NLRB 669, 671 (1989), enfd. 938 F. 2d 815 (7th Cir. 1991). The Board has enumerated several areas that it considers in evaluating that conduct. They include unreasonable bargaining demands, delaying tactics, unilateral changes in mandatory subjects of bargaining, efforts to bypass the Union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed upon provisions and arbitrary scheduling of meetings, failure to provide relevant information, as well as conduct occurring away from the bargaining table. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *Bryant & Stratton Institute,* 321 NLRB 1007 (1996); *Mid-Continent Concrete*, supra.

Notably, it is not required that an employer must have engaged in all or even most of "the enumerated activities before it can be concluded that bargaining has not been conducted in good faith.… Avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale or wide-ranging activities in every one of those areas.… Rather, 'bad faith is prohibited though done with sophistication and finesse.'" *Altorfer Machinery*, 332 NLRB 130 (2000), quoting *NLRB v. Herman Sausage Co.,* 275 F. 2d 229, 232 (5th Cir 1960).

The totality of Respondent's conduct in this case constitutes a pattern of egregious unlawful conduct designed to destroy the collective-bargaining process and undermine the Union. Believing that it had a friendly and inexperienced Union that it would be able to control, Respondent attempted to dominate all aspects of the bargaining. Respondent ignored the Union's proposals, attempted to bargain away legitimate rights of employees, dealt directly with

employees, refused to provide relevant and necessary information, presented a "take it or leave it" complete contract proposal, made unilateral changes to working conditions of employees, reprimanded and discriminated against the Union's president for his communications with employees and other protected conduct, limited the Union's ability to communicate with employees and, ultimately, unlawfully withdrew recognition. It is respectfully submitted that Respondent's conduct constitutes a palpable example of "bad faith bargaining."

The ALJ found that the Union bears some responsibility in the slow pace of the negotiations. Although that may be accurate, the Union bears no responsibility for Respondent's numerous and repeated unfair labor practices. The ALJ failed to identify at least two unfair labor practices he sustained in his determination that Respondent's overall conduct did not constitute bad faith bargaining, including the unilateral changes to healthcare and the unlawful withdrawal of recognition. If the ALJ is correct, that this is a close case, the addition of these two violations to his analysis surely push the Respondent's conduct into the overall bad faith bargaining violation.

CGC respectfully requests that Respondent be held accountable for its overall bad faith bargaining conduct and that the ruling of the ALJ be reversed.

G. The ALJ Erred in Failing to Find that Respondent Promulgated an Overly-Broad and Discriminatory Rule in Violation of Section 8(a)(1) of the Act

1. Allegation

The ALJ failed to find that Respondent's rule prohibiting employees from posting anything that is "divisive, inflammatory or derogative towards employees [or the] management of the Company" as alleged in the Complaint at paragraph 6(b) is overly-broad and discriminatory. The ALJ bases his ruling on the statement that there is no statutory right for the

Union to post materials. (ALJD at 21) The ALJ neglects to discuss that the letter where the rule was promulgated actually acknowledges the Union's right to post materials on Respondent's bulletin boards, thereby giving the Union the right to post materials. (GCX 22) Respondent's rule, however, prohibits certain content by not allowing the Union to post anything Respondent might take issue with which could include a Union's disagreement with contract proposals or proposed changes to wages, hours and working conditions.

The ALJ's dismissal of this allegation was in error and should be overruled.

2. The Record Facts of the Rule Prohibiting the Content of Postings

On September 4, 2008, Respondent issued a written reprimand to Barkley, signed by Cantelme (Tr. 293-296; GCX 22), attached to which was a copy of the Barkley's September 3 email, a communication unmistakably protected by Section 7 of the Act in that it consists of a Union officer's communications to Unit employees about the goals of the Union with respect to its representation of employees. (GCX 23)

Respondent's letter to Barkley also prohibits Barkley from posting anything that is "divisive, inflammatory or derogative towards employees, management or the Company." (GCX 22 and 23)

3. Legal Analysis

Respondent promulgated an overly-broad and discriminatory rule by telling employees that they cannot post anything that is "divisive, inflammatory or derogative towards …management or the Company." The ALJ determined that this rule did not violate the Act because there is no statutory right for the Union to post materials and there is no agreement, such as one would find in a CBA, that gives the parameters for the Union to post materials nor evidence of past practices of the Union posting materials. (ALJD at 21)

The ALJ does not discuss in his ruling that the language in the letter itself states, "PMT recognizes and respects the right of the Union to post information at all PMT work sites." (GCX 22) The ALJ simply says that without an agreement such as one in a CBA or evidence of past practice, Respondent has the right to approve the "content" of the Union's postings on its premises.

In determining whether the maintenance of a rule is violative, an inquiry must be made as to whether the rule would reasonable tend to chill employees in the exercise of the Section 7 rights. In *Lafayette Park Hotel*, 326 NLRB 824 (1998), in finding that the rule against "being uncooperative with supervisors…" did not violate the act, the Board noted that examples of behavior that would violate this rule, which were provided with the actual rule, would not tend to interfere with the exercise of Section 7 rights and rendered the rule specific, unambiguous and clear. *Id.* To the contrary, Respondent's letter, which was distributed to Unit employees, prohibited the employee serving as Union president from "posting divisive, inflammatory or derogative towards …management or the Company." It has long been recognized by the Board that the exercise of rights protected by the Act frequently produces "some irritation to employees, or unrest in a plant…." Unlike the rule in *Lafayette Park*, the rule imposed by Respondent in the instant matter would clearly and unmistakably chill employees' exercise of Section 7 rights by specifically prohibiting protected conduct.

The ALJ erred in not finding that prohibiting a Union from posting anything "divisive" would clearly and unmistakable chill any legitimate debate or disagreements about wages, hours and/or conditions of employment.

H. The ALJ Erred in Failing to Order a *Transmarine* Remedy

1. Allegation

Having found that Respondent failed to notify and bargain with the Union over the effects of the closing of two stations, affecting approximately 12 Unit employees, the ALJ failed to order the requested and standard order for such conduct under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), constituting no less than two weeks of backpay for the employees located at the stations unilaterally closed by Respondent. Instead, the ALJ ordered that those Unit employees whose working conditions suffered as a result of the relocation of the work should be paid some monetary compensation. The ALJ does not discuss what that compensation is, what factors should be looked into, and for what period of time the Unit employees are to be compensated.

The ALJ erred in refusing the standard remedy and ordering an unclear and equivocal remedy. CGC requests that the Board order the standard remedy for this type of violation in accordance with *Transmarine Navigation Corp.*, supra.

2. The Record Evidence Concerning the Closing of Two Stations

During January 2009, Respondent closed two of its stations in Scottsdale, Arizona, i.e., Stations 606 and 607. (Tr. 202. 204) Employees that worked out of these stations at the time of the closing were moved to other stations. (Tr. 209) There were approximately 12 Unit employees affected by the closing of Stations 606 and 607. (GCX 24) Respondent never notified the Union about the closing of the stations nor gave the Union a chance to bargain over the effects of the closing of those stations, including the impact of the closures on those Unit employees who worked at the closed stations as well as those who would be impacted at the stations to which the Stations 606 and 607 employees would be transferred. (Tr. 205)

3. Legal Analysis

The ALJ found that since there was no loss of employment concerning the 12 employees, the automatic minimum of two weeks back pay seems disproportionate. However, the ALJ recognizes the reasons for ordering the two week back pay remedy—a mere order to bargain over the effects of the relocation, coming as it will months if not years after the relocations happened, cannot hope to recreate the situation as it existed at the time. (ALJD at 24) The law is clear in this regard -- as a result of Respondent's failure to provide notice and an opportunity to bargain over the effects and impact of its decision to close two of its stations, Respondent is obliged to provide a *Transmarine* remedy to all impacted Unit employees.

In *Transmarine Navigation Corporation*, supra, an employer unlawfully refused to bargain with a union over the effects on employees of the shutdown of a terminal where the employees had worked. The Board found that the union was denied an opportunity to engage in meaningful bargaining at a meaningful time (i.e., before the shutdown) when the employer still may have needed the employees' services at that facility and, therefore, a measure of balance in the parties' relative bargaining power existed.[11] As a remedy for such a violation, the Board ordered the employer to engage in effects bargaining with the union and to pay the employees their normal wages from five days after the date of the Board's decision until one of the following four conditions occurred: (1) the parties reached agreement; or (2) a bona fide impasse existed; (3) the union failed to request bargaining; or (4) the union failed to bargain in good faith. In any event, the employees were to receive a minimum of two weeks' of wages in back pay. The Board ordered this limited back pay remedy partly to make the employees whole, but also to recreate in some practicable manner a situation in which the parties' bargaining position has economic consequences for the employer. See also *Richmond Convalescent Hospital*,

[11] See also *Metropolitan Teletronics Corp.*, 279 NLRB 957, 960 (1986).

313 NLRB 1247, 1249 (1994); *Sierra International Trucks*, 319 NLRB 948, 951-52 (1995); *Live Oak Skilled Care*, 300 NLRB 1040, 1042 (1990). In other words, the *Transmarine* back pay remedy is used to provide economic incentives for an employer to cure and avoid the effects of its bargaining violations.

Respondent's closure of its stations was not necessitated by an emergency, and did not occur in a framework which would allow Respondent to escape its bargaining obligation. See *Raskin Packing Company*, 246 NLRB 78, 80 (1979) (*Transmarine* back pay remedy is not ordered when an emergency event causes an employer to cease operations immediately, such as when an employer is forced to close its plant immediately upon learning that a bank had discontinued the employer's line of credit). The employer was unable to engage in effects bargaining before closing. Thus, the reason for a *Transmarine* remedy of back pay disappeared because the union was not in a position of strength when effects bargaining could have occurred.[12] Respondent has presented no facts that permit it to seek shelter under this exception. In fact, Respondent knew of the closing of both stations months before their eventual closure. Moreover, there is no evidence that Respondent's closure of the either station was mandated by any dire economic necessity.

The fact that the impacted Unit employees may not have suffered any actual loss in pay or benefits as a result of Respondent's closure of its stations does not negate the need for a *Transmarine* remedy in this case. In *Live Oak Skilled Care*, supra, the administrative law judge had concluded that an employer's former employees had not suffered actual losses and a *Transmarine* back pay remedy was inappropriate, because the hospital's new owner retained the employees, without any hiatus in employment. The new owner agreed to maintain the same

[12] The Board reached similar conclusions in *National Terminal Baking Corp.*, 190 NLRB 465 (1971) (employer closed when two delivery trucks stolen during the same week), and *Benchmark Industries, Inc.*, 269 NLRB 1096 (1984) (employer's building totally destroyed by a fire).

terms and conditions of employment and to recognize the union. The Board reversed the judge, and ordered a *Transmarine* remedy as an appropriate remedy for all such effects bargaining violations, regardless of loss.

The ALJ's distinction between employees who are terminated and those that are not is misplaced. A *Transmarine* remedy has been ordered in numerous cases where employees were not terminated. In *Sea-Jet Trucking Corp.*, 327 NLRB 540 (1999), employees were informed that the plant they worked at would be relocated and each and every employee was offered "continued employment" at the new location. The administrative law judge ordered a *Transmarine* remedy but also ordered compensation for other monetary costs such as moving expenses. The Board modified the remedy, removing the moving costs as something that could be bargained over but sustaining the administrative law judge's order of a *Transmarine* remedy. Id.

A *Transmarine* remedy is appropriate for the closing of two stations and the relocation of the 12 Unit employees regardless of whether they were terminated or not. CGC request that the Board modify the ALJ's order and fashion a remedy that includes the standard *Transmarine* remedy of two weeks of backpay, as a minimum, for the affected employees.

I. ALJ Erred in Not Ordering Interest to be Compounded on a Quarterly Basis

In determining make whole relief for the discriminatees, the General Counsel asserts that the ALJ erred in failing to order that interest on backpay be compounded on a quarterly basis. Only the compounding of interest can make adjudged discriminatees fully whole for their losses. IRS practice, along with and precedent from other areas of law provide ample legal authority for

assessing compound interest to remedy unfair labor practices.[13] See, 26 U.S.C. § 6622(a) (As part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress had mandated that the IRS compound interest on the overpayment and underpayment of taxes); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993) (compound interest appropriate in Title VII case); *Doyle v. Hydro Nuclear Services*, 2000 WL 694384, at *14 (DOL Admin. Rev. Bd. May 17, 2000) (involving whistleblower protection under Energy Reorganization Act of 1974), revd. on other grounds sub nom. *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066 (2002) (Department of Labor Administrative Review Board adopts policy of compounding interest on backpay awards); *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 633 F. Supp. 1047, 1057 (D. Del. 1986) (patent infringement case; compounding interest "will conform to commercial practices and proved the patent holder with adequate compensation for foregone royalty payments"); *Brown v. Consolidated Rail Corp.*, 614 F. Supp. 289, 291 (N.D. Ohio 1985) (Vietnam Veterans Readjustment & Assistance Act case; compound interest awarded regardless of defendant's good faith or justification); *United States v. 319.46 Acres of Land More or Less*, 508 F. Supp. 288, 291 (W.D. Okla. 1981) (eminent domain case; Fifth Amendment "just compensation" standard would be satisfied only by compound interest award). Indeed, the trend in recent years has been increasingly towards remedies that include compound interest, and the NLRA will soon be an anomaly if the Board continues with its current practice.

Accordingly, Counsel for the General Counsel asks that the Board adopt a policy that requires interest to be compounded on a quarterly basis. Under its current policy, the Board calculates interest on monetary remedies using the short-term Federal rate plus three percent.

[13] When Congress amended the Internal Revenue Code in 1982 to require the Internal Revenue Service to access compound interest on the overpayment or underpayment of taxes, it noted that it was conforming the IRS computation of interest to commercial practice. See S. Rep. No. 97 – 494(1), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047.

See *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987). Because the short-term Federal rate is updated on a quarterly basis, it would make administrative sense to also compound interest on the same basis. Id at 1173-74. In addition, compounding interest on a quarterly basis is more moderate that daily compounding, which has not been applied in the analogous Title VII context, but is more reflective of market realities than annual compounding, which is inadequate because it provides a significantly lower interest rate from that charged by private financial institutions that lend money to discriminatees.

III. CONCLUSION

Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board reverse the ALJ's findings and conclusions that are the subject of the above cross-exceptions and find that Respondent committed such violations of Section 8(a)(1), (3), and (5) of the Act as identified above, and to issue an order otherwise affirming and adopting the ALJD.

Dated at Phoenix, Arizona, this 31st day of December 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S CROSS-EXCEPTIONS and GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS in PROFESSIONAL MEDICAL TRANSPORT, INC., Cases 28-CA-22175, et. al. was served by E-Gov, E-Filing and by E-mail, on this 31st day of December 2009, on the following:

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