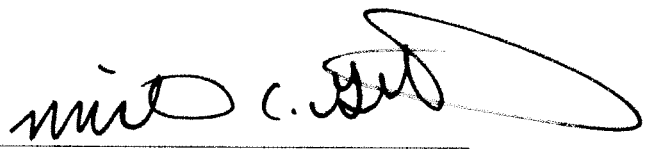
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROFESSIONAL MEDICAL TRANSPORT, INC.		
and	Case Nos.	28-CA-22175
		28-CA-22289
INDEPENDENT CERTIFIED EMERGENCY PROFESSIONALS OF ARIZONA, LOCAL #1		28-CA-22338
		28-CA-22350
		28-CA-22519

RESPONDENT PROFESSIONAL MEDICAL TRANSPORT'S

REPLY BRIEF IN SUPPORT OF EXCEPTIONS

SHERMAN & HOWARD L.L.C.



Robert J. Deeny
Thomas J. Kennedy
Michael C. Grubbs
2800 N. Central Avenue, Suite 1100
Phoenix, AZ 85004
Attorneys for Professional Medical Transport, Inc.

I. LEGAL ARGUMENT

A. The ALJ erred in finding that PMT unlawfully withdrew recognition from the Union.

One critical issue not permitted at the hearing involved Respondent's contention that the Union has never obtained majority support. Despite no evidence of majority support at any time, the ALJ incorrectly found that Respondent unlawfully withdrew recognition from the Union. The Board should reverse the ALJ's decision in this regard because Section 10(b) should not be read to allow recognition of a minority union, the law requires a showing of actual majority support in order to have a valid recognition, and because an employer cannot prove a loss of majority support where there has never been a showing of majority support.

The ALJ precluded Respondent from presenting evidence regarding the Union's lack of majority support at the time of voluntary recognition or since. The ALJ's decision was based primarily on the erroneous idea that Section 10(b), after six months have passed, bars any challenge to an employer's original unlawful recognition of a Union. This result cannot be compelled by the National Labor Relations Act or the case law interpreting the Act.

One of the principal purposes of the NLRA is to protect the rights of employees to choose, or not to choose, their bargaining representatives. Section 7 of the Act grants employees the right "to bargain collectively through representatives *of their own choosing*." 29 U.S.C. § 157 (emphasis added). Of course, a majority of employees in an appropriate bargaining unit may select a union as their Section 9(a) representative through a Board-sponsored secret ballot election. 29 U.S.C. §§ 159(c) and (e). Courts have long recognized that an election is the preferred method for determining the employees' bargaining representative. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory - indeed the preferred - method of ascertaining whether a union has majority support"). Employers may also voluntarily recognize a union under Section 9(a) without an election and certification,

but only if that recognition is based on an *actual* showing that the union has obtained support from a majority of the employees. *Int'l Ladies' Garment Workers' Union v. NLRB,* 366 U.S. 731, 737-38 (1961). An actual showing requires objective evidence that the employees have freely chosen to be represented by a union. Absent such evidence, the law has been, and remains, that an employer's voluntary recognition is legally insufficient to create 9(a) status because the employee, not the employer or union, has the right to choose whether to be represented by a union.

At the hearing, Counsel for the General Counsel ("CGC") was not permitted to present evidence that Respondent's original voluntary recognition was lawful or based on an actual showing that the union has obtained support from a majority of the employees. There is no evidence that there has ever been a card check, petition, or election. CGC failed to establish that majority status was ever confirmed or checked, despite PMT's continued denial that the Union has ever had the support of a majority of affected employees. Thus, it is clear that the voluntary recognition was illegal and invalid and the CGC failed to carry her burden of establishing a fundamental element of the unfair labor practice charges; namely, that the Union has majority support.

CGC points out that the cases cited by Respondent dealt with situations where the voluntary recognition was challenged within the 10(b) period. However, none of those cases *limited* their holdings to situations where the voluntary recognition was challenged within six months of the time it was conferred. For example, in *Georgetown Hotel v. NLRB,* 835 F.2d 1467, 1470-72 (D.C. Cir. 1987), the D.C. Circuit held that "voluntary recognition has been found to have occurred when an employer agrees to recognize a union through a card check or some other procedure and then subsequently confirms the union's majority status through that procedure."

The court reversed the Board's finding of a Section 9(a) relationship, stating "in this case, the Board is unable to point to any evidence in the record to suggest that verification, the critical prerequisite to recognition, ever occurred." *Id.* Nowhere in *Georgetown Hotel* did the court add an exception to the requirement for verification that, for example, "if six months have passed since voluntary recognition, there is no need for verification of majority support." Such a caveat is nonsensical, in contravention of the purpose of the statute to protect employee rights, and does not exist in the relevant case law. Further, the Board requires verification and confirmation for voluntary recognition. *See e.g., McLaren Health Care Corp.* 333 NLRB 256, 258 (2001)(holding that "voluntary recognition occurs "through a card check or some other procedure" that "subsequently confirms the union's majority status through that procedure.") Thus, the Board also requires confirmation of majority status. It is indisputable that no "procedure" or "confirmation" took place here. Courts have refused to find that a binding recognition agreement exists unless both of those requirements are satisfied.

Further, despite CGC's limited, erroneous view of the *Nova Plumbing* holding, the D.C. Circuit court has held, in analogous circumstances, that an agreement between an employer and union cannot create a Section 9(a) relationship without an actual showing of majority support. 330 F.3d 531 (D.C. Cir. 2003). Thus, the legal fiction upon which the ALJ and General Counsel have relied - that a piece of paper signed by an employer and a union, without any contemporaneous showing of majority support, somehow creates a valid, majority-supported employee bargaining representative - has been rejected by the controlling circuit court. In *Nova Plumbing,* the D.C. Circuit refused to enforce a Board order requiring an employer to bargain with a union under Section 9(a) *despite* the parties' clear and unambiguous contract language

recognizing the union as a majority representative. The Court refused enforcement because, as here, there was no actual showing that a majority of the affected employees supported the union.

The union in *Nova Plumbing* threatened litigation if the company refused to recognize and bargain with the union. Nova Plumbing initially responded by petitioning for a Board-sponsored election. The company, however, later withdrew its petition and signed a two-year agreement with the union to resolve their dispute. That agreement required Nova Plumbing to recognize the union as the majority representative of its employees. *Nova Plumbing Inc.,* 330 F.3d at 535. Notwithstanding the contract's language, there was no evidence of majority support among the employees. *Id.* Nova Plumbing bargained with the union briefly, but broke off negotiations, contending, in direct contradiction to the agreement it had signed, that it had a Section 8(f) relationship and that it was permitted to walk away from its bargaining obligations after the agreement expired. *Id.* The Board rejected Nova Plumbing's position and held that the agreement created a Section 9(a) relationship. Nova Plumbing sought judicial review of the Board's order. It argued that the Board's order was unenforceable because there was no actual majority support for the union among its employees. The court agreed, finding that the Board had impermissibly sanctioned a Section 9(a) relationship in the absence of an actual showing of majority support. *Nova Plumbing,* 330 F.3d at 536-39. Thus, under D.C. Circuit law, the ALJ's holding is incorrect.

Additionally, the cases cited by CGC are distinguishable. CGC cites *Pekowski Enterprises, Inc. v. International Brotherhood of Teamsters,* 327 NLRB 413 (1999) and similar cases for the proposition that an employer cannot challenge its original voluntary recognition of a union if more than six months have passed. However, these cases are distinguishable from the matter at hand. Importantly, in the cases cited by the CGC, the employers attempted to challenge

their earlier voluntary recognitions despite having entered into collective bargaining agreements with the various unions. No such collective bargaining agreement exists here.

For example, in *Pekowski,* the parties had entered into collective bargaining agreements that covered a nearly four year period, from 1992-1996. *Id.* at 414. Similarly, in *Local Lodge No. 1424 v. NLRB,* 362 U.S. 411, 80 S.Ct. 822 (U.S. 1960), the parties had entered into a collective bargaining agreement before the employer even argued that its original voluntary recognition was improper because the union did not enjoy majority support at the time of recognition. *Id.* at 419, 80 S.Ct. at 828. In *Jim Kelley's Tahoe Nugget,* 227 NLRB 357 (1976), also relied upon by CGC, the parties had successive collective bargaining agreements covering a fourteen year period. *See also, Strand Theatre of Shreveport Corp,* 346 NLRB 523, 536-37 (2006) (where parties had entered into collective bargaining agreements covering the period from 1999 through 2004); *Royal Components, Inc.,* 317 NLRB 971 (1995)(parties had entered into collective bargaining agreements covering period from 1990 through 1995).

The common theme of the cases cited by the CGC is that the parties had many years of collective bargaining agreements. Accordingly, the presumption upon which the CGC relies is more appropriately limited to situations where a collective bargaining agreement has been entered into between the parties. *See, e.g., Bartenders Ass'n of Pocatello ,* 213 NLRB 651, 652 (1974)("And, since Respondent recognized the Union and entered into bargaining agreements with it, this gives rise to the presumption that the Union's majority representative status has continued."); *Auciello Iron Works, Inc. v. NLRB,* 517 US 781, 786 (1996)(holding that union is entitled to conclusive presumption of majority status during the term of any collective-bargaining agreement up to 3 years). Here, as between Respondent and the Union, no such collective bargaining agreement has ever been entered into. Accordingly, any presumption of majority

status is inappropriate and Respondent should be free to challenge its original unlawful voluntary recognition of the Union.

The proposition that a voluntary recognition letter standing alone can establish the existence of a section 9(a) relationship runs roughshod over the principles established in *Garment Workers, supra,* for it completely fails to account for employees' right to representatives of their own choosing. Our nation's labor policies, as reflected in the NLRA, "have never included a preference for imposing a collective bargaining representative upon those who have not affirmatively chosen that representative by election." *Be-Lo Stores v. NLRB,* 126 F.3d 268, 272 (4th Cir. 1997). Consistent with the NLRA's mandate to protect employee Section 7 rights to choose their own bargaining representatives, the law requires an actual showing of majority support before imposing a Section 9(a) relationship on employees based on the agreement between an employer and a union. *Nova Plumbing,* 330 F.3d at 534.

Section 9 (a) of the Act and its imperative of a majority-designated collective bargaining agent must be the touchstone of the analysis. As the Supreme Court declared in *Colgate-Palmolive-Peet Co v NLRB,* 338 US 355, 363:" It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy...." In comparing Title VII with the NLRA the Supreme Court noted the NLRA's "...majoritarian processes". *Alexander v Gardner Denver Company*, 414 US 36,52 (1974). *Garment Workers*, *supra,* emphasizes the primacy of majority status under federal labor law. Moreover, the Board itself in *Gourmet Foods,* 270 NLRB 578, 584 (1984) recognized that: "The principle of majority rule is written into Section 9(a) of the National Labor Relations Act...It is this standard of majority rule that enables the Act's policies ....For it is the culmination of choice by a majority of employees that leads to the process of collective bargaining." *Id.* (refusing to

issue bargaining order absent proof of Union's majority status). Section 10(b) was never designed, intended, or aimed at subverting the majority status mandate of Section 9 highlighted in the law and consistently recognized and deferred to by the Supreme Court. The CGC's wooden mechanical approach to Section 10(b), unmindful and dismissive of the values of Section 9(a), must yield to much more ascendant interests, as exemplified by the above-referenced case law. *See also, Conair v NLRB* 721 F.2d 1355 (D.C. Cir. 1983) (holding that the Board has no remedial power to issue non-majority bargaining orders and further stating "[n]othing now in the text of the governing statute or in its legislative history suggests that Congress contemplated general authority in the Board to select or designate a Union for employees, a majority of whom never signaled assent to the arrangement.)" *See also,* 2 *The Developing Labor Law* at 2271 (Patrick Hardin & John E. Higgins, Jr. Editors-in-Chief, 5th ed. 2006) ("This requirement of majority status is viewed by the Board as both a direct limitation on its remedial authority and as a policy decision").

Finally, the contention that Respondent failed to prove actual loss of majority support is immaterial. The ALJ precluded this inquiry in pre-trial rulings based on Respondent's Motion for Summary Judgment on the issue, which was rejected by the Board. Respondent cannot prove a loss of that which has never been obtained. In other words, it would be impossible for Respondent to show a loss of majority support where there has never been any evidence or showing of majority support. For all the foregoing reasons, the ALJ's holding that Respondent unlawfully withdrew recognition from the Union was in error.

B. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by unilaterally assigning unit work to firefighters.

Another critical component of the ALJ's decision was his erroneous finding that, since in or about mid-September 2008, PMT has taken away shifts from full-time unit employees and

given them to part-time employees and has reduced the number of overtime hours assigned to certain full-time unit employees. This finding was incorrect because the allegations are barred by Section 10(b), PMT's use of part-time employees has followed an established past practice, any loss of unscheduled overtime was caused by the employees themselves, the unit alleged in the Complaint included part-timers, and the ALJ's decision to expand the alleged loss of overtime to all employees was improper.

1. The allegations are barred by Section 10(b)

The General Counsel relies on a "continuing violation" argument, without citation to any relevant case law, for the conclusion that the allegations are not time-barred. However, the evidence and case law indicates otherwise. Here, the allegations arise out of actions that took place, as alleged in the Complaint, in mid-September 2008. However, no charge was filed regarding this alleged unilateral change until April 30, 2009, which exceeds the 10(b) limitations period. (GC Ex. 1(s)). Accordingly, the allegations are untimely and should be dismissed.

Importantly, there is no evidence that anything PMT did in relation to filling unscheduled overtime changed within the 10(b) period. *Continental Oil Co.*, 194 NLRB 126 (1971) is instructive on this issue. There, the employer first implemented a method of allocating overtime, which allegedly violated its CBA, more than 6 months before the filing of the charge. The employer followed this same method during the 10(b) period. The Board found that the employer's mere adherence to its method of allocating overtime established outside the 10(b) period did not constitute a modification within the 10(b) period. The Board dismissed the complaint as time-barred. *Id.* Thus, the CGC's theory of a "continuing violation" is not supported by Board law and the allegation is time barred.

2. PMT's use of part-time employees has followed an established past practice

Unilateral action does not violate the Act if it merely follows an established past practice and does not alter the status quo. *See The Post-Tribune Co.*, 337 NLRB 1279 (2002). Here, the evidence showed that PMT's method of filling unscheduled overtime remained consistent. Accordingly, there was no "change" over which bargaining was required.

There was no evidence at the hearing that anything changed in regards to the way PMT filled unscheduled overtime shifts. In fact, as Ms. Kellie O'Connor testified, the way in which unscheduled overtime shifts are filled has remained unchanged since prior to the Union's very existence. Ms. O'Connor testified at the hearing that the process for filling overtime has remained the same since the before the Union came into existence. (TR at 533:2-23). There was no testimony at trial controverting Ms. O'Connor's testimony that the process by which overtime shifts were filled has remained consistent. Thus, because PMT has merely followed an established past practice, there was no unilateral change in violation of the Act.

3. Any loss of unscheduled overtime was caused by the employees themselves

Further, as Ms. O'Connor testified, each of the Union members who allegedly lost overtime opportunities was attending time-intensive paramedic school during the timeframe that they allege lost overtime opportunities. (TR at 608:11-610:22). Namely, Todd Wais, Justin Lisonbee, Jason Seyfert and Ryan Nolan were all in medic school at that time. (Id.; *See also*, TR:481:3-4). This testimony was not contradicted at the hearing. Thus, the ALJ's rejection of Respondent's contention that any drop in overtime hours was because these individuals' availability for overtime was limited was in error.

4. The unit alleged in the Complaint included part-timers

CGC contends that part-time firefighters should not be included in the bargaining unit. However, this argument misses mark. Here, the Complaint alleged a unit that included part-time employees. (TR at 90:4-13). The unit alleged in the Complaint did not specifically exclude part-time firefighters. Clearly, if part-time employees are included in the unit, as alleged in the Complaint, there can be no violation by the assigning of unit work to these part-time employees. Finally, if the unit as alleged in the Complaint is improper, then the General Counsel has failed to establish a fundamental element of its Complaint and all charges should be dismissed.

5. The ALJ's decision to expand the alleged loss of overtime to all employees was improper and violates PMT's due process rights

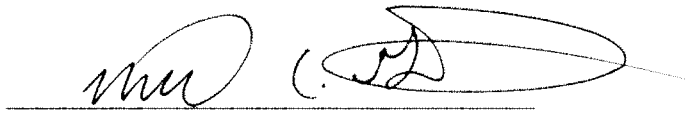
The ALJ compounded his error in mischaracterizing the unit by granting a make whole award for "all unit employees who . . . are determined to have lost earnings and other benefits as a result of the unlawful transfer of bargaining unit work." (24 ALJD 38-40). However, the Complaint, upon which Respondent relied, merely named five employees and PMT was under the impression at the hearing that it was these five named employees who were the ones seeking redress for the alleged loss of overtime. These were the employees whose overtime records were examined. These were the employees who testified at the hearing and who Respondent had the opportunity to cross-examine. The ALJ's expansion of the allegation to include all unit employees was improper and denied PMT the opportunity to fully defend its case.

II. CONCLUSION

For all of the foregoing reasons, the ALJ's decision and remedy that Respondent engaged in unfair labor practices, and the remedial aspects of the Judge's Order in that regard are incorrect and should be reversed

RESPECTFULLY SUBMITTED this 14th day of January, 2010.

SHERMAN & HOWARD L.L.C.



Robert J. Deeny
Thomas J. Kennedy
Michael C. Grubbs
2800 N. Central Avenue, Suite 1100
Phoenix, AZ 85004
Attorneys for Professional Medical
Transport, Inc.

I certify that I caused a copy of the foregoing to be electronically filed this 14th day of January, 2010.

COPIES of the foregoing were sent via Electronic mail this __ day of January, 2010, to:

Cornele A. Overstreet
Regional Director, Region 28
NATIONAL LABOR RELATIONS BOARD
2600 N. Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
cornele.overstreet@nlrb.gov

Sandra L. Lyons
Counsel for the General Counsel, Region 28
NATIONAL LABOR RELATIONS BOARD
2600 N. Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Sandra.Lyons@nlrb.gov

Joshua S. Barkley
Tony Lopez
INDEPENDENT CERTIFIED EMERGENCY
Professionals of Arizona, Local #1
11417 E. Decatur Street
Mesa, AZ 85207
coachjbar@yahoo.com

By _____