No. 09-60939

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VEVRIA NELSON

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

CORRECTIONS CORPORATION OF AMERICA

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Vevria Nelson ("Nelson") to review a Decision and Order of the National Labor Relations Board ("the Board")

dismissing an unfair labor practice complaint against Corrections Corporation of America ("the Company"). The Board's Decision and Order issued on November 12, 2009, and is reported at 354 NLRB No. 105. (D&O 1-18.)[1] The Board's Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). (D&O 1 n.1).[2]

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[1] Because the petitioner failed to timely file paginated record excerpts that contain the Board's Decision and Order, which includes the decision of the administrative law judge, the Board's brief cites to the Board's Decision and Order itself ("D&O"). "Tr." references are to pages of testimony in the unfair labor practice hearing before the administrative law judge. "GCX" and "RX" references are to the exhibits of the Board's General Counsel and the Company ("Respondent" before the Board), respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The First, Second, Fourth, Seventh, and Tenth Circuits have upheld the issuance of decisions by the same two-member quorum. *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S.Ct. 488 (Nov. 2, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). The D.C. Circuit has issued the only contrary decision. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377). On November 2, 2009, the United States Supreme Court granted a writ of certiorari on the issue in *New Process*, and argument was held on March 23, 2010. Before this Court, the issue was argued in *Bentonite Performance Minerals LLC v. NLRB*, No. 09-60034, and *NLRB v. Coastal Cargo Co.*, No. 09-60156, on February 1, 2010, and briefed in *Oaktree Capital Management L.P. v. NLRB*, No. 09-60327.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160 (f)), the alleged unfair labor practices having occurred in Tutwiler, Mississippi, within this judicial circuit, where the Company operates a correctional facility.

Nelson's petition was filed on December 11, 2009, and is timely under the Act, which places no time limitation on such a filing. The Company, which was the prevailing party before the Board on the dismissed allegations now before the Court, has intervened on the Board's behalf.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company did not violate the Act by discharging Vevria Nelson for engaging in abusive behavior toward other employees that jeopardized its multi-million dollar contract to house inmates for the State of California.

STATEMENT OF THE CASE

Acting on an unfair labor practice charge filed by Nelson, the Board's General Counsel issued a complaint, alleging that the Company discharged Nelson because of her protected activities in violation of Section 8(a)(1) of the Act (29

U.S.C. § 158(a)(1)). (D&O 5; GCX 1(c).) After a hearing, an administrative law judge issued a decision and recommended order, finding merit to the complaint allegation that Nelson was unlawfully discharged. The Company filed exceptions to the judge's finding that the Company had violated the Act. (D&O 1; Exceptions.) Thereafter, the Board (Chairman Liebman and Member Schaumber) issued its Decision and Order disagreeing with the judge, concluding instead that the Company did not violate the Act as alleged, and accordingly dismissing the complaint. (D&O 1-4.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; In 2007, the Company Enters into a Contract to House Inmates from California at Its Tutwiler Facility, Subject to Scrutiny from a Federal Court Receiver Supervising Health Care in the California Prison System

The Company operates correctional facilities throughout the United States, including a correctional facility in Tutwiler, Mississippi. (D&O 1, 5; Tr. 179-82, GCX 1(c) par. 2, 1(e) par. 2.) In 2007, the Company acquired a contract with the California Department of Corrections and Rehabilitation to house California inmates at the Tutwiler facility, a contract that served as the facility's sole source of inmates. (D&O 1, 11; Tr. 181-82, RX 14.) The Company secured the contract by agreeing to a $52 million renovation and expansion of the facility. (D&O 2, 11;

Tr. 182-83.) Entering into the contract subjected the Company to a federal court-appointed receiver that monitored the delivery of medical care to California inmates regardless of where they were incarcerated. The receiver was appointed in response to litigation regarding deficient health care services in California prisons. (D&O 1, 11; Tr. 184-86.)

B. Nelson Transfers to the Tutwiler Facility; Several Employees File Complaints Against Nelson

Vevria Nelson worked for the Company from 1997 until 2000. She rejoined the Company in August of 2006 and transferred to the Tutwiler facility in January of 2007, where she worked as a licensed practical nurse ("LPN") in the medical department. (D&O 1, 5-6; Tr. 31-33.) When Nelson rejoined the Company she signed a "Code of Conduct Acknowledgment Form," in which she acknowledged that she had read company policies and had agreed to abide by them. (Tr. 104-08, 204-05; RX 9-11.) Those polices included "[t]reating each other with respect" (RX 19 p. 6), and not using "physical violence, threats, or intimidation toward fellow employees. . . ." (RX 20 p. 1.)

During 2007, several employees at the Tutwiler facility filed Incident Statements and/or letters of complaint against Nelson. All of these documents were brought to the attention of Warden Robert Adams, who began working at the facility in February of 2007, and who had overall responsibility for managing the

facility. (D&O 1, 5-6, 12; Tr. 230-31, 237-38, GCX 1(c) par. 3(a), 1(e) par. 3, RX 50, 61-63.) The complaints included:

- On March 15, Mental Health Coordinator Mildred Ware complained that Nelson had confronted her in a "threatening and unprofessional" manner regarding keys to a medical office. (D&O 1, 12; Tr. 407-12, RX 50, 67.) Ware believed that Nelson would have made physical contact with her absent intervention by security. (D&O 12; Tr. 410.)

- On August 20, nurse's assistant LaTonya Rushing complained that Nelson had shouted at her and talked to her in an inappropriate manner. (D&O 1, 12; Tr. 232, 362, 365-66, RX 61.)

- On September 4, Rushing complained that Nelson had removed her bottle of water from the refrigerator and threw it in the garbage. (D&O 1, 12; Tr. 233, 364-65, RX 62.)

- On October 10, Licensed Practical Nurse Percythia Thomas complained that Nelson, in the presence of several other nurses and Registered Nurse ("RN") Supervisor Albert Maples, had grabbed medication from her hand. (Tr. 385-86, RX 63.) Thomas also complained that Nelson was rude, unprofessional, disrespectful, called people stupid, and verbally abused staff. (RX 64.)

- On October 13, Nurse Practitioner Tammy Taylor complained about "the ongoing problems occurring daily in the medical department because of the uncivil conduct" by Nelson. (D&O 1, 12; Tr. 233, RX 49.) Taylor described Nelson as a "saboteur and bully," whose conduct created a "toxic work environment" that brought about "low morale, magnifie[d] stress[,] and interfere[d] with teamwork, safety, and productivity while increasing staff turnover." (D&O 1, 12; Tr. 233, RX 49.)

On approximately October 29, Nelson met with RN Supervisor Maples and Health Services Administrator ("HSA") Gloria Johnson, who was in charge of the medical department. Johnson told Nelson that Assistant Warden John Jackson had

directed her to talk to Nelson about "complaints of unprofessionalism towards [her] co-workers." Nelson denied having engaged in inappropriate conduct. (Tr. 33-34, 99-104, 110, GCX 1(c) par. 3(a), 1(e) par. 3, RX 4.) Thereafter, Nelson filed a grievance in which she complained of harassment, but denied engaging in inappropriate conduct. On November 1, Nelson met with Assistant Warden Jackson, who rejected her grievance because he had not found any evidence of harassment against her. (RX 4.)

C. Between February and March 2008, Nelson Continues to Antagonize Coworkers; Nelson Files Another Grievance

On February 22, 2008, Nelson instigated a confrontation with Dr. Jerry Tankersley after she refused his request for pain medication for an inmate recovering from dental surgery. RN Supervisor Maples intervened after Nelson and Tankersley argued about the request. (D&O 1, 12; Tr. 329-32, 339-41, GCX 52.) Nelson then yelled at Maples and refused Maples's requests to calm down. (D&O 1, 12; RX 52.) Both Tankersley and Maples filed Incident Statements. (RX 51, 52.) Nelson, an African American, also filed an Incident Statement, accusing Maples of discriminating against her in how Maples handled the incident with Tankersley, who is white. (D&O 1; GCX 11.)

On February 26, Nelson filed a grievance with Human Resources Manager Victoria Holly against Supervisor Maples. Nelson asserted that Maples had

discriminated against her on the basis of her sex and race. She included several attachments, which addressed, among other things, the February 22 incident with Dr. Tankersley. (D&O 5, 6-7; Tr. 35-36, GCX 1(c) par. 3(a), 1(e) par. 3.)

HSA Johnson conducted the initial investigation of the February 22 incident. On March 5, Johnson issued a written counseling to Nelson. The counseling advised Nelson: "It is not acceptable for staff to engage in a shouting match . . . regardless of the circumstances . . . . Your behavior on [February 22] was not professional in nature and thus was a violation of [company] policy." (D&O 1, 8, 11; Tr. 82-84, 92-93, GCX 16, 31, 32.)

Nelson's dissatisfaction with Johnson's response led the Company to hold five meetings with Nelson between March 5 and April 14 in an unsuccessful attempt to resolve the grievance. Thereafter, Managing Director Jack Garner, who oversaw 11 facilities, including the Tutwiler facility, denied the grievance. (D&O 7-8, 13; Tr. 12, 40-48, 179, 332-33, GCX 2, 5, 6, 8.)

D. In April of 2008, an Inmate Dies at the Facility; Employees Single Out Nelson as a Source of Conflict; RN Supervisor Maples Resigns Due, in Part, to Nelson; In May of 2008, Nelson Complains About Pay

In April, an inmate death at the facility led to an investigation by the receiver. (D&O 1, 11; Tr. 186-87, 250-52.) Around this same time, Warden Adams had concluded that Nelson's interactions had created division in the

medical department, and he arranged for a training seminar to identify and alleviate employee conflict. (D&O 2; Tr. 194-95, 226, 239.) During one seminar session, Senior Human Resources Director Cindy Koehn asked participants to anonymously write down the name of any individuals who were a source of conflict in the medical department. Thirteen of 16 participants named Nelson as the sole source of conflict. Two participants named Nelson and other employees. (D&O 2, 5, 12; Tr. 195-96, 240-42, 359-60, 366-67, 386-87, 428, 430-33, RX 33, GCX 1(c) par. 3(a), 1(e) par. 3.) After the training, Koehn spoke to Warden Adams and Company Vice President Jimmy Turner, who oversaw 22 facilities including the Tutwiler facility, about the employees' dissatisfaction with Nelson. (Tr. 179-80, 195-96, 432-33.)

On April 23, Supervisor Maples told Warden Adams he was resigning effective May 6 because of the "[h]igh stress level" in the medical department. Maples informed Adams that Nelson had contributed to his stress. (D&O 2, 3, 13-14; Tr. 227, 245-48, 326-28, GCX 27.)

On May 5, Nelson mailed a letter she had prepared to Vice President of Health Services John Tighe concerning the difference in wages between RNs and LPNs at the facility. In the letter, signed by Nelson and 14 other LPNs, the LPNs asked for a $5 per-hour wage increase. (D&O 5, 8-9; Tr. 51-54, 158, 169-70, GCX 1(c) par. 3(a), 1(e) par. 3, GCX 9, 10.)

E. In Late May of 2008, RN Scott Complains About Nelson, the Receiver Issues a Critical Report that Emphasizes the Facility's Need to Maintain and Increase Its RN Staff; In June, RN Hardin Resigns Due to Nelson

On May 21, RN Shakantayeri Scott filed an Incident Statement against Nelson. Scott wrote that Nelson had confronted her about a statement Scott had made to an LPN, and that during the confrontation Nelson screamed at Scott, and "shoved" her in the chest, which caused her to stumble backward. (D&O 2, 12; Tr. 113, 346-48, RX 53.) LPN Kim Watson submitted an Incident Statement corroborating Scott's account. (D&O 2, 12; Tr. 351-53, RX 54.) Warden Adams received copies of both incident reports. (Tr. 235-36.)

Around this time, the receiver issued a "fairly scathing" report in response to the inmate's death the previous month. In the report, the receiver concluded that the medical department had committed "several miscues and missteps," and had failed to comply with the receiver's rules and regulations. (D&O 1, 11; Tr. 188.) The receiver's report emphasized the Company's need to maintain and increase its medical staff, particularly RNs. (D&O 3; Tr. 188-93, 251-53, 304-05, RX 15.) The receiver's chief of staff warned the Company to "immediately correct" those deficiencies, or "he would remove the inmates from the . . . [f]acility and pull them back to California." (D&O 1, 11; Tr.189, 193, 252.) Losing the contract, as Vice President Jimmy Turner testified, "would have been tremendously devastating" to

the Company because of the expense it had incurred to acquire the contract, and because the absence of inmates would have forced the Company to lay off the entire staff of 610 employees at the facility. (D&O 1, 2, 5, 11, 12; Tr. 181, 189-90, 192, 223, 251-52, 304-05.)

In June, notwithstanding the Company's need to retain its skilled RNs, RN Deanna Hardin informed Warden Adams and Managing Director Garner that she was resigning "because of Nelson's behavior," but would consider returning if Nelson left. (D&O 2, 3, 14; Tr. 248, 275-76.) Hardin characterized the medical department environment as "hostile," and subsequently described Nelson as "the biggest, baddest bulldog that just barked all the time in your face and would never go away." (D&O 2; Tr. 397.)

F. On July 1, 2008, Human Resources Manager Holly Complains About Nelson; Between July 24 and July 30, Nelson and Other RNs Raise Pay Concerns; on July 29, Nelson Has a Confrontation With RN Strong Regarding Patient Care

On July 1, Human Resources Manager Holly submitted an Incident Statement. In the statement, a copy of which went to Warden Adams, Holly wrote that Nelson had behaved "very unprofessionally" during a conversation about a work assignment. (D&O 12; Tr. 236, RX 55.) On July 24, Nelson, along with 3 other LPNs—LaShunda Henderson, Percynthia Thomas, and Teri Williams—spoke with Recruitment Specialist Nicole Carter and Senior Human Resources

Director Koehn about bonuses the Company was planning to give to RNs, but not LPNs. (D&O 9; Tr. 56-70, GCX 1(c) par. 3(a), (e), par. 3, 4.)

On July 29, RN Clinical Supervisor Dorothy Strong overheard nurses discussing a patient who had chest pains. Strong intervened and asked the nurses to identify the patient. The nurses did not respond. After Strong repeated the question, a nurse replied that no patient was suffering from chest pains. (D&O 2, 12; Tr. 309-11, RX 56.) Nelson then approached the group, and referring to Strong, exclaimed, "[t]hat's what I say about people being nosy . . . [] they don't know what's going on [a]nd they just ask questions, questions, questions." (D&O 2, 12; Tr. 311.) Nelson's outburst "really embarrassed [Strong]" in front of her subordinates, and she "became visibly upset" and cried following the confrontation. (D&O 2, 12; Tr. 312-13, 321-22, RX 56.) Strong submitted an Incident Statement detailing the confrontation. (D&O 2; Tr. 312, RX 56.) In the statement, Strong noted that Nelson routinely made ugly remarks to, or about, the RNs. (D&O 2, 12; Tr. 312-13, RX 56, 57.) Dr. Chester Layne, who witnessed the incident, also filed an Incident Statement that accused Nelson of acting inappropriately in her encounter with Strong. (D&O 2, 12; Tr. 236-37, 321-22, RX 57.)

On July 30, LPN's Nelson, Brown, and Thomas spoke to Senior Human Resources Director Koehn, Human Resources Manager Holly, and Recruitment

Specialist Carter about bonuses for the LPN's. (D&O 2, 9; Tr. 65-70, GCX 1(e) par. 2.)

G. On August 1, 2008, the Company Discharges Nelson

After Nelson's confrontation with Strong, Warden Adams discussed that conflict, the May incident involving RN Scott, and the May and June RN resignations with Managing Director Garner and Vice President Jimmy Turner. Adams noted that he was at "his wit's end" because of Nelson. They agreed with Adams's recommendation to discharge Nelson because her conduct was "detrimental to the facility" and put the Company in a position where it could lose its California contract. (D&O 2, 5, 11, 14; Tr. 197-98, 214-25, 253-56, 286.)

On August 1, Adams and Assistant Warden Lucy Cano met with Nelson. Adams told Nelson that she was discharged. (D&O 2, 9; Tr. 70-71, 152, 256-58.) Adams referred to prepared talking points, which stated, in part:

- "[Y]ou [Nelson] never acknowledge that your own behavior has contributed to or created difficult situations for you and others who work with you."
- " [Y]ou [Nelson] blame everyone else and seem to look for reasons to complain about others."
- "[T]he quality of the medical care the Facility is providing has been questioned by our California customer and we are facing a very challenging situation."
- "Now more than ever, everyone here, especially the medical team, must focus and work together to demonstrate that we provide the best

possible service to our customer and the best quality care for our inmate population."

- "I [Adams] do not believe that you can put your personal feelings aside and focus on working with the medical team to achieve that goal."

(D&O 2; RX 58.)

On August 8, the Company sent a letter to Nelson that confirmed her discharge. The letter stated that Nelson had violated the Company's code of conduct. Enclosed was a form for Nelson, if she chose, to file a grievance over the discharge. (D&O 10; Tr. 75-76, GCX 12.) Nelson proceeded to grieve her discharge, and she provided the Company with names of eight employees to interview. (D&O 10; Tr. 75-76, GCX 13.)

The Company assigned Keenan Davis, a Human Resources Manager at a different facility, to interview the eight employees. (D&O 10; Tr. 76-78, 200-02, 393-94, GCX 13.) Davis's subsequent report noted that, during interviews with the eight, they made numerous critical comments about Nelson's behavior and conduct toward other medical department employees. (Tr. 203, RX 24.) In a subsequent letter, Vice President Turner denied Nelson's grievance and upheld the discharge. Turner informed Nelson that repeated complaints about her behavior, which her own references "did not dispel," established that her "behavior has demonstrated" that she was "either unwilling or unable to maintain a professional and respectful

attitude toward others" with whom she worked at the facility. (D&O 11; Tr. 80-81, GCX 15.)

In September, the Company and the receiver entered into a formal plan to address the deficiencies contained in the receiver's earlier report. (D&O 2 n.2; RX 16.)

II. THE BOARD'S CONCLUSION AND ORDER

On the foregoing facts, and reversing the administrative law judge, the Board (Chairman Liebman and Member Schaumber) assumed *arguendo* that Nelson's protected activity was a motivating factor in her discharge. It nevertheless found, however, that the Company "would have discharged Nelson for legitimate reasons even in the absence of any protected activity." (D&O 1.) In finding that the Company had proven its affirmative defense, the Board drew contrary inferences and weighed the evidence differently than the judge. First, the Board gave more weight than the judge to the fact that an inmate's death jeopardized the Company's contract to house California inmates and placed the jobs of over 600 employees at risk. Second, the Board gave more weight than the judge to the fact that Nelson's abusive conduct, which had led two RNs to resign and generated numerous employee complaints, was detrimental to the Company's need to maintain and increase its RN staff as a condition of maintaining the California contract. Accordingly, the Board dismissed the complaint. (D&O 4.)

SUMMARY OF ARGUMENT

The Board presumed that Nelson had engaged in protected concerted activity when she raised concerns about pay and bonuses. The Board reasonably found, however, contrary to the judge, that the Company had carried its burden to show that it would have discharged Nelson for legitimate reasons even absent any protected activity. The Board's finding, based on its drawing contrary inferences and weighing the evidence differently than the judge, is entitled to considerable deference regardless of whether the judge's decision is also reasonable.

Without doubt, the Company faced a crisis regarding its contract to house inmates from California at its Tutwiler facility. An inmate's death led to a highly critical report that placed the contract in jeopardy and the jobs of over 600 employees at risk. The Company was under immense pressure to, among other things, maintain and increase its RN staff. Unfortunately, Nelson's continued employment raised serious concerns as to whether the Company could meet California's demands.

Nelson had begun working at the Tutwiler facility approximately 1 year prior to the inmate's death. During that time frame, numerous employees had complained about Nelson's conduct and attitude. Moreover, during the 4 months between the inmate's death and Nelson's discharge, it became apparent to the Company that conflict between Nelson and the other employees was not going to

dissipate, and that her continued employment was detrimental to the Company's need to maintain and increase its RN staff.

Indeed, around the time of the inmate's death, the Company learned, during a facilitation intended to improve employee relations, that numerous employees viewed Nelson as the sole cause of conflict. Thereafter, the Company received yet another complaint about Nelson, one RN resigned partly because of Nelson's behavior, and a second RN resigned explicitly because of Nelson. In this context, when the Company discharged Nelson after yet another confrontation with an RN in late July that left the RN in tears (and led to yet another complaint against Nelson), the Board was fully warranted in finding that the Company had carried its burden to show that it would have discharged Nelson even absent any protected activity.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY DID NOT VIOLATE THE ACT BY DISCHARGING VEVRIA NELSON FOR ENGAGING IN ABUSIVE BEHAVIOR TOWARD OTHER EMPLOYEES THAT JEOPARDIZED ITS MULTI-MILLION DOLLAR CONTRACT TO HOUSE INMATES FOR THE STATE OF CALIFORNIA

A. Applicable Principles and Standard of Review

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations," and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157. In turn, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) protects employees' invocation of those rights by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ." In light of these two statutory provisions, it is well-settled that an employer violates Section 8(a)(1) of the Act by discharging an employee because of her protected concerted activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-98, 401 (1983); *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238-39 (5th Cir. 1999).

To prove a violation of Section 8(a)(1), the Board's General Counsel has the initial burden of persuasion to show that an employer's opposition to protected

concerted activity was a "motivating factor" in the employer's decision to take an adverse action. *Transportation Mgmt.*, 462 U.S. at 401, 401-04; *Reef Ind., Inc. v. NLRB*, 952 F.2d 830, 835-36, and n.11 (5th Cir. 1991). If substantial evidence supports the Board's finding that opposition to protected concerted activity was a motivating factor in an adverse action, the employer can nevertheless prevail by proving, as an affirmative defense, that it would have taken the same action even absent the employee's protected concerted activity. *Transportation Mgmt.*, 462 U.S. at 400-04; *NLRB v. Delta Gas, Inc.*, 840 F.2d 309, 311 (5th Cir. 1988).

If substantial evidence supports the Board's finding that the Company carried the burden of persuasion on its affirmative defense, the Court must uphold the Board's dismissal of the complaint. *See Kopack v. NLRB*, 668 F.2d 946, 951 n.3, 952 (7th Cir. 1982). *Cf. Oil, Chemical & Atomic Wkrs. Int'l U, Local 4-243 v. NLRB*, 362 F.2d 943, 946 (D.C. Cir. 1966) (holding that the Board's determination that there has been no violation of the Act "must be upheld unless irrational or unsupported by substantial evidence"). Substantial evidence is "such relevant evidence as a reasonable mind would accept to support a conclusion." *NLRB v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812, 815-16 (5th Cir. 2009) (internal quotations omitted). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably

have made a different choice had the matter been before it *de novo*." *Id.* *Accord J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003).

In sum, Nelson, the party challenging the Board's Order, has the burden to establish before the Court that the Board's dismissal of the complaint is unsupported by substantial evidence. As shown below, Nelson has failed to meet that burden. Moreover, neither Nelson's burden nor this Court's standard of review is modified when the Board and the administrative law judge disagree as to the derivative inferences made from the evidence. *NLRB v. United Ins. Co.,* 390 U.S. 254, 260 (1968). As this Court has explained, it "cannot reverse the Board's decision when the Board and the [judge] merely draw different inferences from established facts. Moreover, even if [the Court] might reach a contrary result were it deciding the case *de novo,* [it] defer[s] to plausible inferences that the Board draws from the evidence." *Texas World Service Co., Inc. v. NLRB*, 928 F.2d 1426, 1431 (5th Cir. 1991).

B. Substantial Evidence Supports the Board's Finding that the Company Would Have Discharged Nelson For Legitimate Reasons Even in the Absence of Any Protected Activity

The Board (D&O 3) assumed *arguendo* that the General Counsel demonstrated that Nelson had engaged in protected concerted activity—the pursuit of complaints alleging discrimination against her and contesting possible wage and bonus disparities between LPNs and RNs—and that her protected activity was a motivating factor in her discharge. The Board reasonably found (D&O 1, 4), however, contrary to the judge, that the Company "would have discharged Nelson for legitimate reasons"—her unprotected "abusive behavior" —"even in the absence of any protected activity." As the Board explained (D&O 3), the Company "established that it could not tolerate employee conduct that threatened its California contract. Nelson's repeated pattern of abusive behavior directly threatened that contract, and the [Company] discharged her once it became clear that this was so." For the reasons explained below, the Court should enforce the Board's reasonable conclusion that Nelson's discharge did not violate the Act.

To begin, as the Board found (D&O 1), and as Nelson essentially concedes (Br. 15), her "tenure at Tutwiler was marked by controversy." Indeed, shortly after Nelson began working at the Tutwiler facility in January of 2007, employees began to accuse her of engaging in abusive conduct. During a 13-month period between March of 2007 and March of 2008, numerous employees filed complaints and

wrote letters regarding Nelson's unprofessional and inappropriate conduct. One employee complained that Nelson threatened her regarding keys to a medical office, an incident that required security to intervene. Other complaints stated that Nelson shouted at an employee, threw away an employee's beverage from the refrigerator, grabbed medication from an employee's hand, and refused a doctor's request to provide pain medication to a patient. Nelson's ongoing inappropriate conduct further led employees to complain that Nelson was rude, verbally abused staff, and created a "toxic" work environment that interfered with "teamwork, safety, and productivity." (D&O 1; RX 49, 64.)

The employees' discontent with Nelson's inappropriate conduct continued after March of 2008, but, as the Board reasonably found (D&O 3), a threat to the Company's contract to house California inmates altered the Company's "willingness to tolerate Nelson's behavior." Thus, the April of 2008 death of an inmate led to an investigation by the receiver overseeing the medical care of the California inmates. The receiver then issued a "scathing report," and the Company was warned that absent immediate correction the facility would lose its contract to house the California inmates. (D&O 1; Tr. 189, 193, 252.)

In light of the critical report and warning, the Board was fully warranted to find (D&O 3) that the Company's contract was in "serious jeopardy." Moreover, losing the contract would have left the facility, as the Board found (D&O 3),

without "its only source of inmates," placed "the jobs of 610 employees in peril," and thrown it into "financial ruin."

Significantly, for the Company and its employees to avoid a debilitating fate, as the receiver stressed, the Company needed to retain and increase the number of RNs in the medical department. Yet, as the Board explained (D&O 3), "[a]t a time when the [Company] could not afford to lose a single RN, Nelson undermined the [Company's] ability to meet this essential receivership requirement." First, around the time of the inmate's death, the Company learned through a facilitated training seminar that numerous coworkers viewed Nelson as solely responsible for ongoing conflict in the medical department. Second, RN Supervisor Maples informed Warden Adams that he was resigning in early May of 2008 because of the "high stress level" in the medical department, and that Nelson had contributed to that stress. (D&O 2, 3, 13-14; Tr. 227, 245-48, 326-28.) Third, in May, Nelson yelled at and pushed another RN during a confrontation. Fourth, in June, RN Hardin resigned "because of" Nelson. (D&O 2, 3, 14; Tr. 248, 275-76.) Fifth, in July, Nelson instigated a confrontation with RN Clinical Supervisor Strong. During that confrontation, Nelson, as the Board explained (D&O 3), "interrupted Strong's justified questioning of her subordinates about a patient who was potentially suffering from chest pains." Nelson's conduct "really embarrassed" Strong, leaving her in tears. (D&O 2, 3; Tr. 236-37, 312-13, 321-22, RX 56, 57.)

In these circumstances, as the Board reasonably found (D&O 3), "[g]iven Strong's strong reaction, it was not unreasonable for the [Company] to fear that it might lose yet another RN because of Nelson," a dire outcome given the pressure placed on it by the receiver to increase the facility's RN staff. The Company, with its contract already in trouble due to an inmate's death, could not afford problems with the care of a patient in which delay could prove fatal. Yet, Nelson's conduct, as the Board found (D&O 4), "constituted a legitimate threat to the [Company's] California contract" because (D&O 3) she "interfered" with Strong's "attempt to ascertain an inmate's medical status at a time when that inmate could have been suffering from a life-threatening condition."

In these circumstances, Nelson's confrontation with Strong, which had the potential to cause another RN to leave and did interfere with patient care, fully warranted the Board (D&O 3-4) to respect the Company's determination that the Strong incident "was the final straw for Nelson." Thus, substantial evidence supports the Board's conclusion that, "because Nelson's conduct constituted a legitimate threat to the [Company's] California contract," the Company proved that it would have discharged Nelson even absent any protected concerted activity.

C. Nelson's Criticisms of the Board's Decision Are Without Merit

Nelson relies (Br. 1, 3, 4, 6, 15) on the judge's inferences and weighing of evidence to assert that the Board's decision is not supported by substantial

evidence. Her argument is misplaced, however, because the issue before this Court is not whether the judge's determination is also plausible under *de novo* review, but whether the different inferences and conclusions drawn by the Board are supported by substantial evidence.

Like the Board, the judge had concluded (D&O 2, 16, 17) "that a number of the staff did not have a favorable opinion of Nelson, and [that] she may not have been a model employee." From there, however, the judge and the Board parted ways. Yet, as shown above, the Board's different analysis was reasonable and supported by uncontested facts in the record.

Specifically, the Board (D&O 3) reasonably gave more weight to evidence that, prior to Nelson's discharge, the Company's contract to house California inmates was in "serious jeopardy." The Board's attaching significance to that fact was hardly unreasonable. Although Nelson (Br. 16) refers to the Board's finding regarding the contract status as "contrived," and based on an "exaggerated assertion," her brief does not dispute that after the inmate's death, the receiver issued a highly critical report and warned the Company that its contract was in jeopardy.

Likewise, the Board reasonably gave more weight to evidence that, notwithstanding the receiver's imperative that the Company maintain and increase

its RN staff, Nelson's conduct had contributed to the resignation of two RNs.[3] As the Board explained (D&O 3), the judge "failed to fully consider the impact Nelson's actions had on the [Company's] ability to employ RNs."

Nelson fares no better by claiming (Br. 3-16) that none of the evidence taken alone provided a sufficient basis for the Board to find that the Company had carried its burden. The Board did not find, nor did the Company assert, that it carried its burden based solely on one complaint against Nelson. Rather, the Board found that the Company carried its burden by viewing the incidents as a whole in context with the emergent threat to the Company's contract and the detrimental impact Nelson's conduct was having on its keeping RNs. In light of the overall circumstances, the Company, as the Board explained (D&O 4), "understandably became more diligent in addressing misconduct that, in the past, it may have overlooked."

Moreover, given evidence of the ongoing complaints against Nelson, the anonymous survey where numerous employees held Nelson solely responsible for causing conflict, and her role in the resignation of two RNs, Nelson is in no

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[3] Although it is true that, as Nelson notes (Br. 3, 9-10), the two RNs did not put in writing that Nelson had led to their quits, their credible trial testimony amply supports that finding. *See* pp. 9, 11, *supra*.

position to claim (Br. 15) that the evidence as a "whole" "create[s] a false vision" that she "caus[ed] trouble in the medical department." Indeed, even the judge—who recommended a ruling in Nelson's favor—found to contrary. (D&O 17.)

Nelson also contends that, because the Company failed to inform her of each allegation against her, the Company was not *actually* concerned with her behavior enough to terminate her employment. That said, whether or not Nelson (Br. 3-4, 8) was aware of every allegation against her, she conceded (D&O 11; Tr. 93-94, 96-102, 111-14, 146-47, RX 4) that she was well aware of numerous complaints. Moreover, although Nelson suffered no formal discipline prior to her discharge (Br. 3-4, 7-9), the complaints had already led to a written counseling and a directive from Assistant Warden Jackson that Supervisor Maples talk to her about ongoing inappropriate conduct.[4] Finally, given Warden Adams's testimony (Tr. 291) that the Company can fire employees without first going through progressive discipline, and Nelson's acknowledgment (Tr. 104) that company policy required her to have respect toward her coworkers and that unprofessional conduct could lead to her discharge without prior warning, Nelson is in no position to claim (Br.

[4] The Board (D&O 4 n.7) reasonably gave "little weight" to Nelson's reliance (Br. 3, 17) on HSA Johnson's positive view of Nelson. Ample evidence shows that Nelson's friendship with Johnson had led Johnson to overlook or permit Nelson's abusive conduct. (Tr. 243-45, 254-55, 288, 399-401, 431-32, RX 49, 64).

3-5) that the Company did not meet its burden because it failed to warn her that her conduct could lead to discharge.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Nelson's petition for review.

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April 2010

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VEVRIA NELSON	:	
	:	
Petitioner	:	
	:	Case No. 09-60939
	:	
v.	:	Board Case No.
	:	26-CA-23180
	:	
NATIONAL LABOR RELATIONS BOARD	:	
	:	
Respondent	:	
	:	
and	:	
	:	
CORRECTIONS CORPORATION OF AMERICA	:	
	:	
	:	
Intervenor		

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the Board certifies that its final brief contains 6,214 words of proportionally-spaced, 14-point type, and word processing system used was Microsoft Word 2000.

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1099 14th Street, NW
Washington, DC 20570

Dated at Washington, D.C.
this 6th day of April 2010

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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	:	
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	:	
Respondent	:	
	:	
and	:	
	:	
CORRECTIONS CORPORATION OF AMERICA	:	
	:	
Intervenor	:	

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that the following participant in the case is a registered CM/ECF user and that service will be accomplished by the CM/ECF system.

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I further certify that two copies of the Board's brief in the above-captioned have been served by first-class mail on Petitioner Vevria Nelson, who is not a registered user of the CM/ECF system, at the following address:

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Dated at Washington, D.C.
this 6th day of April 2010