UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEDCO HEALTH SOLUTIONS OF LAS VEGAS, INC.

and **Cases 28-CA-22914**
28-CA-22915

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL 675

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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I. INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (the Board), the Counsel for the Acting General Counsel (CAGC) submits this Answering Brief to the Exceptions, filed by Medco Health Solutions of Las Vegas, Inc. (Respondent), to the Decision (ALJD) of Administrative Law Judge William G. Kocol (ALJ) in this matter.[1] The arguments and analysis submitted by Respondent in its Exceptions are a mere rehashing of its positions which were soundly rejected by the ALJ. As fully addressed in the ALJD, this is a relatively straightforward case in which Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act) by unilaterally changing its Dress Code policies and refusing to bargain over such changes; maintaining an overly-broad rule prohibiting employees from wearing certain articles of clothing; discriminatorily applying its rules to employee Michael Shore (Shore) when he wore a shirt protesting Respondent's "WOW" incentive program (a shirt he obtained from and which reflected the logo of the

[1] The ALJD was issued on September 14, 2010.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Local 675 (the Union)); and by threatening Shore by inviting him to quit his employment if he objected to the "WOW" program. The ALJ's findings and conclusions, and recommended order, are fully supported by the credited record evidence and the applicable case law. It is respectfully submitted that the Board should adopt and affirm the ALJ's findings of fact, conclusions of law, and recommended order and reject Respondent's Exceptions in their entirety.

II. FACTS

Respondent's Exceptions, in part, are based on testimony that was discredited by the ALJ. The credible record facts, as described by the ALJ and as more fully detailed below, demonstrate that Respondent's bases for its Exceptions are, in large measure, either contrary to the ALJ's credibility findings or are otherwise not supported by the record.

A. Background

Respondent is a pharmacy benefit manager and runs the nation's largest mail order pharmacy operations. (Tr. 26:7-13)[2] Respondent operates several facilities in various locations throughout the United States, including a facility in Las Vegas, Nevada. Respondent's clients include private corporations, labor organizations, and local, state, and federal government agencies. (Tr. 129:6-21, 299:12-15)

Respondent's Las Vegas facility is a fully automated facility. Its primary responsibility is to package and distribute medications. At its Las Vegas facility, Respondent employs approximately 841 employees who make up several departments. (Tr. 25:9-11) The

[2] "Tr. ___" refers to pages of the Transcript of Proceedings of unfair labor practice hearing held between July 21 and July 22, 2010.

Union represents two bargaining units within the Respondent's Las Vegas facility: the Pharmacist Unit and Pharmacy (Non-Pharmacist) Unit. (ALJD 2).

B. Facility Tours

As properly found by the ALJ, as a result of the nature or Respondent's operations, there is no face-to-face interactions between Respondent's employees and consumers. (ALJD 2:19). Respondent also conducts tours at its facilities so as to allow potential and existing clients to view Respondent's facilities. (ALJD 2:20). Tours consist of escorting visitors through designated areas of the facility to display the operations taking place within Respondent's building. (Tr. 64:11-14, 197:6-25, 198:1-6) The frequency of tours varies, as they may occur as often as several times a week or, at times, several weeks may pass without a tour taking place. (Tr. 131:10-22, 217:6-9, 299:4-5) Employees are given advanced notice of upcoming tours by announcements on television monitors within the facility at least 24 hours ahead of scheduled tours. (ALJD 2:21; Tr.299:21-25, 300:1-3) Due to the nature of Respondent's operations in Las Vegas, visitors are not granted full access to the facilities. Privacy concerns restrict the tours to designated areas of the facility. (Tr. 300:23-25, 301:1-10)

C. WOW Recognition Program

Respondent utilizes several incentive programs to motivate employees and maintain morale. (GCX 14)[3] One such program is the WOW Recognition program. (ALJD 3:24 - 4:36). The program has been in place at the Las Vegas facility since June 24, 2009, though it is a national program utilized in all of Respondent's facilities. (GCX 2) The WOW Recognition program recognizes employees for providing exceptional service in the

[3] "GCX ___" refers to exhibits introduced by General Counsel at the hearing. "RX __" refers to exhibits introduced by Respondent at the hearing.

workplace and to customers. (GCX 2, 3, 14) Under the program, there are five different types of behavior for which an employee may receive a WOW Recognition award. (GCX 2)

To be granted a WOW Recognition award, an employee must first be nominated by a member of management, co-worker, client, or patient. (Tr. 30:22-25, 31:1-9) Members of management then vote on which nominees should receive a WOW Recognition award. (Tr. 32:3-5) Employees who are selected to receive the award are given a colored lanyard or belt which symbolizes the level of WOW Recognition achieved. (GCX 2, 14) There are six different colored lanyards, with the color black corresponding to the highest level of achievement. Employees who receive a black lanyard are recognized in a national newsletter which is periodically published by Respondent. (GCX 3) Additionally, their expertise is shared and utilized nationally by Respondent. (GCX 2) Respondent maintains records of who has received WOW Recognition awards and the Las Vegas facility even has a full-time WOW coordinator, who is responsible for administering the program. (Tr. 44:5-9, 283:21-25)

Employees who receive a WOW Recognition award are also given a certificate signed by Respondent's Vice President, Director of Pharmacy Practice, and the Director of Human Resources. (GCX 2) Employees may be recognized in person, including at a ceremony which is held each week for recipients of the award. The ceremony is hosted by the facility's Vice President and is attended by members of management and the award recipients. (Tr. 284:22-23) The ceremonies last approximately "25 to 45 minutes, depending on how many people are recognized." (Tr. 284:24-25, 285:1) Food and beverages are served at these events and employees are paid during this time. (Tr. 285:5-6) As part of this program, Respondent utilizes its "Wall of WOW," a wall-sized display in the employee cafeteria where WOW Recognition awards are posted next to each employee's name. (GCX 2, Tr. 63:6-13)

Further, WOW award recipients have their picture and a short description of their WOW achievement broadcast on the television monitors in Respondent's facility. (GCX 2)

D. Respondent's Dress Code Policy

The ALJ, based on the credited record evidence, found that effective January 10, 2010, Respondent altered its dress code to require pharmacists to wear white lab coats provided by Respondent (ALJD 7:22), and that it did so in violation of Section 8(a)(1) and (5) of the Act (ALJD 10:25-29). As discussed more fully below, Respondent's contentions and defenses regarding this allegation were thoroughly rejected by the ALJD, including as a result of his credibility resolutions in favor of CAGC's witnesses. (ALJD 10:4)

The record facts show that since on or about August 1, 1997, Respondent has maintained a Dress Code policy that applies to all of its employees, unless otherwise noted in the policy. (RX 3) Respondent's Dress Code policy provides, in part:

> Articles of clothing that contain phrases, words, statements, pictures, cartoons or drawings that are degrading, confrontational, slanderous, insulting or provocative are never appropriate. (GCX 4)

The most-recent revision to the Dress Code policy was made by Respondent on November 20, 2009. Respondent's revision, however, did not go into effect until January 1, 2010. This revision contains the following new requirements for employees, including employees represented by the Union:

- All Pharmacists are required to wear white lab coats furnished by the Company.

- All employees are required to dress in business casual attire on scheduled tour days unless required to wear a company provided uniform. (GCX 4)

As found by the ALJ, Respondent, when it first announced these changes to the Union, did so as a *fait accompli* with no intention of bargaining with the Union (ALJD 9:17).

Moreover, and as found by the ALJ, by its communications with the Union on December 9, and when it met with the Union on December 10, it refused to bargain about such changes. (ALJD 8; 9:19). As described more fully below, Respondent, by its Exceptions, repeats its defenses that were specifically rejected by the ALJ. (ALJD 9:22-10:25)

E. Respondent's Adverse Reaction to Employees' Protected Concerted Activities

Contrary to Respondent's Exceptions and brief in support, the credible record evidence shows that Shore, when he wore the T-shirt protesting the WOW program, was engaged in protected concerted and Union activities. The record also shows that Respondent's reaction was, as found by the ALJ, violative of Section 8(a)(1) of the Act.

More specifically, and as succinctly summarized by the ALJ, the record shows that on February 26, 2010, employee Shore reported to work wearing a Union T-shirt which had been produced by a local in Pittsburgh, Pennsylvania (and which had been given to him by co-worker and Unit Committee Chairperson, Marissa Osterman (Osterman) in January 2010. The T-shirt had the logo of Local Union 993 printed on the front, left chest and the slogan, "I Don't Need a WOW to do My Job" printed on the back. (GCX 5) On this particular day, Shore, a Union steward, a Union Labor committee member, and an employee in Respondent's Coverage Review Department (CRD), wore a solid navy blue lab coat over his T-shirt while on duty. (Tr. 218:22-25, 222:16-25, 223:1-6) Shore wore the lab coat because it was a tour day and it was his understanding that employees in the CRD were required to wear lab coats on tour days. (Tr. 223:7-17)

As found by the ALJ, not all employees liked the WOW program. (ALJD 4:38 - 5:4) As discussed above, Shore was given the T-shirt by Osterman, who had acquired it in

January 2010, at a Union meeting (a "Medco Council Meeting") held in Florida. (Tr. 258:20-25) The Medco Council Meeting was a gathering of Unit committee chairpersons, presidents, and representative from all the local unions within Respondent's facilities throughout the country to discuss labor and union issues. (Tr. 260:8-14) One such issue discussed by Union officials in attendance at the January 2010 meeting was the general discontent with Respondent's WOW Recognition program. (Tr. 260:15-17, 261:11-25, 262:1-17) At the meeting, various proposals were made by those in attendance as to what methods could be employed by local unions to voice their objections to the program. A number of proposals were raised, including devising a survey that could then be presented to Respondent. During discussions, a representative of Local 993 told those present that members in his local had worn a Union T-shirt bearing the Union logo on the front and the slogan, "I Don't Need a WOW to do My Job." He distributed one T-shirt to each Unit committee member and offered extra shirts to those that desired them. (Tr. 262:18-25, 263:1-2)

There is no dispute that the lettering on the T-shirt, if the shirt is worn without outer clothing, is clearly visible to those in proximity to the person wearing the shirt. However, on the day Shore wore the T-shirt, it was not visible while he was working because he also wore his lab coat. Shore did not remove his lab coat until he was off the clock and on break. (Tr. 226:12-25) Shore took a break at approximately 10:30 a.m. (Tr. 227:15-16) Upon going on break, Shore removed his lab coat, thereby exposing his T-shirt for the first time, placed his coat on his desk, and walked downstairs to the employee cafeteria, where he remained for the entirety of his break time. (Tr. 242:23-25, 243:1-10)

While in the cafeteria, a number of employees saw Shore wearing the T-shirt, and several made comments in support of his doing so and of the phrase printed on the back. One

employee even inquired as to where he could get one, while another gave Shore a thumbs up. (Tr. 227:2-6) It was not until after Shore returned from his break, put on his lab coat, and attended a labor-management meeting that he was asked by a supervisor to report to Shanahan's office. (ALJD 5:6 - 9; Tr. 227:20-25, 228)

Upon being asked, Shore immediately reported to Shanahan's office. (Tr. 228:14-15, 229:2-4, 295:7-9) When he arrived, Agnew, Shanahan, and Union Committee Chair Osterman were present. (Tr. 229:5-10) Agnew had asked that Osterman be present, though she too did not inform Osterman of the purpose of the meeting. (Tr. 254:16-20, 255:11-12) Shore and Osterman both credibly testified, and the ALJ found (ALJD 5:10 - 15), that Shanahan opened discussions by expressing his disappointment in Shore, though the basis for his "disappointment" was not immediately made clear. (Tr. 230:4-7, 255:15-22) Shore was then asked to stand and turn around. (Tr. 251:12-25) Shore complied with the request, despite still not knowing the purpose of the request. Shore was then asked to remove his lab coat and turn around, thus exposing the Union's logo on the front and the WOW protest phrase on the back to Shanahan and Agnew. (ALJD 5:11 - 13; Tr. 255:23-25, 256, 293:24-25, 294:1-5) Upon viewing Shore's T-shirt, Shanahan expressed his discontent and outrage with Shore and stated that the shirt was insulting and disrespectful. (Tr. 230:8-15, 256,257) Shore was then ordered to remove his T-shirt and replace it with another shirt before returning to work. (ALJD 5:15 - 16; Tr. 230:22-25, 296:18-20) Shanahan relied on Respondent's Dress Code policy when ordering Shore to remove the T-shirt. (Tr. 297:14-19) In an effort to avoid Shore from being disciplined by Respondent, Osterman offered him an extra shirt to wear. (Tr. 257:14-18)

Respondent admits, and the ALJ found, that Shanahan told that if Shore did not like working for Respondent, he did not have to work there. (ALJD 5:19 - 21; Tr. 163:17-21, 297:10-13) At the conclusion of the meeting, Shore changed his T-shirt and returned to work. (Tr. 163:17-21, 297:10-13) Neither Shore nor any other employees have worn the T-shirt in questions or similar types of T-shirts since Shore's meeting with Shanahan and Agnew. (Tr. 231:22-24)

F. Respondent's Unilaterally Changed Its Dress Code Policy

As found by the ALJ, and contrary to Respondent's assertions in support of its Exceptions, the record fully supports a finding that the Respondent violated Section 8(a)(1) and (5) by unilaterally changing its dress code.

By way of background, the record shows that on August 11, 2009, the Union was certified by the Acting Regional Director of Region 28 as the exclusive bargaining representative of the Pharmacist Unit employees. (GCX 6)[4]

Following its certification as the exclusive bargaining representative of Respondent's Pharmacist Unit employees, the Union began negotiating with Respondent over the terms of a collective-bargaining agreement. A total of three bargaining sessions were held: August 2009, October 2009, and December 7, 2009. (Tr. 66:19-25, 67:1-12, 352:13-25, 395:14-21) The parties' current collective-bargaining agreement (the CBA) was ratified between December 10 and 14, 2009. (Tr. 66:19-25; 67:1-16, 302:18-21) The parties' CBA became effective retroactively to September 1, 2009, and expires by its terms on September 1, 2012. (GCX 7)

[4] Prior to the Union's certification, Pharmacist Unit employees had been represented by the Guild for Professional Pharmacists (the Guild). The Guild and Respondent were parties to a collective-bargaining agreement (which was effective from October 15, 2006, to the date the Union replaced the Guild as the Pharmacy Unit employees' collective-bargaining representative). (RX 4) In addition, during the period from 2003 to 2006, the Union had previously represented the Pharmacist Unit employees. (Tr. 400:24-25, 401:1-6)

G. Facts Regarding Respondent's Unilateral Change to Its Dress Code Policy

1. November 20 Memoranda

Contrary to Respondent's assertions in support of its Exceptions, the record establishes that from the beginning, it simply had no intention of bargaining with the Union about changes to its dress code policy and, in fact, presented the changes as a *fait accompli* and, after the fact, went through the motions of meeting with the Union about such changes. (ALJD 9:12 - 20)

More specifically, on November 19, 2009, while the parties were still in collective-bargaining negotiations, staff Pharmacist and Unit Committee Chairman William Webb (Webb) were summoned to Shanahan's office for a meeting. (Tr. 303:17-25, 304:1-10, 35) Shanahan explained that Respondent had made the decision to modify its dress code to require all Unit Pharmacists to wear white lab coats each day and to dress in business casual attire on tour days. Shanahan explained that the modification would become effective on January 1, 2010. (Tr. 353:24-25, 354:1-4) Also present at the meeting was Kathy Feduska, Respondent's Director of Pharmacy Operations. (Tr. 304:13-14, 353:21-23)[5] Webb was informed that the memorandum announcing the change to Unit employees would be distributed to all Pharmacists the following day and was asked if he had any questions. (Tr. 304-15-22, 355:9-12) Webb did not ask questions at that time inasmuch as he was surprised by the announcement and believed that because the effective date of the modification was still

[5] At hearing, there was conflicting testimony as to who else (in addition to Webb and Shanahan) was present at the meeting which took place on November 19, 2009. Webb testified that Kathy Feduska was present, while Shanahan and Agnew both testified that Agnew was present at the meeting. While the CAGC reserves the right to utilize the conflicting testimony for credibility purposes, it is immaterial who was actually present, as the events which took place at the meeting are not in dispute.

several weeks away, the Union had plenty of time to bargain over the issue, if it chose to do so. (Tr. 354:8-15, 355:17-22)

The following day, November 20, 2009, Respondent's memorandum was distributed by Respondent to all staff Pharmacists in its facility. (Tr. 356:7-10) Copies of the memorandum were placed in each staff Pharmacist's mail box. (Tr. 76:24-24) The November 20 memorandum reads:

> Effective January 1st, 2010, all Medco Pharmacists at the various operational sites throughout the country will be required to wear white lab coats as part of their day to day attire. This will ensure a professional, tour ready environment at all times. It will also help to present a professional image of all pharmacists while in Medco's work environment and assist in Medco's ongoing efforts to elevate to practice of pharmacy both internally and externally.
>
> At this time, we will not be requiring a change in our current day to day casual attire other than the white lab coats. All employees will be expected to dress in business casual attire on scheduled tour days. We are currently working with our Tour Manager to determine a process for ensuring notice of scheduled tours is provided to all employees.
>
> We are currently working with our uniform vendor to review coat designs and fabrics. We are also making arrangements to have our vendor come on-site in the near future to ensure that all of you are measured and fitted appropriately.
>
> As a member of our professional workforce, your cooperation and assistance is vital to our continuing success as one of the premier employers in the healthcare industry. (GCX 8)

Contrary to Respondent's Exceptions, the records fully supports the ALJ's finding that on December 9, by email, and at the parties' meeting on December 10, 2009, Respondent refused to bargain with the Union about the changes to the dress code policy. (ALJD 8:7 - 33; 8:fn. 8; 9:19 - 20). More specifically, on December 9, after consulting with members of the Union Labor Committee and Union Secretary Treasurer David Campbell (Campbell) -- and while bargaining negotiations were still ongoing and before the modification went into effect -- Webb e-mailed Agnew to request to bargain over Respondent's modifications to the Dress

Code. (Tr. 356:16-22, 357:1-7; GCX 9) That same afternoon Agnew responded to Webb's request making clear that while Respondent was willing to discuss the modification, *it did not believe that it did had an obligation to bargain with the Union.* Agnew's e-mail response to Webb provided, in part:

> We would be happy to sit down with you again to discuss the upcoming change in the Company's current dress code policy, however, *we do not believe this is a mandatory subject for bargaining.* (Emphasis added) (GCX 9)

Despite Agnew's e-mail, a meeting was held on December 10, 2009. Respondent was represented at the meeting by Agnew and Shanahan while the Union was represented by Union Labor Committee members Webb, Mark Small, and Richard Lauro. (Tr. 357:24-25, 358:6-7) Though Respondent's representatives attended the meeting, they did so without the intent to bargain over the Dress Code or its already-announced modifications to that code. In fact, at the commencement of the meeting, Shanahan made it clear that Respondent had no intention of bargaining over the issue. (Tr. 81:10-12, 307:19-24, 358:1-5) Notwithstanding Shanahan's statement, members of the Union's Labor Committee raised several issues regarding the use of lab coats, including the room temperature at the facility, the availability of short-sleeve lab coats, and what disciplinary consequences would result if employees failed to comply with the new policy. (Tr. 81:18-23, 309:3-6; 358:17-25, 359:1-5) In spite of the Union's attempts to engage Respondent in bargaining, Respondent was unwilling to do so. (Tr. 359:7-20) In the face of Respondent's refusal to bargain, the meeting was adjourned by Webb, who concluded that the parties were "getting nowhere" and "that this was not a bargaining session." (Tr. 309:9-11, 359:9-19)

Following the meeting on December 10, and after Respondent's changes to its Dress Code went into effect, the Union continued to voice its opposition to the modifications and

inquire about the reasons for Respondent's decision. Between February 8 and 9, 2010, e-mails were exchanged between Webb and Agnew regarding Respondent's reasons for implementing the changes to the Dress Code and Respondent's requirement that Pharmacists wear lab coats. (GCX 11, 12) On February 12, 2010, Webb filed a grievance against Respondent under the parties' newly-ratified CBA. (GCX 10) The grievance regarding the changes to the Dress Code was personally delivered to Agnew. (GCX 10) That same afternoon, after receiving the grievance, Agnew e-mailed Webb informing him that the grievance was untimely and, therefore, rejected. (GCX 13)

On February 18, 2010, the Union attempted once again to raise the issue of Respondent's unilateral changes to the Dress Code policy at a labor-management meeting with Agnew. The topic was placed on the meeting agenda, but Agnew refused to discuss it for fear that it could be used as a basis to file a new grievance against Respondent. (Tr. 99:9-25, 100:1-18, 365:3-17) On February 22, 2010, after exhausting its efforts to reach a resolution on the issue, the Union filed a charge with the Las Vegas Resident Office of the National Board Relations Board. (GCX 1(a))

III. ANALYSIS

A. The ALJ's Credibility Resolutions Are Appropriate and Well-Founded

Many of the ALJ's findings and conclusions are based either on specific credibility resolutions or on a composite of the credible testimony presented at hearing. (ALJD 5; 8:fn.8) Such findings, as discussed and explained by the ALJ in his Decision, are appropriate, based on valid considerations, and should be accepted by the Board. Respondent's request, by its Exceptions, that the Board reconsider the ALJ's credibility determinations in certain respects, should be rejected by the Board. The Board's established policy is not to overrule an

administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products,* 91 NLRB 544 (1950, enfd. 188 F.2d 362 (3d Cir. 1951. Respondent has failed to point to any legitimate basis for reversing the ALJ's findings.

B. Respondent's Dress Code Is Overly Broad.

The ALJ properly found that Respondent's maintenance of its "overly broad work rules," i.e., Dress Code, violates Section 8(a)(1), as alleged. (ALJD 7:15 - 18). Contrary to Respondent's contentions in support of its Exceptions, the ALJ's findings and conclusions in this regard are fully supported by the record and applicable case law. The ALJ's application of the Board's *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004, analysis is appropriate.

1. Respondent's Prohibition of Articles of Clothing Which Are "Confrontational, Insulting, or Provocative" Unlawfully Restrains and Coerces Employees in the Exercise of Section 7 Rights.

Respondent's Dress Code policy contains a provision which includes terms that are overly broad, such that it has the effect of unlawfully restraining and coercing the Section 7 rights of its employees. The provision at issue reads:

> Articles of clothing that contain phrases, words, statements, pictures, cartoons or drawings that are degrading, confrontational, slanderous, insulting or provocative are never appropriate. (GCX 4)

The ALJ's analysis demonstrates that he gave full consideration to the Board's admonition to refrain from reading the particular phrases in isolation and to not presume improper interference with employee rights. (ALJD 6:50 - 52) [6]

[6] Respondent's suggestion that the charge, insofar as it alleges that its Dress Code's language is unlawful, is untimely and without merit. Respondent argues that because the rule has been in effect since 1997, the charge in this matter is untimely. Respondent fails to consider that the allegations at issue here are the maintenance (not

Respondent argues that its prohibition of the T-shirt worn by Shore on February 12, 2009, was prohibited because it was "insulting" and not because it was a Union T-shirt. Respondent, however, has failed to recognize that a rule need not explicitly restrict Section 7 activity to be unlawful. The Board has held that "[i]f the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Northeastern Land Services, Ltd.*, 352 NLRB 744 (2009 (applying the Board's standards as set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)). In the instant case, while there is no evidence that Respondent promulgated this rule in response to union or other protected activity, the language of the policy itself shows that employees would reasonable construe the language of the rule to prohibit their Section 7 conduct. Moreover, there is sufficient evidence to establish that the rule was applied in response to employees' Section 7 conduct.

Respondent's rule in this case, which prohibits articles of clothing which are insulting, provocative, or confrontational, are ambiguous and therefore overly-broad. Within its rules, Respondent does not define or even clarify what would constitute articles of clothing which are insulting, provocative, or confrontational.[7] The only guidance provided to employees to

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the promulgation) of the rule, and its application. Contrary to Respondent's Exception 14, both allegations are supported by a timely-filed charged.

[7] Moreover, contrary to Respondent's assertions, its rules are not easy to follow and such restrictions are not readily apparent as not inhibiting Section 7 rights. In fact, neither Shanahan nor Agnew could clearly answer what constitutes an article of clothing which is provocative or confrontational, thus highlighting just how highly subjective the rule is. (Tr. 47:11-25, 48:1-14, 290:20-25, 291:1-16) When asked to explain what an insulting article of clothing is, Shanahan testified that it was "...just a direct knock, for lack of a better word, at a person, policy, program, the company." (Tr. 291:-6-8) Shanahan's definition of what is "insulting" clearly shows that Respondent maintains this rule with an eye toward restraining and coercing its employees in the exercise of their right to engage protected activity. Most telling, and almost an admission by Respondent of the policy's ambiguity, is the fact that the policy itself directs employees to "ask" when they are uncertain about the

determine whether what they are wearing complies with Respondent's rule is a notation contained at the very end of the Dress Code policy. Employees are directed to:

> …..ask yourself 'is this appropriate?' If clothing is questionable, always defer to the conservative or *ask in advance*. These are easy to follow guidelines and are established for a business purpose. *Any exceptions to this policy must be approved by Human Resources.* (GCX 4) (Emphasis added)

Based on the breadth of the language of Respondent's policy, it is reasonable to conclude that employees would reasonably conclude that it would prohibit them from wearing clothing that may be viewed by Respondent as insulting (such as clothes questioning Respondent's policies), or provocative (say, for example, clothes urging employees to support the Union), or confrontational (for instance, shirts with slogans encouraging employees support the Union during negotiations).

In addition, the lack of any objective guidance as to the meaning of the rules could reasonably lead employees, out of fear of being disciplined, to not engage in protected concerted conduct, thereby chilling employees' exercise of their Section 7 rights. In *Advance Transportation Co.*, 310 NLRB 920 (1993) the Board struck down the employer's "no harassment, intimidation" rule as unlawful where the administrative law judge determined it to be "vague and ambiguous and so overly broad as to fail to define permissible conduct thereby fortifying [the employer] with power to define its terms and inhibit employees in exercising rights under Section 7 of the Act." 310 NLRB 920, 925 (1993). Similarly, the terms at issue in the instant case are so vague and ambiguous, and lack any kind of objective

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appropriateness of the article they wish to wear. Such a prohibition is, at a minimum, further evidence of the policy's unlawful nature inasmuch as it requires employees, in order to determine whether their clothing would violate the policy, to disclose their protected activities to avoid the risk of being disciplined. Further, the fact that Human Resources can "approve" any "exceptions" to this policy indicates that Respondent may be willing to make certain exceptions, presumably based on subject and content matter which, more likely than not, would chill employees who wished to wear articles of clothing which would otherwise be protected.

guidance, that permitting them to remain would empower Respondent to make arbitrary and subjective determinations that could be used to restrain and coerce Section 7 rights.

In any event, as found by the ALJ, Respondent has applied its policy to restrict the exercise of Section 7 rights, thereby running afoul of another of the *Lutheran Heritage* prongs. Specifically, Respondent relied on this policy to prevent its employee from wearing an article of clothing which expressed concerted discontent with Respondent's WOW program. (Tr. 60:5-17) The statement on the T-shirt threatened the status quo and threatened to undermine a program which Respondent considers to be an important part of its employee incentive program, as well as an important marketing tool for clients. Despite Respondent's claims, it is this kind of employee concerted activity that Congress sought to protect when it passed the Act. Respondent's findings that the maintenance of the overly-broad rule and its unlawful application to Shore are fully supported by the record.[8]

C. Use of Union T-Shirt Containing Phrase "I Don't Need a WOW to Do My Job" is Protected Concerted Activity Under the Act.

The ALJ's finding and conclusion that Shore's wearing of the Union T-shirt was protected by the Act is fully supported by the credible record evidence and Board case law. (ALJD 5:37 - 6:26) Despite Respondent's contentions to the contrary, the wearing of the T-shirt in the instant case constitutes protected concerted activity which Respondent unlawfully

[8] The credible record evidence establishes that the rule was applied to explicitly restrict the exercise of Section 7 rights. At hearing, Shanahan and Agnew testified that they were both upset and disappointed by Shore's use of the T-shirt that bore the slogan "I Don't Need a WOW to do My Job." (Tr. 55:11-19, 296:7-14) Shanahan described it as being insulting and agreed that the Dress Code provision was used as a basis to have Shore remove his T-shirt. (Tr. 297:14-23). Shore's use of the T-shirt and the content displayed on the T-shirt is protected under the Act, as found by the ALJ (ALJD 6:20 - 24). The T-shirt in question is a Union T-shirt which expresses the Union's position on an issue and also constitutes concerted activity as it expresses the views of members of sister local unions as well as that of many of Respondent's Las Vegas facility employees. The fact that Shore was told to remove his T-shirt and threatened from wearing it again because Respondent found it to be "insulting" and was "upset and disappointed," supports a finding that Respondent discriminatorily applied the rule to restrict its employees Section 7 rights.

restrained and coerced. Though it is recognized that the act of wearing a T-shirt should be examined objectively, Shore's testimony confirms the obvious -- that the act of wearing the T-shirt was in and of itself an act of protected concerted conduct. At hearing, when asked why he wore the T-shirt, Shore testified that "I wore the shirt because of the USW logo, first of all." (Tr. 224:3-5) The T-shirt was, by nature of its logos, concerted, in support of the Union, and related to terms and conditions of employment -- not an individual action removed from the protections of the Act. The record is crystal clear -- the T-shirt is a Union shirt which contains the United Steel Workers logo and "Local 993" printed on the front, and a statement regarding Respondent's WOW incentive program on the back. (GCX 5; Tr. 259:16-25, 260:1-6)

Additionally, the use of the T-shirt constitutes concerted activity as its use was clearly a "logical outgrowth of group activity." See *Salisbury Hotel*, 283 NLRB 685 (1987). In *Salisbury Hotel*, an employee who called the Department of Labor regarding the employer's lunch hour policy without explicitly consulting her co-workers was engaged in concerted activity because the call was a continuation of efforts initiated by a group of employees to protest the new lunch hour policy. Id. at 686-87. The Board explained that "[a]lthough there is no evidence that the [r]espondent's employees explicitly agreed to act together to change the [r]espondent's new lunch hour policy, they did at least tacitly agree that they had a grievance and that they should take it up with management." Id.

The testimony at hearing established that, like the employees in *Salisbury Hotel*, Respondent's employees, through their Union representatives and among themselves, discussed their discontent with the WOW program. The ALJ found that there was displeasure among employees regarding the WOW program. (ALJD 4:37) The record fully supports

such a finding. For example, at the Medco Council meeting, Union representatives discussed the WOW program and the possibility of conducting a survey to gauge how employees felt about the WOW program. (Tr. 261:11-25) The survey's purpose was to present Respondent with evidence of the general discontent with the program. (Tr. 261:13-25, 262:1-6). Moreover, the record also shows that even before the Medco Council meeting, employees approached Osterman to voice their discontent with the WOW program. (Tr. 256:23-25, 259:1-10, 262:7-17) Further, Shore testified that employees approached him, in his capacity as Union steward, to express their discontent with the program. (Tr. 233:9-25, 234) Shore's use of the T-shirt was a continuation of, and in support of, efforts of employees initiated to voice their concerns and discontent with Respondent's WOW program. It is, therefore, protected activity under Section 7 of the Act.

D. No Special Circumstances Exist

Respondent's contentions that the ALJ erred by not finding "special circumstances" in this case is without merit. Respondent's Brief in Support at pp. 29, 30. To the contrary, Respondent has failed to meet its burden in establishing a special circumstance, and none are shown by the record.

The Section 7 right of employees may give way to employer limitations when "special circumstances" override the Section 7 interests of employees and legitimize the regulation or prohibition of such apparel. *Evergreen Nursing Home*, 198 NLRB 775, 778-79 (1972). The Board has found special circumstances justifying proscription of union insignia and apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its

employees. *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). Most significantly, the Board finds that, "[t]he special circumstances exception is narrow and a rule that curtails an employee's right to wear union insignia is presumptively invalid." *E&L Transport*, 331 NLRB 640, fn. 3 (2000). These rules were recently reiterated by the Board in *The Guard Publishing Company d/b/a Register Guard*, 351 NLRB 1110, fn. 2 and 1137 (2007). The burden is on the employer to prove the existence of special circumstances that would justify the restriction at issue. *W San Diego*, 348 NLRB 372, 373 (2006). Respondent, both at trial and by its Exceptions, has failed to meet its burden.

Section 7 rights of employees can also be outweighed where the conduct or the message displayed is "vulgar or obscene" or "inflammatory and offensive." See *Leiser Construction, LLC.*, 349 NLRB 413 (2007); *Komatsu America Corp.*, 342 NLRB 649, 650 (2004). The Board has upheld bans of union insignia when the message is so "offensive, obscene or obnoxious" as to justify the employer's requirement that the "employees remove or cover them, or else leave the premises." *Southwestern Bell Telephone Co.*, 200 NLRB 667, 670 (1972). Such cases do not support Respondent's contentions in the instant case.

In *Southwestern Bell Telephone Co*., the Board upheld a ban of union insignia when the message on the shirt was "offensive, obscene or obnoxious." Id. The Board found that the union's T-shirt worn by employees during a union dispute which read "Ma Bell is a Cheap Mother" was unprotected and undermined workplace discipline. The Board reasoned that "[i]n view of the controversial nature of the language used and its admitted susceptibility to derisive and profane construction," the employer "could legitimately ban the use of provocative slogan as a reasonable precaution against discord and bitterness between employees and management, as well as to assure decorum and discipline in the plant." Id. at

670 . As the record establishes, there are no "special circumstances" in the present case that privilege Respondent's unlawful conduct.

At hearing, Shanahan and Agnew testified that they were disappointed by the use of the T-shirt and felt disrespected by Shore's wearing of the shirt. (Tr. 55:11-19, 196:7-14) They also professed a concern that it was offensive to employees and management alike. Respondent's baseless concerns are insufficient to outweigh the Section 7 rights of its employees to engage in this activity. The phrase printed on the back of the T-shirt was not "offensive, obscene, or obnoxious" and, therefore, cannot be prohibited on these grounds. The phrase "I Don't Need a WOW to do My Job" is unambiguous and does not contain language that can have double meaning, as was the case in *Southwestern Bell Telephone Co.* The language is clear and not susceptible to misinterpretation. A reasonable person with knowledge of the WOW program would immediately understand the message communicated by the phrase. Likewise, a person who lacked knowledge of the WOW program would not reasonably interpret the language to be offensive or have the effect of calling Respondent's business practices into question.

Moreover, Respondent, while admitting that the WOW program is a vital component of its employee relations program and makes up a significant part of what is discussed on tours, nonetheless suggests that as a result, its prohibition of the T-shirt in question was justified based on a "special circumstance." Respondent's argument lacks merit and is not supported by Board precedent. Respondent's argument that the T-shirt may be seen by clients or customers when they tour the facility and therefore affect Respondent's ability to do business is unconvincing. The language on the T-shirt has not been shown to be offensive or otherwise prone to damage Respondent's business or client relations. Even if Respondent's

concern was a sufficient basis to impose some restrictions on the wearing of the T-shirt, which it is clearly not, Respondent's blanket prohibition is not privileged in the circumstances presented.

More to the point, as to Respondent's claims regarding customer concerns, the Board has held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia. *Meijer, Inc.*, 318 NLRB 50 (1995). In that case, the fact that some of the employer's existing or potential clients may see employees wearing apparel that expresses employee concerns or grievances is not sufficient to constitute a special circumstance. Id.

The limited instances in which the Board found a shirt's message unprotected based on its content do not support Respondent's contentions. In *Pathmark Stores, Inc*., 342 NLRB 378 (2004) the Board held that the employer was justified in prohibiting employees from wearing union T-shirts and baseball caps bearing the message "Don't Cheat the Meat." 342 NLRB 378 (2004). The union believed that the employer was cheating its customers by allowing them to observe unit employees cutting meat products, thereby creating the impression that its meat products were cut fresh, when in fact the employer was selling pre-packaged meat that was not labeled as such. The Board held that "in striking a balance between the parties' competing interests, we find that Respondent's concerns are appropriately gauged on the basis of the more adverse, but reasonable, construction of the ambiguous slogan." Id. at 379 (citing *Honda of America Mfg., Inc.*, 334 NLRB 746, 748 fn. 6 (2001). Thus, the Board reasoned that the employer had a legitimate interest in protecting its customer relationship that outweighed any legitimate interest of employees to wear the

apparel. Id. The language of the T-shirt in this case is clearly distinguishable from the language in *Pathmark*.

Similarly, in *Noah's New York Bagels, Inc.*, a case cited by Respondent, the Board ruled that an employer did not violate the Act when it prohibit unit employees from wearing union T-shirts and buttons with the phrase "If its not Union, its not Kosher." 324 NLRB 266 (1997). The Board reasoned that the employer's prohibition against employees wearing T-shirt's that mocked its Kosher policy was lawful. Id. 275. The Board reasoned that the employer lawfully enforced its policy requiring the wearing of company T-shirts and held that the Union's appeal to ethnic prejudices on which the employer's business relied was not protected. Id. See also *Komatsu America Corp*., 342 NLRB 649, 650 (2004).

The present case is clearly distinguishable from the cases noted above. In these cases the Board ruled that special circumstances existed based on the negative reference or allusion to the company's sales practices that were created by the use of the apparel at issue. As previously noted, the phrase "I Don't' Need a WOW to Do My Job" is unambiguous. It does not raise any negative inferences that give rise to questions related to the operation of Respondent's business or its sales practices. The slogan is simply an expression that reflects the Union's and, more specifically, its members' feelings about Respondent's WOW program.

The facts of this case are more analogous to *Escanaba Paper Co.*, 342 NLRB 378 (2009) where the employer prohibited employees from wearing union buttons with the phrase "Just Say NO" and "Hey Mead – Flex this" 342 NLRB 378 (2004). The apparel was worn by unit employees in an effort to pressure the employer to negotiate a more favorable collective-bargaining agreement. The Board held that the employer did not meet its burden of showing

that a special circumstance existed since there was no evidence that the use of the pins "caused or threatened to cause any harm" to the employers operations. Id. at 732. Further, the Board affirmed the administrative law judge's ruling that the mere possibility that messages might make a negative impression on customers and suppliers did not outweigh the employees' Section 7 rights. Id. The fact that the employees had limited access to the employer's customers and suppliers was considered by the administrative law judge and Board. Id. at 733

In the instant case, employees have limited access to the employer's clients. As previously discussed, when visitors are given tours they are escorted and their access is restricted. The fact that Respondent's existing or potential clients may come into contact with employees does not outweigh the Section 7 rights of its employees. See *Sears, Roebuck & Co.*, 305 NLRB 193, 198-199 (1991). Further, as highlighted by the Board in *Escanaba Paper Co.*, the possibility that the phrase on the T-shirt at issue may cause a negative impression on Respondent's clients is insufficient to justify its prohibition. 342 NLRB at 733 Thus, Respondent's prohibition of the T-shirt at issue in this case unlawfully interfered with the Section 7 rights of its employees.

F. Respondent Invited Its Employees to Quit In Violation of the Act.

The ALJ's finding that Respondent violated the Act by responding to Shore's protected conduct with an invitation to quit his employment is fully supported by the credited record testimony and Board law. Contrary to Respondent's contentions, when Shanahan invited Shore to quit, in the circumstances presented, it violated Section 8(a)(1) of the Act.

As stated by the ALJ, the Board has consistently held that an employer that responds to protected concerted protests of working conditions by telling employees that they can leave

if they do not like the conditions, coerces employees within the meaning of the Act. (ALJD 6:28) Inviting employees to quit their employment in such circumstances interferes with the free exercise of employees' Section 7 right to protest working conditions. *Alton H. Piester, LL*, 353 NLRB No. 33 (2008)*; House Calls, Inc.*, 304 NLRB 311, 313 (1991)*; Chinese Daily News*, 346 NLRB 906 (2006). In *McDaniel Ford, Inc.*, the Board reiterated this principle when it stated "[i]t is well settled that an employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that "engaging in ...concerted activities and their continued employment are not compatible, and implicitly threatens discharge of the employees involved." 322 NLRB 956, 962 (1996).

E. Respondent's Unilateral Change to Dress Code Policy

The record establishes that Respondent consistently and unequivocally refused to bargain with the Union over changes to Respondent's Dress Code. The ALJ's findings that Respondent violated Section 8(a)(1) and (5) of the Act by presenting the changes as a fait accompli and then refusing to bargain over such changes are fully supported by the record. Moreover, the ALJ goes into significant detail in showing that each and every one of Respondent's defenses are without merit. (ALJD 9 -10) It is respectfully submitted that the Board should reject each and every proffered defense, offered kitchen-sink style by Respondent, and affirm and adopt the ALJD and recommended Order.

As set forth above under the Facts section, and as found by the ALJ (ALJD 7 - 9), the record fully and factually supports the ALJ's findings. The record establishes that the dress code, in the situation presented, is a mandatory subject of bargaining, that the Union did not

waive its right to bargain over the changes presented to it, and that the changes were material.[9]

1. Respondent's Contentions Regarding the Parties' Management Rights Clause Are Without Merit.

The ALJ correctly rejected Respondent's contention that it was privileged to make the changes at issue because of the management rights clause in the parties' collective-bargaining agreement. (ALJD 9:22). The ALJ correctly notes that at the time of Respondent's unlawful conduct, the contract had not been agreed to or ratified, and that in any event the clause did not amount to a clear and unequivocal waiver by the Union. (ALJD 9:22 - 42)

More specifically, the Management Rights Clause referred to by Respondent is contained within Article XXVII of the CBA is as follows:

> The Company reserves the right to exercise all the duties and responsibilities of management and to determine all matters of management policy and pharmacy operation, and to direct and control the work force including, but not limited to, the decision to hire, promote, demote, discipline, suspend, discharge for cause, transfer, and relieve employees from duty because of lack of work or for other legitimate reasons and to direct, schedule, assign and train employees. The Employer shall be the exclusive judge of all matters pertaining to the servicing of its clients, location of its pharmacy, the schedule and standards of production, equipment, methods, processes, means and materials to be used. The promulgation and enforcement of rules and regulations not inconsistent with the provisions of this Agreement are vested in the Employer, provided that if the Union deems any such rule or regulation to be inconsistent with the provisions of this Agreement, it shall so notify the Employer. Within twenty-four (24) hours of notice to such effect, the Employer may withdraw the rule or regulation. Otherwise the Union may submit it to settlement by the adjustment

[9] In this case, as a result of the modification, Pharmacists are now required to wear an additional article of clothing (lab coats), which was not previously required, while employees of other departments are not. Further, employees are required to supply their own casual business attire on tour days. By Respondent's admission, tours may take place several times per week. (Tr. 299:3-5) As a result, Pharmacists may be required to wear casual business attire regularly, resulting in significant personal expenses associated with purchasing appropriate attire. Respondent has also stipulated that employees who did not comply with modifications would be subject to Respondent's disciplinary steps. (Tr. 245:17-25, 246, 247:1-3) An employee dress code is a mandatory subject of bargaining, and an employer violates Section 8(a)(1) and (5) when it unilaterally implements changes to a dress code. *Yellow Enterprise Systems, Inc.*, 342 NLRB 804, 827 (2004) (citing *Transportation Enterprises*, 240 NLRB 551, 560 (1979), *enfd. in relevant part*, 630 F.2d 421 (7th Cir. 1980)). The changes at issue herein are mandatory subjects of bargaining.

> procedure of this Agreement but the rule or regulation shall remain in force pending such settlement. (GCX 7)

While the Management Rights Clause reserves to Respondent certain rights, it does not privilege Respondent to unilaterally modify the dress code of bargaining unit employees.

It has long been established that an employer violates Section 8(a)(5) when it makes a unilateral change in unit employees' terms and conditions of employment, unless authorized to do so by a union waiver of bargaining rights. In *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-813 (2007), the Board reaffirmed its long held position that a purported contractual waiver of a union's right to bargain is effective if the relinquishment is "clear and unmistakable"

In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), the United States Supreme Court held that it would not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." However, the requirement that a waiver of bargaining rights be "explicitly stated" does not require that the action be authorized in exact words within a contract. As the Board noted in *Provena*, a waiver may be found if the contract either "expressly or by necessary implication" confers on management a right to unilaterally take the action at issue. 350 NLRB 810-813, citing *New York Mirror,* 151 NLRB 834, 839-40 (1965). Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter. *Rockwell International Corp. v. NLRB,* 260 NLRB 1346, 1347 (1982).

In interpreting the parties' CBA, the relevant factors to consider include: (1) the wording of the proffered sections of the agreement at issue; (2) the parties' past practices; (3)

the relevant bargaining history; and (4) any other provisions of the collective bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue. See *American Diamond Tool,* 306 NLRB 570, 570 (1992).

In *Southern Florida Hotel Assn.*, 245 NLRB 561, 567-569, enfd. in relevant part 751 F.2d 1571 (11th Cir. 1985), the Board found a limited waiver in a management rights clause that reserved to the employer the right to "make, continue and change such reasonable rules and regulations as it may deem necessary and proper in the conduct of its business." The Board reasoned that based on the extensive history and nature of the parties' negotiations about the wording and potential effect of the clause, it was understood by both parties that the clause granted the employer "significantly expanded authority to unilaterally implement reasonable changes in work rules." In fact, the Board found, under the circumstances, the union's acceptance of the management-rights clause "amounted to a broad waiver of the union's right to be notified of and to bargain about changes in working conditions." Id. at 568. Notwithstanding the above analysis and findings, the Board, nevertheless, found that the union's acceptance of the management rights clause did not constitute a waiver with respect to every one of the numerous changes implemented by the employer. More specifically, the Board found that the employer's broad, contractually reserved right to change rules and regulations did not specifically give the employer the right to unilaterally make changes in employment and rates of pay. The Board held that the language contained in the management rights clause did not constitute a waiver by the union of its right to be informed of and negotiate about rule changes that directly affected employees' wages. Id. Therefore, even in the context of a broad waiver by the union of the right to be notified of and to bargain about changes in working conditions in general, the Board found that the union had not made a

clear, unequivocal, unmistakable waiver of its specific right to be notified of and bargain about such changes that affected wages.

Applying the Board's principles and law to this case, the provision in the Management Rights Clause upon which Respondent is attempting to rely upon is couched in the most general of terms and makes no reference to any particular subject, much less a specific reference to Respondent's right to alter the employee dress code. Further, there are no other provisions contained within the CBA that, if examined separately or collectively, would privilege Respondent to make the changes to the Dress Code policy by "necessary implication." The fact that the Union was certified as the exclusive bargaining representative of the Pharmacist Unit a little over a year ago makes the parties' past practices and relevant bargaining history virtually non-existent. Even assuming, as Respondent claims that there was a past practice of permitting Respondent to make unilateral changes, Respondent has failed to establish such facts in the record. In any event, absent a showing to the contrary, the Board has consistently maintained that a union's acquiescence in an employer's unilateral conduct does not necessarily constitute a waiver of the right to bargain in the future over the same or similar employer conduct. See *E.R. Steubner, Inc.*, 313 NLRB 459 (1993). The record fails to establish that the parties' Management Rights Clause privileges Respondent to make the changes at issue in the instant case, that the Union has acquiesced to such a reading of the clause, or that the Union has waived its right to bargain over changes to the dress policies of Respondent.

In addition, Respondent's proffered interpretation of the plain language of the Management Rights clause is contrary to the terms of the clause itself. At hearing, Shanahan and Agnew testified that under the terms of the Management Rights Clause, the Union is

required to file objections to any proposed changes within 24 hours of receiving notice from Respondent. Thus, according to Respondent, if the Union fails to raise objections within the 24-hour period, it waives its right to bargain. (Tr. 212:21-25, 213:1-7) Respondent appears to be misreading the applicable provisions of the clause, perhaps to justify its unlawful act. As is evident from the plain language of the clause, and contrary to Respondent's upside down interpretation of the clause, the 24-hour requirement applies to *Respondent*, not the Union.

More specifically, the relevant provisions of the clause describe which party is subject to the "24- hour requirement" and define its purpose. The sentences in question read:

> The promulgation and enforcement of rules and regulations not inconsistent with the provisions of this Agreement are vested in the Employer, provided that if the Union deems any such rule or regulation to be inconsistent with the provisions of this Agreement, it shall so notify the Employer. *Within twenty-four (24) hours of notice to such effect*, the Employer may withdraw the rule or regulation. Otherwise the Union may submit it to settlement by the adjustment procedure of this Agreement but the rule or regulation shall remain in force pending such settlement (emphasis added).

The first sentence notes in broad and general terms references certain types of rules and regulations to which the clause may apply and addresses the issue of notice by the Union. The sentence does not contain the specificity required under Board law to establish a clear and unmistakable waiver regarding a particular term and condition of employment. The second sentence makes reference to the "24- hours" period, which is imposed on Respondent, not the Union. Finally, the third sentence of the parties' clause contemplates, and provides, that the Union may file a grievance in accordance with the terms of the CBA.

2. Respondent's Notice To The Union Of The Modifications Amounted To Nothing More Than A *Fait Accompli*.

Contrary to Respondent's Exceptions 17-20, 30, 31, 33, 35, 36, and 37), the Board should, as did the ALJ, find that Respondent presented the changes as a *fait accompli*.

The law with respect to what constitutes a unilateral change is well settled. During negotiations for a collective-bargaining agreement, an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). While negotiations for a collective-bargaining agreement are ongoing, "an employer's obligations to refrain from unilateral change extends beyond the mere duty to give notice and an opportunity bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). In *Dorsey Trailers, Inc.*, the Board held that

> [a] bargaining impasse occurs when good-faith negotiations have exhausted the prospect of reaching an agreement. Good-faith bargaining requires timely notice and meaningful opportunity to bargain regarding the employer's proposed change, as no genuine bargaining can be conducted where the decision has already been made and implemented. Thus, no impasse is possible where an employer presents the union with a 'fait accompli' as to a matter over which bargaining to impasse is required. 327 NLRB 835, 858 (1999), enf. granted in part and denied in part 233 F.3d 831 (4th Cir. 2000).

Even during time periods when negotiations for a new collective-bargaining agreement are not in progress, an employer must give a union notice of an intended change sufficiently in advance to permit an opportunity to bargain meaningfully about the change. "To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time *or because the employer has no intention of changing its mind*, then the notice is nothing

more than informing the Union of a fait accompli." *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982) (emphasis added).[10]

In this case, Respondent informed the Union of its modification to the Dress Code the day before the changes were announced to employees and six weeks before the implementation of such changes. However, Respondent cannot evade the fact that it admitted that the purpose of notifying the Union on November 19, 2009, was not to bargain over the issue but simply to provide notice. (Tr. 305:14-25, 306:1-2) Respondent clearly communicated to the Union its refusal to bargain on two separate occasions.

Specifically, on December 9, 2009, following the Union's written request to bargain over the modification, Agnew responded by e-mail making clear that Respondent would meet to discuss the changes but that it "did not believe this is a mandatory subject for bargaining." (GCX 9) The ALJ is correct in describing this as Respondent refusing to bargain with the Union. (ALJD 9:19) On December 10, 2010, when the parties met, it was once again made clear by Shanahan that Respondent was not there for the purpose of bargaining. (Tr. 81:10-12, 307:19-24, 358:1-5) Thus, Respondent made it explicitly apparent that the purpose of the meeting was to answer questions and not to bargain. In spite of this, the Union attempted to express its concerns and objections to the modifications. For example, the Union raised concerns about the room temperature in the area where Pharmacists work. The meeting ended when the Union, in the face of Respondent's obstinacy and express refusals to do so, reasonably determined that Respondent was unwilling bargain. (Tr. 309:9-11, 359:9-19) Even after the implementation of the changes to the Dress Code policy, the Union continued

[10] Employers may, in certain circumstances not present in this case, make changes in terms of employment without the approval of the union even though negotiations have not exhausted themselves to the point of impasse, however, "[a]n employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001), quoting *NLRB v. Citizens Hotel*, 326 F.2d 501, 505 (5th Cir. 1964).

to voice its disagreement with the modification. For example, following the ratification of the CBA, the Union filed a grievance over the unilateral changes to the Dress Code, which was rejected by Respondent on the grounds that it was untimely.

As to the fact that Respondent, in November 2009, presented the Union with a *fait accompli* regarding the dress policy changes, the language of Respondent's memorandum announcing the change is instructive. Such language shows that the dress code changes were being implemented on a national level at all of Respondent's facilities. This is evident in the first sentence of the first paragraph of the memorandum, which states that the modification apply to "all Medco Pharmacists at the various operational sites throughout the country." Respondent had decided to implement this policy change throughout all of its facility and, as is evident from the record evidence, never intended to bargain over the issue on a local level. This conclusion is further supported by Agnew's admission that Respondent's decision to modify the Dress Code policy was based on a Professional Enhancement Committee made up of employees throughout the nation, including one in Las Vegas. (Tr. 69:17-25, 70, 71; GCX 12)

3. Respondent Did Not Bargain In Good Faith And Therefore Could Not Have Bargained To Impasse.

Contrary to Respondent's contentions set forth in its Exceptions, the ALJ's finding and conclusion that there was no impasse is fully supported by the record and Board case law. (ALJD 10:23 - 29) The ALJ properly notes that "no good-faith bargaining impasse can exist in the face of prior unremedied refusal-to-bargain violations on the subject of the [purported] impasse." ALJD 10:25, 26.

In addition, the absence of an impasse is shown by other facts in this case, as well. For instance, from the outset, Respondent stated its refusal to bargain with the Union about

the changes at issue. It is well established that the duty to bargain in good faith is an "obligation...to participate actively in the deliberations so as to indicate a present *intention* to find a basis for agreement. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943) (emphasis added). The Board has held that the presence or absence of intent "must be discerned from the record." *General Elec. Co.*, 150 NLRB 192, 194 (1964), enforced, 418 F.2d 736 (2d Cir. 1969). Intent will not be at issue where the conduct of the accused party fails to meet the minimum obligations imposed by law or constitutes an outright refusal to bargain. *Katz*, 369 U.S. at 743. However, where the conduct of the parties does not so easily warrant a finding that a party refused to bargain, relevant factors must be determined whether the party is bargaining in good or bad faith. The standard devised by the Board to make this determination is the "totality of the conduct" which is used to test the "quality" of the negotiations. *NLRB v. Suffield Acad.*, 322 F.3d 196, 198 (2d. Cir. 2003), enforcing 336 NRB 659 (2001). Therefore, even where an employer's specific actions, when viewed alone, may not support a charge of bad faith bargaining, the party's overall course of conduct in negotiations may reveal a violation of the Act.

Applying such Board law to the facts of this case, it is evident that Respondent refused to bargain, or, if its discussions with the Union were found to constitute bargaining, Respondent did not bargain in good faith. In either scenario, Respondent's defense that it bargained to impasse is baseless. As previously noted, in its responses to the Union's requests to bargain over the dress code changes, Respondent stated that it was not willing to bargain and that the December 10 meeting was not to be a bargaining session. Despite Respondent's suggestion that it met with the Union and ultimately "bargained" in good faith to an agreement or impasse, the record clearly shows otherwise.

While there is no dispute that the parties met, the record establishes that their meetings did not constitute bargaining. Respondent not only made this clear at the outset, but its subsequent conduct further indicates that it did not act with the intent to deliberate and reach agreement. This is supported by Respondent's admissions at hearing and by CAGC's witnesses' testimony. As also established by Respondent's admissions, Union Committee Chairman Webb adjourned the parties' December meeting because "[e]verything that we brought up was dismissed by the company, so I felt we were getting nowhere, this was not a bargaining session…" (Tr. 359:12-19)

At hearings, Shanahan suggested that the parties had reached an agreement at the December meeting or at the very least, that Respondent had bargained in good faith even after announcing that Respondent was not there to bargain. (Tr. 309:21-23) Agnew also attempted create the impression that an agreement was reached between the parties which satisfied Respondent's obligation to bargain. However, an examination of such testimony shows that what Respondent proffers is far from evidence of bargaining, the reaching of an agreement, or impasse. For example, when asked whether Respondent believed the parties had reached an agreement at the meeting, Agnew answered that, "[w]ell, we got some nodding, that that was a good thing." (Tr. 82:2-10) The suggestion that the December meeting produced any agreement regarding the dress code changes is belied by the manner in which the meeting ended. Moreover, Respondent's claims that it agreed to provide short sleeve lab coats as a result of the meeting is not accurate -- that decision had already been communicated to the Union prior to the December meeting. (Tr. 356:2-6, 374:10-16) Finally, Webb's testimony that Respondent dismissed everything that the Union raised, as well as the Union's position that the parties had not reached any kind of agreement or made any progress, undermines

Respondent's applicable defenses that it bargained in good faith. (Tr. 374:10-25, 375:1-5) The record evidence establishes that Respondent violated Section 8(a)(1) and (5), as alleged, by making unilateral changes regarding the Dress Code.

IV. CONCLUSION

It is respectfully submitted that, based on the foregoing, the credited record evidence, and applicable Board law, the Board should issue a Decision and Order adopting and affirming the ALJ's findings, conclusions, and recommended Order and providing for whatever other remedies deemed appropriate to address and remedy Respondent's violations of Section 8(a)(1) and (5) of the Act, including, but not limited to, electronic Notice posting.[11]

Dated at Las Vegas, Nevada, this 26th day of October 2010.

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[11] *J. Picini Flooring*, 356 NLRB No. 9 (October 25, 2010). Though the ALJ did not grant CAGC's request for electronic posting, stating that he did not consider the record sufficiently developed to justify CAGC's request for an electronic posting remedy (ALJD 11:7-9), the ALJD in this matter issued prior to the Board's policy pronouncement in *J. Picini Flooring*. It is respectfully submitted that record establishes that Respondent operates a state-of-the-art facility that is based, in large measure, on electronic communication. See, for instances, examples of Respondent communicating electronically with its employees as reflected by GCX 11, 12, 13, 17. Moreover, the record is replete with references to Respondent's managers communicating by email with the Union's representatives, including employee representatives and stewards. In this circumstance, and in light of the Board's recent decision in *J. Picini Flooring*, and the record as a whole, it is respectfully submitted that the Board should order electronic notice posting.

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL ANSWERING BRIEF in MEDCO HEALTH SOLUTIONS OF LAS VEGAS, INC., Cases 28-CA-22914 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via Federal Express, on this 26th day of October 2010, on the following:

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