UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROFESSIONAL MEDICAL TRANSPORT, INC.		
and	Case Nos.	28-CA-023399
		28-CA-060435
		28-CA-061218
INDEPENDENT CERTIFIED EMERGENCY PROFESSIONALS OF ARIZONA, LOCAL #1		28-CA-062824

RESPONDENT PROFESSIONAL MEDICAL TRANSPORT INC.'S BRIEF IN SUPPORT OF EXCEPTIONS

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I. STATEMENT OF THE CASE

This matter was heard before Administrative Law Judge Lana H. Parke ("ALJ") on October 11, 12, 13, and 14, 2011 at the offices of Region 28 of the NLRB in Phoenix, Arizona.

As fully set forth below, PMT denies that it has violated the National Labor Relations Act (the "NLRA" or "Act"). Counsel for the General Counsel has failed to carry her burden of establishing that PMT's actions violated the Act. PMT has complied with the requirements of the NLRA.

Additionally, as explained below, many of the key facts in this case are undisputed, or otherwise are disputed only with conclusory, self-serving assertions. The General Counsel's witnesses were primarily Union officers whose self-interest and self-identification lies with the Union. On the other hand, PMT's witnesses' credibility was established through demeanor, consistency, body language, and most importantly, plausibility. The self-interested testimony of General Counsel's witnesses was unworthy of credence. Yet, as outlined below, the ALJ reflexively, and without sufficient explanation, credited the General Counsel's witnesses in every case. The limited exception to this occurred only when PMT had documented, written evidence contradicting the General Counsel's witnesses. In not one instance did the ALJ credit PMT's witnesses' testimony. The ALJ offered no explanation for this skewed approach.

Importantly, the Ninth Circuit reasoned in *Lewin v. Schweiker,* 654 F.2d 631 (9th Cir. 1981) that courts have consistently required explicit credibility findings where, as here, such credibility is a critical factor in the decision. The Seventh Circuit has similarly cautioned that a judge's "boilerplate comment concerning general credibility determinations" without further explanation was inadequate for review. *K-Mart v. NLRB*, 62 F.3d 209, 213 (7th Cir. 1995). Earlier this same court rejected an ALJ's credibility findings because the judge gave no reasons

for crediting witnesses and thus the findings "provide no basis for assessing the relative credibility of the witnesses." *NLRB v. Cutting, Inc.* 701 F.2d 659, 666-667 (7th Cir 1983).

The NLRB itself, with its normal deference to credibility determinations of the ALJ, declared: "…we believe that it would be far better for judges to give a more specific basis for demeanor-based credibility resolutions." *Atlantic Veal and Lamb,* 342 NLRB 418 (2004). Later, in *Tower Industries Inc*., 349 NLRB 1327 (2007), Member Schaumber found a blanket footnote on demeanor insufficient and would have remanded to the ALJ for her to further elaborate on the reasons for her findings. Here, PMT's record evidence was ignored, overlooked, downplayed, or disregarded by the ALJ with no sufficient explanation as to why she credited General Counsel's witnesses and ignored PMT's witnesses' testimony in nearly every case.

Regardless, the General Counsel must prove an unfair labor practice by a preponderance of the evidence. *See, e.g., Pirelli Cable Corp. v. NLRB*, 141 F.3d 503 (4th Cir. 1998). The General Counsel always has the burden of affirmatively establishing that an unfair labor practice has been committed by a respondent, which burden never shifts to the respondent. *Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154 (8th Cir. 1968). The ALJ ignored this requirement and placed on Respondent the burden of proving it did not commit the alleged unfair labor practices. Instead, the ALJ substituted her judgment for the teachings of the Board and the courts in derogation of established law.

II. QUESTIONS PRESENTED

A. Whether Respondent violated Section 8(a)(1) of the Act by informing employees they could not take concerted complaints to the human resources office. (Exceptions 1, 12, 13, 14, 15, 37, 38, 65, 66, 70, 71, 72).

B. Whether Respondent violated Section 8(a)(1) of the Act by threatening employee Greg Empey with surveillance and termination. (Exceptions 16, 17, 34, 35, 39, 40, 41, 42, 65, 66, 70, 71, 72).

C. Whether Respondent violated Section 8(a)(1) of the Act in its written statements related to the disciplinary suspension of Joshua Barkley. (Exceptions 18, 43, 48, 49, 50, 51, 52, 56, 65, 66, 70, 72).

D. Whether Respondent violated Section 8(a)(1) of the Act by limiting employee Craig Clifford's entitlement to union representation. (Exceptions 19, 20, 44, 45, 46, 47, 65, 66, 70, 71, 72).

E. Whether Respondent violated Sections 8(a)(3) and 8(a)(4) of the Act by disciplining employees Joshua Barkley and Travis Yates. (Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 43, 48, 49, 50, 51, 52, 53, 54, 55, 56, 65, 66, 67, 68, 69, 70, 71, 72).

F. Whether Respondent violated Section 8(a)(5) of the Act in relation to a January 10 information request. (Exceptions 30, 57, 58, 59, 65, 66, 70, 71, 72).

G. Whether Respondent violated Section 8(a)(5) of the Act in relation to a June 29 information request (Exceptions 31, 32, 36, 57, 60, 65, 66, 70, 71, 72).

H. Whether Respondent violated Section 8(a)(5) of the Act in relation to the cessation of Unit 603 service. (Exceptions 33, 61, 62, 65, 66, 70, 71, 72).

I. Whether Respondent violated Section 8(a)(5) of the Act in relation to payment of the Union President's "designee" to attend collective bargaining meetings. (Exceptions 63, 64, 65, 66, 70, 71, 72).

III. ARGUMENT AND AUTHORITIES

A. The ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by informing employees they could not take concerted complaints to the human resources office.

The ALJ found that Beverly Lemoine, PMT's 911 Regional Manager for Scottsdale, violated the Act by prohibited employees from presenting concerted complaints to human resources. (ALJD 14:18-26.) [1] This conclusion is baseless and should be dismissed.

This allegation arose from a confrontation between PMT employee Chris Mills and a co-worker, Dave Medley, wherein Mr. Mills told Mr. Medley to "go fuck himself" after Mr. Medley accused Mr. Mills of being a "snitch." (Tr. of Hr'g. in Case No. 28-CA-023399, hereinafter "Tr." at 553:7-13.) Mr. Mills purportedly brought this confrontation to the attention of his supervisor, Ms. Lemoine, who allegedly advised him that he could not go to Human Resources with the complaint. (Tr. 550:1-551:2.) Ms. Lemoine's detailed recollection of the conversation confirms that she never prohibited Mr. Mills from directing his complaint to human resources. In the conversation, Mr. Mills told Ms. Lemoine that he felt like he was being blamed for stuff he did not do. (Tr. at 640:15-23.) Ms. Lemoine asked Mr. Mills if he had been threatened or felt like he was in a hostile work environment. (Tr. at 640:25-641:5.) Mr. Mills response was "no" and that he was "just pissed off." (*Id.*)[2] Ms. Lemoine indicated that she would handle the issue. (Tr. at 641:11-12.) However, Mr. Mills did not tell Ms. Lemoine anything that would indicate a core human resources issue. Regardless, although the testimony at the hearing focused on the confrontation and surrounding circumstances, Ms. Lemoine never told Mr. Mills to not go to human resources with his complaint and, in fact, Ms. Lemoine would have no authority to bar

[1] Citations to Decision of the Administrative Law Judge will be "ALJD" followed by the page number, a colon, and the line numbers from where the exception is based in whole or in part.

[2] The ALJ erroneously concluded that Mr. Mills reported that Mr. Medley threatened him. (ALJD 6:36.) Ms Lemoine's detailed recollection of the conversation with Mr. Mills controverts the ALJ's conclusion.

employees from going to human resources. (Tr. at 641:13-25.)[3] Accordingly, there is no violation of the Act.

However, even assuming, for the sake of the argument only, such a "discriminatory rule" was made, the allegation is still meritless as Mr. Mills contacted human resources within 25-30 minutes of the confrontation with Mr. Medley. (Tr. at 562:25-563:6.) Thus, even presuming Ms. Lemoine's words to Mr. Mills could be construed as advising him "not to go to Human Resources with the complaints," any harm was rectified almost immediately when the issue was brought to PMT's human resources department. There was no allegation that any action taken by human resources after it was notified was unlawful. Additionally, there was no allegation that this "rule" applied to anyone besides Mr. Mills. Under the teachings of cases such as *American Federation of Musicians Local 76,* 202 NLRB 620 (1973), even an isolated *de minimis* unfair labor practice does not merit any further inquiry. In *American Federation of Musicians,* the Board held that the case involved: "One of those infinitesimally small abstract grievances [that] must give way to actual and existing legal problems if courts [and the NLRB] are to dispose of their heavy calendars." *Id.* (stating also "[i]n the circumstances here, however, the conduct involved was so minimal and has been so substantially remedied by the Respondent's subsequent conduct that the entire situation is one of little significance and there is no real need for a Board remedy.") Thus, even assuming the statement was made, which it was not, the ALJ erred in finding a violation of the Act.

[3] There was also testimony at the hearing regarding Ms. Lemoine's friendship with David Medley. Yet, there was no evidence presented that Ms. Lemoine, a former Union member herself, had shown any partiality to Mr. Medley or antipathy to Mr. Mills in this situation.

B. The ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by threatening employee Greg Empey with surveillance and termination.

The ALJ also found that at the conclusion of a March 21, 2011, disciplinary meeting, Barbie Marr, PMT's 911 Regional Manager for Chandler/Tempe, threatened employee Greg Empey by stating that he was being watched and was subject to termination. (ALJD 7:1-5.) The Administrative Law Judge's finding that Marr, in the presence of Clonts, told Empey that because of the concerns he had brought up in the meeting, he was being watched and was subject to termination in the future. (ALJD 14:37-38.) The ALJ found, without analysis, that the Respondent incorrectly maintains the statement had nothing to do with protected and concerted activity. (ALJD 14:42-43.) The ALJ erroneously ignored PMT's evidence and the finding is in error.

Although Ms. Marr, as established on the record, was unavailable to testify at the hearing due to illness, Mr. Clonts was also present at the meeting and at the hearing in this matter. (Tr. at 637:8-15.) Mr. Clonts testified that Ms. Marr did not make such a threat and further stated that she was not the type of person who would make such a threat. (*Id.*) Accordingly, the General Counsel did not meet its burden to establish that the threat was made.

The ALJ, offering clear insight into her result-oriented approach, failed to mention in her decision why Ms. Marr was unable to testify. The ALJ ignored Ms. Marr's illness, instead noting only that "Marr did not testify at the hearing" and that "[g]iven Marr's failure to rebut Empey's testimony. . . I credit Empey's account." (ALJD 7 fn 14.) This blatant spin is inappropriate for a purportedly neutral fact-finder. Regardless, the ALJ's decision was in error.

Even if such a "threat" was made, which Respondent does not concede, General Counsel did not establish a violation of the Act. The standard for determining whether a statement violates Section 8(a)(1) is an objective one that focuses on whether the statement has a

reasonable tendency to coerce the employee or interfere with Section 7 rights. *Flying Foods Group, Inc., d/b/a Flying Foods and Hotel Employees Restaurant Employees International Union LOCAL 355, AFL-CIO,* 345 NLRB 101, 105 (2005). However, for a statement to violate the Act, it must be made "in order to discourage [] employees from engaging in union activities." *See, e.g., ABC Industrial Laundry,* 355 NLRB No. 17 (2010). Here, there was no evidence that the "threat," if indeed one was made, had anything to do with union, or protected and concerted activity. In other words, there was no evidence of a causal connection between any protected activity by Mr. Empey and any alleged threat by Ms. Marr. Accordingly, even if a threat was made, the ALJ's decision was in error as there is nothing to connect the alleged threat with Mr. Empey's purported Union activity. The ALJ's finding on this allegation should be reversed.

C. The ALJ erred in finding Respondent violated Section 8(a)(1) of the Act in its written statements related to the disciplinary suspension of Joshua Barkley.

In the ALJ's recommended order, the ALJ found that the General Counsel alleged the statement in Barkley's disciplinary suspension to be a violation of 8(a)(1) by "accusing employee of filing unsubstantiated unfair labor practice charges with the Board." (ALJD 7:8-24.) PMT disputes this finding. However, the finding itself violates PMT's due process rights as the Complaint in this matter contained no allegation that Respondent violated the Act by accusing Mr. Barkley of filing unsubstantiated charges. For this reason alone, the ALJ's finding should be reversed.

In *Lamar Advertising of Hartford,* 343 NLRB 261, 265 (2004), the NLRB itself paid deference to the due process principles controlling here.

> To satisfy the requirements of due process, an administrative agency must given the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC,* 450 F.2d 534, 542 (6th Cir. 1971)." (Emphasis added).

The Complaint, upon which Respondent relied, made no mention of any separate violation of the Act for "accusing" Mr. Barkley of filing false charges. The ALJ's expansion of the allegations related to Mr. Barkley's discipline to include this purported violation, which was absent from the Complaint, denied PMT the opportunity to fully defend its case.

In *Sierra Bullets, LLC.,* 340 NLRB 242, 243 (2002), the Board held that a violation based on a broader theory, when the General Counsel expressly tried the case on a narrow theory, is improper and violates due process. *See also, Champion Int'l. Corp.,* 339 NLRB 672, 673 (2003) (holding that it is fundamental that respondent cannot fully and fairly litigate a case unless it knows what the accusation is).

It is rudimentary that due process mandates that the respondent have notice of the allegations against it so that it may present an appropriate defense. Customarily, such notice is afforded through the allegations reflected in the complaint. But, in *Pergament United Sales,* 296 NLRB 333, 334 (1989), *enf'd* 920 F.2d 130 (2nd Cir. 1990), the Board explained that it may find and remedy a violation even if there is no specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. The question then becomes when has a matter been "fully litigated."

Answering this question, in *Pergament United Sales, supra,* the Board stated that the resolution of this issue depends, at least in part, on whether the respondent would have changed the conduct of its case at the hearing had the specific allegation been asserted. *See generally, Loyalhanna Health Care Associates,* 352 NLRB No. 105 (2008) (unalleged violation not fully litigated, evidence was submitted in association with an alleged claim based on one theory of liability which the judge then relied on to find an unalleged claim based on a different theory of liability. The Board observed that had the respondent known it faced liability on this unalleged

theory of liability, it might have called certain witnesses to testify, or may have changed its conduct of the case by cross-examining certain other witnesses on the issue. Under these facts, the respondent had no reason to believe that there was any such issue in the case.)

Here, PMT was not aware of any alleged independent violation based on its statement regarding Mr. Barkley's habit of filing repeated unfair labor practice charges. Thus, at the hearing, and in the post-hearing brief, PMT focused its defenses solely on the issue of whether Mr. Barkley was properly disciplined. Thus, because PMT was not given the opportunity to present its defense, the ALJ's decision to expand the allegations in the Complaint was inappropriate and denied PMT due process.

Further, where the Board has found that a party's due process rights have been violated, the violation hinging on the judge's theory incompatible with due process, cannot be sustained. The Board routinely reverses the finding and dismisses this portion of the complaint, disdaining the alternative of remanding. The General Counsel is not entitled to a "second bite of the apple." *See, Paul Mueller Co.,* 332 NLRB 1350 (2000). Thus, this allegation must be dismissed.

Even putting aside for one moment the due process issues related to this un-alleged violation of the Act, the ALJ's decision was erroneous. The standard for determining whether a statement violates Section 8(a)(1) is an objective one that focuses on whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights. *Flying Foods Group, Inc., d/b/a Flying Foods and Hotel Employees Restaurant Employees International Union LOCAL 355, AFL-CIO,* 345 NLRB 101, 105 (2005). Analysis of this issue must take into consideration that Section 8(c) of the Act explicitly recognizes an employer's right to express its views about labor issues and unionization, provided the employer does so in non-coercive terms. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1999). Section 8(c) implements the First

Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of Section 8(a)(1). *Bancroft Mfg. Co., Inc.*, 189 NLRB 619, 622 (1971); *see also, Stanley Oil Co., Inc.*, 213 NLRB 219 (1974). In *Gissel*, the Supreme Court held: "[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by ... the Board." 395 U.S. at 617.

The NLRB has developed a body of case law that is predicated upon employers, through their speech rights, counterbalancing union rhetoric. *See, Steam Press Holdings v. Hawaii Teamsters,* 302 F.3d 998, 1009 (9th Cir. 2002) (reasoning that "freedom of speech is an essential component of the labor-management relationship" and this freedom counterbalances "a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty . . ."). Perhaps most apt is this language from *Livingston Shirt Corp.,* 107 NLRB 400, 405-06 (1953): "If the privilege of [Section 8(c) employer] free speech is to be given real meaning, it cannot be qualified by grafting upon it conditions which are tantamount to negation." In sum, an employer's free speech rights are robust as both Section 8(c) and the First Amendment provide.

Here, the statement which the ALJ found objectionable contained no "threat" or coercion of Mr. Barkley. Rather, it contained Respondent's opinion that Mr. Barkley had, in the past, filed unsubstantiated unfair labor practice charges. Although the ALJ found the statement to indicate greater discipline based on Mr. Barkley filing charges with the NLRB, the evidence actually shows that had Mr. Barkley not been involved with the NLRB, he would have been terminated. (Tr. at 361:21-25.) Regardless, there is no violation of the Act based on an employer stating an opinion that is critical of the union or its actions.

In *Sears, Roebuck & Co.*, 305 NLRB 193 (1991), the Board stated: "[W]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1) [of the Act]." That case involved "flip and intemperate remarks" of a manager, with respect to the likelihood of a union resorting to leg breaking to collect dues. The NLRB found such comments to be the manager's personal opinion and protected under the free speech provisions of Section 8(c) of the Act; *see also, Exterior Systems, Inc.*, 338 NLRB 677, 697 (2002) (holding that there was no violation of the Act where an employer called a union salting applicant a "union piece of shit.").

Similarly, in *Children's Center for Behavioral Development*, 347 NLRB 35 (2006), the Board considered a respondent's memo to its employees with content that was more negative toward the union than anything PMT stated in its discipline memo related to Mr. Barkley. The memo in *Children's Center* accused the union of "doing everything in its power" to harm the respondent, including interfering with the respondent's relationship with a funding source, United Way. The memo read as follows:

> I am sure that you know that Children's Center for Behavioral Development is suffering from severe financial hardship. What many of you may not know is that, I believe that for months now, the Union has been doing everything in its power to harm Children's Center for Behavioral Development. The Union has interfered with our relationship with the United Way, which affected our funding. Now the Union is trying to arbitrate grievances on behalf of Eileen Redeker, which has caused the Children's Center for Behavioral Development to incur costs and legal fees, which it cannot afford. In addition, the Union is now claiming that it has a contract with CCBD, even though the Union rejected the Center's last offer earlier this year and the parties have not been back to the negotiating table since.
> I wanted to make all of you aware of these issues and ask that you not permit Union issues to distract us from our mission. It is only by working together that we can move forward and succeed in these difficult times.

The Board, reversing the administrative law judge, found that this memo was "a lawful expression of the Respondent's opinion about the Union and does not violate the Act." 347 NLRB No. 3. The Board continued in *Children's Center*, "an employer may criticize, disparage or denigrate a union without running afoul of Section 8(a)(1) provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Id.* (emphasis added.)

The communication to employees contained no threats or promises of benefits. Rather, it outlined, in truthful, accurate language, PMT's opinion of Mr. Barkley's prior filing of unsubstantiated unfair labor practice charges with the NLRB. Indeed, as reflected in the record, numerous charges and complaint allegations filed by Mr. Barkley against PMT have been dismissed or withdrawn. (Tr. at 526:11-15.) Regardless, a communication does not violate the Act simply because it is critical of the union. *Charroin Mfg. Co.,* 88 NLRB 38, 40-41 (1950) (holding that speeches that were hostile toward the union must be considered as being within the scope of the free speech guaranty of Section 8(c) of the amended Act, as they contained neither threat of force or reprisal nor promise of benefit). The ALJ's findings related to PMT's "accusations" against Mr. Barkley must be reversed.

D. The ALJ erred in finding Respondent violated Section 8(a)(1) of the Act by limiting employee Craig Clifford's entitlement to union representation.

The ALJ found that "[w]hen, in August, Clonts told Clifford he did not need union representative because prospective discipline was only a verbal warning, he misstated the law." (ALJD 15:19-20.) The Administrative Law Judge's found that Clonts' statement was coercive and violated Section 8(a)(1). (ALJD 15:40-41.)

In relation to this specific allegation, PMT employee Craig Clifford was the alleged recipient of Mr. Clonts' statement. (Tr. at 571:23-572:5.) However, Mr. Clifford himself testified

that he did, in fact, have Union representation at his disciplinary meeting. (Tr. at 573:20-21.) Again, Mr. Clifford did not testify that he has actually ever been denied union representation.

As was apparent from the testimony and documentary evidence at the hearing, PMT goes well above and beyond to protect its employees' *Weingarten* rights by affirmatively notifying employees of such rights and rescheduling meetings to comport with union representatives' schedules. (Tr. at 298:18-23.) This practice is evidenced in several exhibits to the proceeding. (*See* G.C. Exs. 59,64, 65.) Mr. Clonts has never denied an employee Union representation. (Tr. at 298:24-299:2.) In fact, if an employee requested Union representation and none was available, the meeting would simply be rescheduled. (Tr. at 299:2-7.) The General Counsel offered no evidence of any employee ever being denied Union representation at an investigatory meeting or otherwise.

Thus, even assuming the "threat," was made, which PMT does not concede, there is no evidence that any of the employees' Section 7 rights were interfered with. Again, the standard for determining whether a statement violates Section 8(a)(1) is an objective one that focuses on whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights. *Flying Foods Group, Inc., d/b/a Flying Foods and Hotel Employees Restaurant Employees International Union LOCAL 355, AFL-CIO,* 345 NLRB 101, 105 (2005). Here, as described above, no employees, especially Mr. Clifford, have ever been denied Union representation. In fact, Respondent affirmatively notifies employees of their right to Union representation at investigatory meetings. No employee besides Mr. Clifford even heard the purported statement. Under these facts, the statement, if made, did not have a "reasonable tendency to interfere with employees' Section 7 rights." The ALJ's finding of a violation of the Act based on Mr. Clonts' purported "misstatement of the law" must be reversed.

E. The ALJ erred in finding that Respondent violated Sections 8(a)(3) and 8(a)(4) of the Act by disciplining employees Joshua Barkley and Travis Yates.

1. PMT did not unlawfully discipline Mr. Barkley and Mr. Yates over their flagrant violations of HIPAA.

The ALJ's findings with regards to the discipline of employees Travis Yates and Joshua Barkley exemplify the results-oriented approach consistently contained in the ALJ's decision and recommended order. As outlined below, the ALJ erred in finding that PMT expressly declared its hostility toward Barkley's protected activities in the written disciplinary suspension notice given to Barkley. (ALJD 16:2-5.) The ALJ erred in finding that General Counsel met the initial *Wright Line* burden and that Respondent had not met its shifted burden. (ALJD 16:27-30.) The ALJ erred in finding that the Respondent has failed to explain why it deviated from past disciplinary practice, bypassing the initial steps of prediscipline discussion/counseling and memo to employee file, in its dealings with Barkley and Yates. (ALJD 16:32-34.) The ALJ erred in finding that there was no evidence, beyond an alleged self-serving claim, that the Respondent regarded any of the asserted infractions as momentous and that Respondent failed to provide evidence of comparative discipline for similar violations. (ALJD 16:35-36.) The ALJ erred in finding reasonable inferences that the alleged offenses were not the primary focus of Barkley and Yates' discipline. (ALJD 16:41-43.) Finally, the ALJ erred in finding that Respondent violated Section 8(a)(4), (3), and (1) of the Act by issuing verbal written warnings, written warnings, and suspensions to Barkley and Yates, and demotion and transfer to Barkley. (ALJD 16:43-45.) PMT treated Mr. Yates and Mr. Barkley consistently, or even more favorably, than other employees who have committed similar acts. There is no showing of anti-union animus in the discipline. The ALJ's findings in regards to the discipline of Barkley and Yates are erroneous and must be reversed.

The factual background regarding the allegation of discipline for HIPAA violations is as follows: In June 2011, Beverly Lemoine, Regional Manager for Scottsdale, spoke with Mr. Barkley regarding several patient charts that needed to be amended. (Tr. at 178:8-14.) The charts needed attestation portions filled out. (Tr. at 181:8-16.) This issue was brought to Ms. Lemoine's attention by the billing department. (Tr. at 181:17-21.) Ms Lemoine provided Mr. Barkley with instructions on how to amend charts and instructions to fax the addenda to PMT's 911 office and send hard copies by interoffice mail. (Tr. at 180:11-25.) Ms. Lemoine again asked Mr. Barkley to fill out the attestations and send copies back to her via interoffice mail. (Tr. at 182:223-183:5.) In response, the next day, Ms. Lemoine received three faxes from Mr. Barkley, with none of the information properly completed. (Tr. at 183:3-5.) Mr. Barkley also sent hard copies which were incorrectly filled out. (Tr. at 184:12-21.) Ms. Lemoine had at least two additional conversations with Mr. Barkley in which she requested the forms be filled out correctly and returned to her. (Tr. at 284:12-21; 186:22-25.)

On or about June 23, 2011, Ms. Lemoine was at Station 604 performing her duties as Regional Manager and meeting with Field Training Officer John Gary. (Tr. at 219:17-25; 230:22-25.) Station 604 is the station out of which Mr. Yates and Mr. Barkley operated in the summer of 2011. (Tr. at 401:12-13; 590:2-9.) In addition to performing her other duties, Ms. Lemoine decided to look for the documents that she had requested from Mr. Barkley, which she had yet to receive. (Tr. at 187:18-23.) In the process of looking for the documents, Ms. Lemoine opened the drawers of the station desk. (Tr. at 194:14-17.) In a drawer of the desk she found multiple patient-related documents (Tr. at 198:4-6; G.C. Ex. 48). The records found included:

- Morphine replacement documentation, REF# SP04100052001
- Phoenix Fire Department EMS Incident Report, incident number 10-110602 (both a xerox copy and the original hospital copy)

- PMT Narcotics Usage Form for Incident # 32826
- PMT patient care record: 3/23/09 run # 21990
- Narcotics Usage Form 9/16/2010 run# 73032
- PMT patient care record: 1/25/2010 run# 6909
- PMT patient care record: 1/16/2010 run# 4288
- PMT patient care record: 12/03/2009 run# 88992
- PMT patient care record: 4/7/2010 run # 27618
- PMT Transportation Statement 4/4/2010 run# 26921
- PMT patient care record: 3/19/2010 run # 22217 (3 copies)
- Scottsdale Healthcare Osborn Admission Face Sheet MR # 0000897492
- An envelope containing notices that Mr. Barkley had been directed to distribute to the B-shift crews on 601, 602 and 607 in November, 2009, along with a confirmation signature form.

(G.C. Ex. 48.)

The desk in which these records were found was not locked and the office in which the desk was located was also unlocked. (Tr. at 671:20-23.) The documents contained protected health information and were not redacted. (Tr. at 314:9-15.) The documents contained information that is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191, 110 Stat. 1936, 42 U.S.C. § 1320 *et. seq.* Specifically, the documents contained "individually identifiable health information." *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1089 (9th Cir. 2007) (citing 45 C.F.R. § 160.202).

Information protected by HIPAA includes, but is not limited to, the following: information that relates to the individual's past, present, or future physical or mental health or condition; information that relates to the provision of health care to the individual; information that relates to the payment for the provision of health care to the individual; and information that identifies the individual or for which there is a reasonable basis to believe can be used to identify

the individual. *See, e.g., Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1089 (9th Cir. 2007) (an individual's "privacy is a primary HIPAA goal"); *Norman-Bloodsaw v. Lawrence Berkeley Lab*., 135 F.3d 1260, 1269 (9th Cir. 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality"). *Gonzalez v. Marks*, 2009 U.S. Dist. LEXIS 8201 (E.D. Cal. Jan. 26, 2009) (disclosure of mental health records is governed by HIPAA). The information found on the charts that is protected includes, but is not limited to, the following:

- Date and time of service
- Incident address
- Receiving hospital
- Patient's name
- Patient's address
- Patient's date of birth
- Patient's phone number
- Patient's social security number
- Insurance identification number
- Patient's age
- Pick up location
- Destination location
- PMT run number

- Information on caller
- PMT vehicle number
- Admission number
- Marital status
- Medicare number
- Medicaid number
- Attending physician
- Primary contact
- Insurance plan number
- AHCCCS identification number

The protected health information contained in the documents described above was not secure from viewing by individuals who did not have the right to have access to them. Station 604, at any time, may have visitors who are not authorized to view protected health information. For example, the station may have contractors who enter the station to perform repairs. (Tr. at 192:1-5.) These contractors may enter the station by themselves. (*Id.*) In fact, just a few weeks prior to the hearing in this matter, a contractor was working at the station and was at the station by himself for at least part of the time. (Tr. at 192:6-16.) Additionally, crew members may have visitors at the station. (Tr. at 682:21-683:1.)

After it was brought to his attention, Jim Roeder, PMT's Director of Compliance, investigated the issue. (Tr. at 306:20-22.) After Mr. Roeder received and reviewed the charts, he met with Travis Yates and Joshua Barkley to discuss the documents. (Tr. at 326:14-25.) This

meeting took place on July 7, 2011. (Tr. at 326:23-25.) During the meeting, Mr. Barkley accused Mr. Roeder of "alluding" to a crime and demanded that the police conduct the investigation. (Tr. at 479:8-12; Tr. at 609:16-19.) Mr. Roeder responded that the police were not needed and that he was not accusing Mr. Barkley of any crime. (Tr. at 609:20-22.) When asked about the documents, Mr. Barkley stated that he did not know where the documents came from. (Tr. at 609:8-12.) During the investigation meeting, both Mr. Barkley and Mr. Yates complained about flaws with PMT's equipment. (Tr. at 609:8-610:8.) Otherwise, Mr. Barkley and Mr. Yates did not offer any explanation as to why the documents were where they were found. However, at the hearing, Mr. Barkley did admit that he could not find a way to blame the HIPAA violation on any alleged equipment failure. (Tr. at 533:14-22.)

During the July 7, 2011 investigatory meetings, Mr. Roeder showed Mr. Yates and Mr. Barkley the charts. (Tr. at 533:16-18.). During Mr. Barkley's meeting, wherein Mr. Yates was the Union representative, PMT placed Mr. Barkley on administrative leave pending investigation. (Tr. at 336:9-337:15.) Mr. Yates was also placed on administrative leave, but was allowed to return to work at the request of Mr. Barkley, his Union representative, and because he was not the individual who wrote the charts in question. (Tr. at 337:6-12.) Mr. Barkley's administrative leave was fully paid. (Tr. at 356:14-17.)

While Mr. Barkley was on administrative leave, Mr. Roeder further investigated the HIPAA violation. (Tr. at 347:14-348:25.)[4] The investigation confirmed that Mr. Barkley was responsible for the charts. (Tr. at 671:24-672:1.) Each of the charts contained Mr. Barkley's signature. (*Id.*; G.C. Ex. 48.) The records also contained Mr. Barkley's certification number and

[4] The General Counsel made much of the "search" of the closet at Station 604 during this investigation. However, no employees received discipline based on this search. (Tr. at 673:14-16.) The only patient care report found was from employee Chris Mills and was in a locked closet, which lessened the risk of a HIPAA violation. (Tr. at 673:17-674:15.) Additionally, as Mr. Barkley admitted, the closet at Station 604 is company property. (Tr. at 531:9-12.) A company's search of its own property is certainly no evidence of an unfair labor practice.

name, among other things. (Tr. at 672:6-11.) One significant document found was the original chart from Phoenix Fire Department, when the original should have been with the receiving hospital. (Tr. at 672:15-24.). During his investigation, Mr. Roeder contacted the receiving hospital, which confirmed that it had no record for the patient or that particular call. (Tr. at 673: 5-9.) The receiving hospital thus had no record of the continuity of care for that call. (Tr. at 672:25-673:3.)

During the July 7, 2011 meeting, Mr. Barkley had also stated that he had copies of e-mails regarding equipment problems and that he would provide them to Mr. Roeder. (Tr. at 354:4-14.) Mr. Roeder waited for copies of these e-mails, but he never received them. (*Id.*) Mr. Roeder also had contact with Emergidata, a third-party document company, to review the issue. (Tr. at 354:25-355:20.) Mr. Roeder contacted PMT's attorneys during this time. (Tr. at 355:6-8.) Mr. Roeder met with the billing department to review the charts and ensure that they were billed correctly. (Tr. at 355:21-25.) Each of these tasks was time-consuming and performed in conjunction with Mr. Roeder's existing duties at PMT. (Tr. at 362:10-17.) Thus, the investigation process took approximately three and a half weeks. (Tr. at 354:1-4.) After the investigation was completed and proposed discipline decided upon, it took another week and a half to coordinate schedules to meet with Mr. Barkley and Mr. Yates. (Tr. at 356:3-8.)

On August 16, 2011, PMT held disciplinary meetings with Mr. Barkley and Mr. Yates. During the meeting with Mr. Barkley, PMT asked Mr. Barkley to sign an affidavit to confirm that there was no HIPAA breach and that the documents were not released to anybody outside of the company. (Tr. at 516:7-11; G.C. Ex. 68.) Despite there being no evidence that anything in the affidavit was untrue, Mr. Barkley refused to sign. (Tr. at 516:17-21.) Mr. Yates also refused to sign the affidavit confirming that there was no HIPAA breach. (G.C. Ex. 66.) A HIPAA "breach"

is more serious than a HIPAA "violation." (Tr. at 360:21-361:6.) Mr. Roeder's investigation confirmed that there was a HIPAA violation, but there did not appear to be a HIPAA breach. (*Id.*) Accordingly, the affidavits were offered to Mr. Yates and Mr. Barkley to give them an opportunity to document and confirm that there was, indeed, no HIPAA breach. (*Id.*)

Due to the HIPAA violations, Mr. Barkley was suspended for one shift and demoted from the Field Training Officer position. (Tr. at 517:21-25.) Because a Field Training Officer trains other employees, PMT did not believe that someone who engages in serious HIPAA violations should be training other employees. (Tr. at 359:1-6.) The investigation also confirmed that Mr. Yates' involvement in the HIPAA violation was minimal. (Tr. at 359:12-24.) All PMT could show was that Mr. Yates took the charts and put them in an envelope. (*Id.*) PMT could not show that Mr. Yates was even aware of the original Phoenix Fire Department chart. (*Id.*) Thus, Mr. Yates merely received a written warning and remedial training. (G.C. Ex. 67.)

Despite the ALJ's findings otherwise, the evidence presented at the hearing made clear that PMT takes its HIPAA obligations extremely seriously. (TR. at 670:10-12.) This is because PMT wants to protect its patients' personal information. (Tr. at 670:14-18.) Additionally, the company could be subject to fines for HIPAA violations. (*Id.*) PMT's employees are trained each year on HIPAA requirements during PMT's annual compliance meetings. (Tr. at 312:5-19.) The employees are instructed that they need to secure patient care records and protect patient data. (Tr. at 325:10-24.) The employees are also instructed that they may be personally liable or at risk for jail time for HIPAA violations. (Tr. at 358:13-22.)

The allegations that Respondent violated the Act by disciplining Mr. Yates and Mr. Barkley for their HIPAA violations are baseless. It is black letter law that an employee's union activity does not insulate him from discharge or discipline for engaging in conduct for which he

would have been disciplined even if he had not been a union proponent. *Alpers' Jobbing Co.*, 231 NLRB 449, 450 (1977). Here, PMT had been treating Mr. Barkley, and Mr. Yates to some extent, with kid gloves due to fear of allegations of unlawful retaliation. In this instance, the violation was simply too serious to ignore.

The Board and the courts employ a causation test to analyze the merits of discrimination allegations under *Wright Line*, 251 NLRB 1093 (1980), *enf'd.*, 662 F.2d 899, cert. denied, 455 U.S. 989 (1982). In this framework, General Counsel must make a *prima facie* showing sufficient to support an inference of animosity toward an employee's protected activities was a motivating factor in his or her discipline. A *prima facie* case may be established by proving the following four elements: (1) the employee engaged in union or protected, concerted activities; (2) those responsible for the termination knew about such activities; (3) the company took adverse action against the employee; and (4) a link or nexus exists between the protected activity and the adverse employment action. *Id.*

Under a *Wright Line* analysis, the Region did not establish a *prima facie* case. There was no showing of a link or nexus between any of Mr. Barkley or Mr. Yates' alleged protected activity and the discipline. To meet its burden on this element, General Counsel must have established that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. *Bridgestone Firestone S.C.,* 350 NLRB 526 (2007). Where there is no direct evidence, animus is not lightly to be inferred. *NLRB v. Gulf States United Telephone Co.,* 694 F.2d 92, 95 (5th Cir. 1982). Here, there is no evidence of anti-union animus. Mr. Yates and Mr. Barkley were disciplined for serious and documented violations of PMT policy and federal law. This discipline came only after an extensive investigation, which was further colored by PMT's knowledge that any discipline against Mr. Barkley and Mr. Yates would lead to an unfair labor

practice charge. Thus, PMT was extremely careful to not impart any discipline that could be viewed as retaliatory or discriminatory. PMT's actions were unrelated to any union or protected, concerted activity on the part of Mr. Barkley or Mr. Yates.

Although the ALJ held that PMT gave greater discipline to Mr. Barkley based on Mr. Barkley filing charges with the NLRB, the evidence actually shows that had Mr. Barkley not been involved with the NLRB, he would have been terminated. (Tr. at 361:21-25.) As Mr. Roeder clearly and unequivocally stated, had Mr. Barkley not been so heavily involved with the NLRB, PMT would have terminated him for his egregious violations of HIPAA. (*Id.*) Thus, PMT showed Mr. Barkley extra tolerance and leniency due to his propensity to file unfair labor practice charges. (Tr. at 362:1-5.)

The ALJ clearly misinterpreted the inclusion in Mr. Barkley's discipline memo of a statement reflecting PMT's knowledge of Mr. Barkley's propensity to file unsubstantiated unfair labor practice charges. The ALJ found that the statement illustrated anti-union animus. This finding was in error. The paragraph in Mr. Barkley's disciplinary write-up which referred to the NLRB was merely included to make clear that PMT was aware that Mr. Barkley would likely file a charge over the discipline issued to him, even though the discipline was completely fair and warranted. (Tr. at 361:7-20.) Logic and reason dictates that an employer would not include a statement reflecting anti-union animus on a document that the employer knew would end up in the hands of the NLRB. Regardless, at the time of the investigation, PMT was aware of Mr. Barkley's modus operandi of filing baseless NLRB charges any time anyone at PMT disagreed with him, many of which charges were ultimately withdrawn or dismissed. (Tr. at 345:10-19; Tr. at 526:11-18.) The discipline for the HIPAA violation was, however, not based on the fact that Mr. Barkley filed charges with the NLRB. (Tr. at 346:6-10.) The Union's repeated act of running

to the Board was not used by PMT as a reason for harsh discipline, but rather was relied upon by PMT to shield Mr. Barkley and Mr. Yates from harsher discipline, which any other employee who committed these serious violations would have received. Again, the ALJ's finding that the statement in Mr. Barkley's disciplinary memo indicating PMT's awareness that Mr. Barkley would file a charge over his discipline did not indicate anti-union animus.

Despite the evidence otherwise, the ALJ found that Respondent bore Barkley animus, that it was greater than whatever animus it bore Yates, and that PMT's animus toward Barkley is logically extended to Yates. (ALJD 16:14-26.) This finding is nonsensical. If PMT is "anti-union," which is not the case, PMT would necessarily act with animus toward both the Union President (Barkley) and the Union Vice President (Yates). Here, Mr. Yates received a mere written warning for his lesser role in the HIPAA violations. If PMT were "anti-union" certainly it would have disciplined Mr. Yates more harshly than a mere written warning. The fact that Mr. Yates, the Union Vice President, is being used as the employee whom PMT purportedly treated more favorably than Mr. Barkley, the Union president, significantly undercuts the contention that any discipline issued to Mr. Barkley or Mr. Yates was based on their union status. Thus, the ALJ erred in finding that the General Counsel established a *prima facie* case and that PMT acted with anti-union animus.

Even if General Counsel made out a *prima facie* case, which she did not, the burden simply shifts to PMT to show that it would have taken the same action for non-discriminatory reasons even in the absence of protected activity. *Roure Bertrard Dupont, Inc.,* 271 NLRB 443 (1984). As discussed above, the numerous, documented violations of HIPAA and Company policy led to the discipline. These were legitimate, non-discriminatory reasons for the discipline. In this case, PMT acted consistently as it had with previous HIPAA violations. (Tr. at 357:19-

358:8.) At least two individuals have recently been terminated or suspended for HIPAA violations. (G.C. Ex. 60; G.C. Ex. 61.) Thus, although PMT has only rarely had such serious HIPAA violations as occurred here, PMT has documentary evidence of similar situations where employees received discipline for similar violations. One example occurred when an employee used a patient's phone number, which was secured from the patient care record, to contact the patient requesting social contact. PMT terminated this employee. (G.C. Ex. 61.) Another employee received a written warning for taking patient redacted patient care records home with him. (G.C. Ex. 60.) Mr. Yates is the only employee to have ever received anything less than a suspension for a HIPAA violation. (Tr. at 358:4-8.) Thus, no employee with a HIPAA violation was treated more favorably than were Mr. Barkley and Mr. Yates. Again, HIPAA violations are rare at PMT. (Tr. at 366:6-15.) This is because most PMT employees take their professional obligations seriously. (*Id.*) Additionally, as described above, PMT trains its employees on HIPAA. (*Id.*) Finally, PMT employees are aware of the potential for individual liability for HIPAA violations. (Tr. at 358:13-22.) For those reasons, PMT, fortunately, has not had many instances of HIPAA violations. The ALJ erred in finding that PMT did not present evidence of comparable discipline.

In addition to the HIPAA violation, Mr. Barkley was insubordinate, including by failing to follow the direction of his manager to accurately complete the needed addendum to his patient care record by accurately completing the required attestation. This insubordination also contributed to the decision to discipline Mr. Barkley. "It has often been stated that insubordination and refusal to obey instructions constitute reasonable grounds for disciplining an employee, and discharge for insubordination or refusal to obey instructions is perfectly lawful." *NLRB v. Consolidated Diesel Elec. Co.*, 469 F.2d 1016, 1025 (4th Cir. 1972). Nor does the Act

shield against the consequences of insubordinate behavior if the disciplinary act was not motivated by anti-union animus. *See NLRB v. Brown*, 380 U.S. 278, 286 (1965).

Mr. Barkley and his Union officers are not exempt from PMT's rules and federal law based on their status as Union officers. The Supreme Court reviewed Congressional history illuminating the intent of Congress in enacting Section 10(c): "The House Report states that Section 10(c) was 'intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct.'" *Fibreboard Paper Products Corp. v. NLRB,* 379 US 203, 217 (1964). The Conference Report notes that under Section 10(c) "employees who are discharged or suspended for interfering with other employees at work, whether or not to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules . . . or for other cause...will not be entitled to reinstatement." *Id.* Clearly, Congress believed that the Board had overstepped its authority and interfered with legitimate management rights to take disciplinary action. Section 10(c) was designed to preclude the Board from providing a make whole remedy for employees who were disciplined for cause: "cause," which has been defined by the Board to mean the absence of a prohibited reason. *Taracorp Inc.,* 273 NLRB 221 (1984). Here, PMT disciplined Mr. Yates and Mr. Barkley for "cause" and for reasons unrelated to their Union or protected, concerted activities.

The ALJ's decision also implied that PMT treated Mr. Barkley differently by placing him on paid administrative leave pending the investigation while allowing Mr. Yates to continue working. As outlined above, PMT deemed it necessary to conduct a thorough and detailed investigation before taking any action against Mr. Barkley. Mr. Yates was allowed to continue

working because his actions were less serious than Mr. Barkley's. (Tr. at 359:12-24.) Accordingly, PMT made the lawful decision to place Mr. Barkley on paid administrative leave pending the results of the investigation while allowing Mr. Yates to continue working.

Additionally, the NLRA is not the only consideration in the analysis. The NLRB has been admonished by the Supreme Court not to interpret the Act myopically so that it loses sight of the fact that there are other equally significant Congressional policies and statutory goals which must be balanced, fostered, and advanced. *Southern S.S. Co. v. NLRB,* 316 US 31 (1942). In the words of the Court, "It is significant for this case to observe that the Board has not been commissioned to effectuate the policies of the Act so single mindedly that it may ignore other equally important objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, it is not too much to demand of an administrative body that it understands this accommodation without excessive emphasis upon its immediate task." *Id.* In short, HIPAA and its violation by Mr. Barkley and Mr. Yates is integral to this case and must be carefully considered, weighed, and balanced so as not to defeat HIPAA and the compelling policies underlying it.

The force of the holding of *Southern S.S.* has been consistently extended and applied in a variety of other contexts implicating other federal statutes. For example, in *Sure-Tan, Inc. v. NLRB*, 467 US 883 (1984), the Supreme Court refused to enforce a Board order directing reinstatement of illegal aliens as being in conflict with the Immigration and Nationality Act. *See also, Hoffman Plastic Compounds, Inc. v. NLRB,* 535 US 137 (2002) (Board order conflicted with the Immigration and Reform Control Act); *NLRB v. Bildisco and Bildisco,* 465 U.S. 513 (1984) (refusing to enforce a Board order that conflicted with the federal Bankruptcy Code); *Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100,* 421 US 616 (1975)

(rejecting argument that federal antitrust policy should defer to the NLRA); *Local 1976, United Broth. of Carpenters and Joiners of America, A. F. L. v. NLRB*, 357 U.S. 93 (1958) (precluding Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act. The NLRB has recognized the indisputable fact that it does not operate in an undisciplined manner unfettered by and unmindful of the equally important or, more important, polices underlying other Congressional enactments. *Collyer Insulated Wire, Gulf & Western Systems Co.*, 192 NLRB 837 (1971) ("Labor law as administered by the Board does not operate in a vacuum, isolated from other parts of the Act or, indeed, from other acts of Congress"); *United Brotherhood of Carpenters, Local Union No. 1506,* 355 NLRB No. 159 (2010) (the Board acknowledged its ..."obligation to accommodate the NLRA to other federal statutes"); *Can-Am Plumbing Inc.*, 350 NLRB 947 (2007) *aff'd. NLRB v. Can-Am Plumbing, Inc.*, 340 Fed. Appx 354 (9th Cir 2009)(same).

It is important to note that even if PMT were somehow mistaken that a HIPAA violation occurred and that Mr. Barkley and Mr. Yates were responsible for the violation, the discipline would still be lawful. It is well-settled that even where an employer mistakenly believes misconduct occurred, there is no violation of the Act unless the discharge or discipline was because of the employee's protected activity. *See, e.g., Yuker Const. Co.*, 335 NLRB 1072 (2001) (discharge based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity). In this regard, the General Counsel also made an attempt to show that the records were somehow planted or that Mr. Barkley and Mr. Yates were "set up" by PMT. The nonchalant manner in which this theory was proffered is disturbing, with no facts whatsoever to support it. The only "evidence" to support this theory was that Mr. Barkley searched Station 604

because he thought he was "being listened to." (Tr. at 492:9-17.) He removed electrical covers looking for audio and video. (Tr. at 493:6-11.) Apparently, during these searches, he never saw the charts in question. This evidence is too remote to even entertain the far-out theory that PMT somehow planted patient care records in an effort to discipline Mr. Barkley. Mr. Barkley's paranoia, including searches of Station 604 and demands for police investigation into the HIPAA violations, knows no bounds.

As set forth above, the ALJ's decision downplays or totally disregards the above considerations, undisputed, uncontradicted record evidence, and the legal verities cited above. For example, the ALJ incredibly asserts that PMT did not regard the HIPAA violations of Barkley and Yates as "momentous." (ALJD 16:38.) It is simply implausible that PMT management would simply ignore potential HIPAA violations, despite knowing of the serious penalties for such violations, were management made aware. The ALJ's theory is just not believable and Mr. Roeder's unrefuted testimony completely belies this assertion. Mr. Roeder testified that a HIPAA violation or possible breach of HIPAA was a serious thing. (Tr. at 336:20.) Continuing, Mr. Roeder declared that HIPAA violations are "extremely important" to our company because of all the damage they can cause. (Tr. at 358: 1-3.) HIPAA violations are dealt with "very aggressively." (*Id.*) Further, the Company trains all of its employees on HIPAA, stressing that the individual is liable for fines and jail time depending on the degree of violation. (Tr. at 358:19-23.) Thus, both employee and employer are responsible for violations. Mr. Roeder underscored the importance of HIPAA compliance to PMT in saying that compliance with HIPAA is absolutely a "priority concern" for PMT and him personally. (Tr. at 362:18-20.) This powerful testimony highlighting the overarching significance of HIPAA compliance to PMT finds no recognition in the decision of the ALJ. This serious highly

prejudicial error infects the reasoning of the ALJ leading to a flawed, tainted analysis absent evidentiary underpinnings.

This major error in the ALJ's fact-finding is not an isolated one. The ALJ claims that the Company failed to present evidence of comparative discipline for similar violations. Again Mr. Roeder testified without contradiction that there were two or three other employees disciplined for HIPAA violations. (Tr. at 364:17-18.) This witness was specifically asked why he believed there were no more than a handful of disciplinary actions for HIPAA violations. Mr. Roeder listed three reasons: first, most of the people in the industry are professionals and take their profession seriously so they protect the patients' information; second, PMT does repetitive training to insure the employees understand their obligations and responsibilities respecting patient information and the need to protect it; and, three, the employees have personal liability if they do not. (Tr. at 366:6-15.)

Still another inexplicable refusal by the ALJ to accept and carefully consider unrefuted testimony occurs in the context of what the ALJ mischaracterizes as PMT's hostility toward Mr. Barkley reflected in the disciplinary suspension notice. Mr. Roeder rejected the notion that the suspension notice had anything to do with the decision making. (Tr. at 346:9-10.) Mr. Roeder explained that had Mr. Barkley had no involvement whatsoever with the NLRB at any time, he would have been terminated. (Tr. at 361:21-25.) Mr. Roeder showed Mr. Barkley more tolerance and leniency that he would otherwise. (Tr. at 362:l-15.) The ALJ disparaged this unrefuted testimony as "spin." Instead, the ALJ sought to impute a sinister motive and nefarious sentiments to benign remarks well-explained by a highly credible witness. *See HarperCollins San Francisco v. NLRB*, 79 F.3d 1324 (2d Cir. 1996) (an employer may communicate any views, argument, or opinion in any media form without committing an unfair labor practice as long as there is no

threat of reprisal or promise of benefit, which there was not here). This questionable ALJ eagerness to find an evil motive or intent is inconsistent with federal labor law. *See NLRB v. McGahey*, 233 F.2d 406 (5th Cir 1956) ("an illegal purpose is not lightly to be inferred"); *Petroleum Transportation Co.,* 236 NLRB 254 (1978) (Board adopted ALJ finding that although the Company may have been eager to terminate the employee the General Counsel failed to establish that the employee was terminated for any reason other than his misconduct; this portion of the complaint accordingly was dismissed).

This ALJ thinking also collides with the axiom that: "…management is for management. Neither the Board nor Court can second guess it or give gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or any cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a(3) forbids." *Lozano Enterprises v. NLRB,* 357 F.2d 500 (9th Cir. 1966). Here, Mr. Barkley was not terminated, rather he was given a brief suspension, a different job and paid leave time while the incidents in which he as involved were thoroughly investigated. As Mr. Roeder explained, again in an uncontroverted manner, He could not permit Mr. Barkley to continue as a Field Training Officer, a position which has training responsibilities for new employees, other employees and helps ensure compliance, when he had demonstrated noncompliance with HIPAA and an utter lack of sensitivity and care for HIPAA protected documents. (Tr. at 359:1-11.)

Also, the ALJ figuratively leaps to find a general hostility to unionism by PMT, including the actions of Mr. Yates. (ALJD 16:19-21.) But, general hostility toward the Union in any event does not itself supply the element of unlawful motive, a necessary element to a finding of 8(a)(3) activity. *Carleton College v. NLRB*, 230 F.3d 1075, 1078 (8th Cir. 2000). Mr. Yates was subject

to lesser discipline due to his lesser role in the violation. On this aspect of the case as well, the ALJ's analysis is wrong-headed and merits reversal by the Board to bring the decision within record evidence.

These union officers must be held to the same standards applicable to PMT's other employees. Under federal labor law, they do not enjoy a special, privileged status exempting them from the rules governing employee conduct. Mr. Barkley's paid administrative leave, one-day suspension, and demotion with subsequent small decrease in pay were reasonable considering the seriousness of the HIPAA violations. Similarly, Mr. Yates' written warning was reasonable discipline for his misconduct. For all of the foregoing reasons, the ALJ's decision must be reversed.

2. PMT did not unlawfully discipline Mr. Barkley and Mr. Yates over their slow response times.

The ALJ's findings in relation to the discipline of Mr. Yates and Mr. Barkley over their delayed emergency response times were similarly erroneous. The ALJ erred in finding that PMT's policy "required each crew to be in the vehicle and moving (10-8 time) within 1 minute 30 seconds (1:30) of dispatch notification. (ALJD 4:12-14.) The ALJ erred in finding that PMT had a progressive discipline plan, which included a memo to employee file. (ALJD 5:10-18.) The ALJ erred in finding that neither Barkley nor Yates had ever before received counseling or discipline from PMT. (ALJD 8: 7-9.) The ALJ erred in finding that no evidence was adduced that other employees had received comparable discipline in comparable circumstances. (ALJD 8: 8-9.) The ALJ's findings on this issue must be reversed.

In PMT's business, seconds count. Seconds and minutes can lead to lives being saved, or conversely, lives lost. Additionally, if too may calls are delayed, PMT can lose its contracts. (Tr. at 136:25-137:1.) For contractual compliance, whether a call is one second late or several

minutes late is irrelevant. (Tr. at 146:21-147:7.) Either way, the call is out of compliance. (*Id.*) PMT's "10-8 policy" requires the ambulance crew respond within 60 seconds for an emergency call and two minutes for a non-emergency call. (G.C. Ex. 22; Tr. at 652:15-653:2.) PMT only disciplines when a response time of over one-minute causes a call to be out of compliance. (Tr. at 146:11-20.) The ALJ's finding that PMT had a 1:30 emergency response time requirement is unsupportable by the record and shows the ALJ's almost purposeful ignorance of PMT's evidence.

Regardless, Unit 604 exceeded the one-minute response time requirement on June 1 and June 9, 2011. (G.C. Exs. 51-56.) These delayed response times were confirmed by documented evidence. (G.C. Exs. 52-55.) Additionally, PMT's contract with Scottsdale requires a response time of 8:59. (G.C. Ex. 36.) Unit 604's delayed response time caused PMT to be out of compliance on those calls. (G.C. Exs. 52-56; Tr. at 237:17-20.) For that reason, PMT did issue verbal warnings to Mr. Yates and Mr. Barkley on June 28, 2011 for the slow response times in early June 2011. (G.C. Exs. 51, 56.) A verbal warning is merely the first step in PMT's disciplinary process. (Tr. at 308:19-23.) Thus, the warning had no significant impact on Mr. Yates or Mr. Barkley, other than to remind them to attempt to respond faster.

After being late on the calls, the crew was sent e-mails asking them to fill out required "exception reports" for the calls. (G.C. Exs. 52, 54.) This report seeks an explanation from the crew as to their delayed response time. (Tr. at 645:2-4.) This report is the responsibility of the crew members. (Tr. at 266:13-21.) PMT never received an exception report from the crew. (Tr. at 448:3-16.) Thus, PMT had no information to submit to justify the out of compliance calls.

Mr. Barkley and Mr. Yates think, and apparently the ALJ agreed, that they are "off limits" for discipline because of their status as Union President and Vice President. PMT, and

several decades of legal precedent, contradict the ALJ's decision. Again, an employee's union activity does not insulate him from discharge or discipline for engaging in conduct for which he would have been disciplined even if he had not been a union proponent. *Alpers' Jobbing Co.*, 231 NLRB 449, 450 (1977).

Here, there was uncontroverted testimony that other employees have been disciplined for response times over one minute. (Tr. at 634:21-635:3.) Approximately 15 employees have received similar warnings in the past year and 40 employees have received similar warnings over the past three years. (*Id.*) There is no indication that PMT treated Mr. Yates or Mr. Barkley any differently than these other employees. Yet, somehow, the ALJ ignored this testimony and stated that PMT failed to show evidence of comparable discipline.

Again, as outlined above, PMT has been treating Mr. Barkley, and Mr. Yates to some extent, with extra leniency due to fear of allegations of unlawful retaliation. Despite the ALJ's finding otherwise, Ms. Lemoine had previously discussed the slow response times with Mr. Yates and Mr. Barkley. (Tr. at 265:15-24.) When those discussions fell on deaf ears, PMT found it necessary to discipline the two individuals.

The General Counsel attempted to show that PMT's equipment somehow led to the delayed response times or that the GPS system was not working. However, General Counsel presented no evidence whatsoever indicating that there was any equipment failure as it pertains to these two particular calls. Neither Mr. Yates nor Mr. Barkley complained to their supervisor regarding alleged equipment failures around the time they had the delayed response times which caused out-of-compliance calls. (Tr. at 266:9-12) In fact, Mr. Barkley never denied that the crew was, in fact, late on these two calls. (Tr. at 530:12-16.) Mr. Barkley could not even remember the calls. (Tr. at 446:19-21.) Mr. Barkley never provided any evidence to PMT regarding equipment

failures that might have explained the out-of-compliance calls on June 1, 2011 and June 9, 2011. (*See* Tr. at 532:8-533:3.)

The equipment used to track response times works. (Tr. at 114:12-20.) The system is designed to identify breakdowns in order for repairs to be made. (*Id.*) The ambulances are equipped with two separate methods of tracking response times. First, PMT maintains a GPS system. (Tr. at 112:14-15.) Phoenix Regional Dispatch also maintains an Automatic Vehicle Locator. (Tr. at 112:11-13.) There are rarely, if ever, discrepancies between the two systems. (Tr. at 112:19-113:7.) If there is an error with the AVL, the Phoenix Dispatch center knows right away. (Tr. at 113:12-24.) 32 different jurisdictions rely on this same system with nary a complaint regarding any failure of the system. (Tr. at 128:5-24.) PMT's investigations into complaints regarding the GPS have been investigated and proven to be invalid. (*See, e.g.,* Tr. at 160:2-9.) Thus, the testimony established that PMT's equipment functions as designed and intended. There are mechanisms for employees to report equipment issues. (Tr. at 655:11-25.) Isolated issues with any piece of equipment are addressed. (Tr. at 656:7-13.) There are no wholesale breakdowns of equipment. At best, Mr. Yates and Mr. Barkley's self-serving testimony regarding the equipment, particularly the "time-tracking" equipment, established that they conveniently and periodically complained regarding equipment. These unsupported complaints grousing about equipment are worth little when compared with Mr. Cantelme's and Mr. Beam's testimony regarding the accuracy of the GPS systems.

As a side note, Mr. Barkley and Mr. Yates had slower response times than most other PMT ambulances, by a significant margin. (G.C. Ex. 29.) On their shift, 604(B), in December 2010, they were delayed (meaning they took more than one-minute from the time they got their call to the time they proceeded by ambulance to a call) on 51 of 80 calls. (G.C. Ex. 29; Tr. at

436:16.) Thus, on more than 60% of their emergency calls, they were delayed. (*Id.*) Mr. Cantelme opined that a crew with that type of response time should not be operating in the 911 system. (Tr. at 149:12-16.) The other crews in their station had significantly better response times. In fact, 604(A) was late on only 12 out of 61 calls during that same month. (*Id.*) However, since Mr. Barkley was taken off of Unit 604, response times have improved. (Tr. at 643:22-24.)

Finally, the ALJ erred in relying on the fact that Mr. Barkley and Mr. Yates did not receive a "memo to file" regarding their slow response times. A memo to file is not a part of the disciplinary process. It is merely a document stating that a manager/supervisor talked to the employee. (Tr. at 310:2-6.) It is a "free shot" for an employee for a minor issue and merely documents that the employee was talked to. (Tr. at 310:23-20; Tr. at 642:17-643:1.) Thus, although Ms. Lemoine could have documented her conversations with Mr. Yates and Mr. Barkley, the fact that she did not document such does not mean they did not take place. Regardless, a memo to file is not part of the official disciplinary process. (Tr. at 233:3-8.) It is merely used to educate the employee. (Tr. at 277:25-278:5.) Thus, as a first-step in the process, Mr. Yates and Mr. Barkley received verbal warnings for the delayed response times, which response times they have never denied were delayed.

Under the *Wright Line* standard set forth above, there is no unfair labor practice under these facts. The uncontroverted evidence established that: 1) PMT has a one-minute requirement for emergency response times; 2) Mr. Barkley and Mr. Yates exceeded this one-minute response time requirement; 3) there was no equipment failure or proof thereof; 4) PMT disciplined numerous other employees for similar violations and; 5) no prior counseling is required before a verbal warning, although such counseling was given in this instance. The ALJ's finding of unlawful discipline under these facts was in error and should be reversed.

F. The ALJ erred in finding Respondent violated Section 8(a)(5) of the Act in relation to a January 10 information request.

The ALJ found that Respondent failed to furnish to the Union the information requested on January 10 and thus violated Section 8(a)(5). (ALJD 18:16-18.) This finding is erroneous.

The first request from that date consisted of requests for the investigation file related to the Chris Mills/David Medley confrontation, documentation on Scottsdale Fire Department, and financial records from PMT and American Comtrans Ambulance. (G.C. Ex. 5.) PMT responded to that request and provided the information it had responsive to the second and third requests. (*Id.*) However, PMT did not provide the investigation file related to the Mills/Medley incident. Rather, PMT sought clarification of this request by pointing out the lack of clarity and specificity to the request, as well as the privacy and confidentiality concerns that PMT had. (*Id.*) Mr. Barkley never responded to PMT's objections to the request. (Tr. at 527:22-24.)

The second request from that date consisted of numerous, incomprehensible requests. (G.C. Ex. 6.) For example, Mr. Barkley requested "Number of discipline proceedings for Similar incidents for Fire/Pmt rides." (*Id.*) Mr. Barkley also requested, verbatim:

> - number of total discipline proceedings for the months of September, October, November December of 2010, and January of 2011 for all Unit members
>
> - number of 10-8 time exceptions from all stations, to include Tempe Fire department/PMT rides. Chandler Fire department/PMT rides and Scottsdale 615
>
> - Number of move-ups missed by Fire/PMT rides and action taken by the company to rectify that situation.

- Number of total discipline proceedings for the same months mentioned above for all Fire/PMT rides

This request was vague, confusing, ambiguous, overly burdensome, and not clearly relevant to the Union's representative duties. (*See* GC Ex. 6.) Additionally, it asked for records of fire department discipline, which PMT does not possess. Accordingly, Joy Carpenter, PMT's Human Resources Director, responded to the request by seeking clarification of the relevancy and ambiguity issues. (*Id.*) The Union never responded to Ms. Carpenter's request for clarification. (Tr. at 527:22-24.)

It is well-established that an employer may ask for clarification of an ambiguous request. *See e.g., International Protective Services, Inc.,* 339 NLRB 701 (2003). Additionally, there is no rule that union interests in arguably relevant information must always predominate over all other interests, however legitimate. *Detroit Edison Co. v. NLRB,* 440 U.S. 301 (1979). Here, PMT simply asked the Union for clarification of an ambiguous and vague request, while also asking for what relevant purpose the Union needed the information. Because the Union never responded to PMT's overtures and objections regarding the requests, PMT was not required to provide the information. Accordingly, the ALJ's finding related to the January 10 information request should be reversed.

G. The ALJ erred in finding that Respondent violated Section 8(a)(5) of the Act in relation to a June 29 information request.

The ALJ found that, as to item three in the June 29 request for information, the Respondent's failure to furnish to the Union that information violated Section 8(a)(5). (ALJD 18:16-18.) Item three asked for the language in the city contracts that mandates 100 percent out of chute time compliance. (*Id.*) This finding was in error as PMT fully responded to this request for information.

The June 29 request for information asked for the language in city contracts that mandates 100% out of chute time compliance, among may other items. (G.C. Ex. 10.) PMT responded that same day to Mr. Barkley's request and provided the some of the information requested. (G.C. Ex. 11.) PMT also advised Mr. Barkley that it would have a response to him on the other requests. (*Id.*) Within a few days, PMT provided more information to Mr. Barkley, including the Blackberry messages, as well as an answer to his question regarding "100% out-of-chute time compliance." (G.C. Ex. 12.) The response attached PMT's policy regarding emergency response times and explained the PMT policy's interaction with the city contracts. (*Id.*) Accordingly, PMT responded, in full, to the request for information. This conclusion is supported by uncontroverted documentary evidence, which the ALJ disregarded. Accordingly, the ALJ's finding on this issue must be reversed.

H. The ALJ erred in finding that Respondent violated Section 8(a)(5) of the Act in relation to the cessation of Unit 603 service.

The ALJ found that it was "not clear from the record that the 603 unit cessation had no material effect on workload" and thus Respondent's October 2010 unilateral cessation of unit 603 service violated Section 8(a)(5) and (1). (ALJD 18:42-46.) This finding was in error under the facts presented as well as applicable Board law. The purported "shut down" of Unit 603 does not constitute an unfair labor practice.

The ALJ's dismissive handling of the important issue of the alleged "cessation of unit 603 service" is disturbing. She devotes a mere two sentences to her "findings" before lapsing into a sentence beginning: "Accordingly, the question is whether there was a material, significant change in employment terms." PMT's witnesses, including Jim Roeder, completely dispelled this notion and refuted the whole underpinnings of the General Counsel's case with uncontroverted, documented evidence. Still the ALJ takes an analytical pass here and simply

resorts to evasion, cloaking her discussion as follows: "[i]t is not clear from the record that the 603 unit cessation had no material effect on workload…." (ALJD 18:42-46.) Putting to one side for the moment the fact that there was ample evidence presented by PMT on just that point, the ALJ is careful not to describe what exactly was that claimed or supposed effect. If the record is unclear on this point, as the ALJ herself states, then the General Counsel's allegation should fail under basic rudimentary NLRB practice; namely, that the General Counsel carries the burden of proof of proof. *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503 (4th Cir. 1998).

The facts presented at the hearing established that Unit 603 was a temporary car that was in operation for approximately 6 months in 2010. (Tr. at 675:10-11.) The Unit was put in place to address compliance issues in Scottsdale. (Tr. at 122:10-18.) There were no full-time employees specifically assigned to Unit 603. (Tr. at 134:13-17.) The employees who staffed the ambulances were either employees using overtime or were General Transport employees temporarily assigned to Unit 603. (Tr. at 135:6-11.) During its 2010 operations, Unit 603 responded to an average of only approximately 2.24 calls per day. (R. Ex. 3.) Accordingly, because the Unit was no longer needed for compliance, PMT did cease using Unit 603 in or around October 2010. No employees lost hours due to this "shut down." (Tr. at 675:12-18.) No employees lost employment due to this "shut down." (Tr. at 675:12-14.) In fact, the employees assigned to Unit 603 gained hours after its shutdown. (Tr. at 675:17-18.)

Additionally, despite the Union Vice President's testimony that the shutdown of Unit 603 "doubled" Unit 604's workload, indisputable documentary evidence showed that the shut down had no material effect on the surrounding units' workload. (Tr. at 604:7-8; R. Ex. 3.) In fact, the "shut down" increased Unit 604's workload by less than one emergency call per day. (Tr. at 678:24-679:9.) This documented evidence was uncontroverted, yet still completely ignored by

the ALJ. On these facts, there was no violation of the Act by Unit 603's shut down as there was no material effect on the bargaining unit.

In *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178, 179 (1971), the Supreme Court described the matters as to which bargaining with the union was required as those issues that "vitally" affect terms and conditions of employment and which "settle[] an aspect of the relationship between the employer and employees." *Id.; see also, Paperworkers Local 5 (International Paper),* 294 NLRB 1168, 1180 (1989).

Sections 8(a)(5) and 8(d) of the Act impose a duty on employers to bargain with their employees' representative regarding the employees' "wages, hours, and other terms and conditions of employment." The phrase "other terms and conditions of employment" was not intended to make all management decisions mandatory subjects of bargaining. This principle is consistent with observations made by Justice Stewart in his concurring opinion in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223, 225 (1964), that bargaining has never been required concerning managerial decisions that "lie at the core of entrepreneurial control."

In *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979), quoting Justice Stewart's *Fibreboard* concurrence, the Supreme Court described mandatory subjects as those subjects that are "plainly germane to the 'working environment'" and are "not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" Justice Stewart further reasoned that "[o]nly a narrower concept of 'conditions of employment' will serve the statutory purpose of delineating a limited category of issues which are subject to the duty to bargain collectively." *Fibreboard,* 379 U.S. at 220, 85 S. Ct. at 408.

In *First National Maint. Corp. v. NLRB*, 452 US 666, 678-79 (1981), the Court stated that "[m]anagement must be free from the constraints of the bargaining process to the extent essential

for the running of a profitable business." Critically, an employer has a legitimate need for unencumbered decision-making, according to the Supreme Court. The *First National* court further noted that some management decisions have "only an indirect and attenuated impact on the employment relationship." *Id.* at 676-77. These management decisions do not require bargaining.

The "hows" of running a business and making that business profitable are clearly among the managerial decisions to which the Supreme Court referred. The "shut down" of Unit 603, a temporary car that was only put in place to address compliance issues, is among the management decisions that is not subject to a mandatory bargaining obligation. As outlined above, no employees wages, hours, or terms and conditions of employment were affected by the decision to "shut down" Unit 603. There is no legal support for the General Counsel's apparent contention that PMT must bargain with the Union over every business decision. Accordingly, this allegation must be dismissed. Even if the decision were somehow a bargainable subject, the allegation is still meritless. Again, no employees were affected by this "shut down." No employees lost hours due to the "shut down." Any increase in other employees' workloads was minimal. Accordingly, there has been no "effect" over which to bargain.

This allegation also again brings to mind the Board's instructions from the *American Federation of Musicians* case. This issue is effectively moot as no employees were affected in any way and no evidence was presented otherwise. As the Board stated, "it seems to us that the alleged misconduct here is of such obviously limited impact and significance that we ought not to find that it rises to the level of constituting a violation of our Act. The Board's rising case load and the problems involved in handling it could be alleviated if cases of this type were not processed." *American Federation of Musicians Local 76,* 202 NLRB 620, 621 (1973). In

addition to the impact on the Board's caseload, these types of insignificant, minor allegations as were littered throughout General Counsel's Complaint accomplish nothing more than to take time and energy away from Respondent's ability to focus on running its business and serving the public through emergency medical transportation services. No employees are served by these baseless allegations of *de minimis* violations of the Act. The ALJ's finding on this issue should be reversed.

I. The ALJ erred in finding that Respondent violated Section 8(a)(5) of the Act in relation to payment of the Union President's "designee" to attend collective bargaining meetings.

The ALJ found that Respondent's abrogated the terms of a December 1, 2010 settlement by not allowing the Union President's designee to attend collective bargaining meetings during his normal shift without the designee either making a shift trade or using PTO and thus violated Section 8(a)(5) and (1). (ALJD 19:20-33.) This allegation is not only meritless, it is also procedurally improper and the ALJ's finding otherwise was in error.

The December 1, 2010 settlement, which resolved outstanding unfair labor practice allegations and a civil lawsuit against the Union and Mr. Barkley, contained a term that provided that PMT would "allow the Union President, or his designee, to attend [collective bargaining meetings] and receive their normal wages, if those meetings are scheduled during an assigned shift of the Union President or his designee." (G.C. Ex. 35.) PMT complied with this requirement by allowing Mr. Barkley to attend such meetings and there is no evidence suggesting otherwise. However, PMT has not extended this to any "designee" of Mr. Barkley. The reason is quite simple. Mr. Barkley's "designees" have NO authority to act on behalf of the Union. He has explicitly stated so. (Tr. at 662:4-16.) In an e-mail to Ted Beam, PMT's Director of Operations, Mr. Barkley confirmed that the Union's representatives have no decision-making authority. (R. Ex. 2.) Mr. Barkley also advised Mr. Wilson, PMT's lead negotiator, of the same thing. (Tr. at

662:4-16.) Accordingly, there is no "designee" for PMT to pay for bargaining. PMT would welcome a designee. (Tr. at 665:15-21.)

In addition, Mr. Barkley had 60 hours of pay, which PMT voluntarily provides to the Union for bargaining, from which to compensate any Union members who miss work to bargain. (Tr. at 666:3-7.) PMT has gone above and beyond to accommodate Mr. Barkley's outrageous demands for him, and his entire negotiating team, to be paid to bargain. *Wykoff Steel, Inc.,* 303 NLRB 517 (1991) provides that "[t]he duty to bargain includes the obligation to appoint a negotiator with real authority to negotiate and carry on meaningful bargaining regarding fundamental issues." Here, Mr. Barkley's "designees" were nothing more than powerless messengers with no decision-making authority.

Although the General Counsel attempted to illustrate how difficult it is to find a time when the Union's bargaining team members are all available, the fact is that these employees work 10 days a month. (Tr. at 99:25-100:4.) Surely in the other 20 days per month there are going to be days where the Union's bargaining team members are available to negotiate without forcing PMT to pay for the Union's bargaining team. Regardless, PMT has not breached the settlement agreement in any way. Because the other members of Mr. Barkley's negotiating team are powerless to make any decisions, PMT should not be forced to pay someone to "bargain" who lacks bargaining authority. Accordingly, those employees who the General Counsel attempts to paint as the Union President's "designees" are not designees at all due to their complete lack of authority. Thus, PMT has complied with the terms of the December 1, 2010 settlement agreement.

Additionally, this allegation is essentially one of contract interpretation. In such cases, the 8(a)(5) allegation turns on whether the employer has a sound arguable basis for its interpretation

of the contract. See, e.g., *Crest Litho, Inc.*, 308 NLRB 108, 110 (1992); *Vickers, Inc.*, 153 NLRB 561, 570 (1965). "Where … the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, we will not seek to determine which of two equally plausible contract interpretations is correct." *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988). Similarly, in *Bath Ironworks Corp.*, 345 NLRB 499 (2005), the Board held that where an employer has a sound, arguable basis for its interpretation of the contract, there is no violation of the Act. Here, as described above, PMT's interpretation of the agreement is reasonable and General Counsel presented no evidence of animus, bad faith, or an intent to undermine the Union. For that reason alone, this allegation should be dismissed. Further, even if PMT is incorrectly applying the terms of the agreement, it has long been observed that a breach of contract is not necessarily an unfair labor practice. *See, e.g., International Union, United Mine Workers of America v. NLRB*, 257 F.2d 211, 214-15 (D.C. Cir. 1958); *American Vitrified Products Co.*, 127 NLRB 701 (1960); *United Telephone Co.*, 112 NLRB 779, 781 (1955).

Finally, the allegation is procedurally improper. Normally, in the case of alleged noncompliance with an informal settlement, the Board would be required to revoke the settlement. *See, e.g., Nations Rent, Inc.,* 339 NLRB 830, 831, (2003) (citations omitted) (stating that a Board settlement agreement may be set aside (1) if there has been a failure to comply with the provisions of the settlement agreement or (2) if postsettlement unfair labor practices are committed."). This principle has been applied not only in cases involving a Board settlement, but also in cases involving a non-Board settlement. *Donald Sullivan & Sons,* 333 NLRB 24 (2001) (non-Board settlement properly set aside where employer failed to comply with settlement terms). Here, the Region is attempting to force compliance with settlement without undoing the settlement or going through a compliance proceeding. The reason for this is

apparent. In the event that the settlement here were revoked, PMT would have the opportunity to reinstate its exceptions filed in the earlier case (the ALJ Kocol decision) and fully-litigate the allegations in the other case that was encompassed in the settlement. Because the allegation was procedurally improper in the first instance, the ALJ's finding of a violation of the Act on this issue must be reversed.

IV. CONCLUSION

The Findings and Order are flawed in numerous respects. The ALJ when faced with a choice as to what arguments to address or ignore, statements made or all other matters, seized every opportunity to find for the GC. Such a finding strains credulity. The Judge ignored facts, and law in seeking to justify his conclusion. For all of the reasons set forth above, the ALJ's Findings and Recommended Order should be reversed and the case should be dismissed in its entirety.

DATED this 17th day of January, 2012.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of Respondent's Statement of Exceptions to be electronically filed this 17th day of January, 2012, and that a ***COPY*** of the foregoing was sent first class mail this 17th day of January, 2012, to:

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