

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**Division of Judges
San Francisco Branch Office**

USC UNIVERSITY HOSPITAL

and

NATIONAL UNION OF HEALTHCARE
WORKERS

Case No. 21-CA-39656

Case No. 21-CA-39693

Case No. 21-CA-39798

Case No. 21-CA-39799

Case No. 21-CA-39808

and

Case No. 21-CA-39870

**POST-HEARING BRIEF OF RESPONDENT
USC UNIVERSITY HOSPITAL**

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General Introduction

Respondent USC University Hospital (the “Hospital”) submits this post-hearing brief on the amended consolidated complaint for Cases Nos. 21-CA-39656, 21-CA-39693, 21-CA-39798, 21-CA-39799, 21-CA-39808, and 21-CA-39870.

GENERAL INTRODUCTION

This trial involved the consideration of six completely unconnected cases, which, counsel for the General Counsel admitted, are basically “trivial” charges. Other than the jurisdictional facts, these charges have nothing in common. They involve different issues in different departments at different times and each is presented primarily through different witnesses. The charges were brought by the National Union of Healthcare Workers (“NUHW”) based on a singular lack of investigation into the facts, usually nothing more than uninvestigated, uncorroborated hearsay from a handful of its most strident members. When those members had to testify at the trial, they contradicted each other and often even themselves and sometimes directly contradicted the allegations in the Complaint.

The General Counsel “carries the burden of proving the elements of an unfair labor practice.” NLRB v. Transportation Management Corp., 462 U. S. 393, 401(1983). See also 29 CFR § 101.10(b) (“[t]he Board's attorney has the burden of prov[ing] violations of Section 8”). This means that it bears the burden of persuasion as well as of production. See Director, Office of Workers’ Compensation Programs v. Greenwich Collieries, 512 U. S. 267, 276–278 (1994). An unfair labor practice can be found only “upon the preponderance of the testimony taken.” 29 U.S.C. § 160(c). The General Counsel has utterly failed to meet its burden on any of these charges.

Because each of these cases is completely distinct from the others, each is addressed separately in this brief. Other than the common jurisdictional facts which are set forth below, the Hospital addresses and refutes each charge separately.

Jurisdictional Facts

JURISDICTIONAL FACTS

The Hospital is a California corporation with its sole place of business at 1500 San Pablo Street, Los Angeles, California, and is engaged in business as a general acute-care hospital. (Consolidated Amended Complaint ¶ 3). The Hospital purchased the facility from Tenet Healthcare Corporation (“Tenet”) on or about April 1, 2009. (Consolidated Amended Complaint ¶ 5(a)). At that time, there was in effect a collective bargaining agreement between Tenet and the Service Employees International Union, United Healthcare Workers-West (“SEIU”) with respect to a unit of service and maintenance workers and a separate unit of professional employees (the “Tenet-SEIU contract”). (Consolidated Amended Complaint ¶¶ 4(b), 8(b), (d) and (f)). The Hospital agreed to recognize SEIU as the exclusive bargaining representative of those units and to adopt the terms of the collective bargaining agreement between Tenet and SEIU (the “Tenet-SEIU contract”) insofar as such terms were not unique to Tenet. (Consolidated Amended Complaint ¶ 8(e)). NUHW became the certified bargaining representative of the employees in the service and maintenance unit as of June 17, 2010. (Consolidated Amended Complaint ¶ 9(b); GC-3).¹ The Tenet-SEIU contract expired on March 31, 2011. (Tr. 43:8-46:8 and GC-4).

Negotiations on a contract between NUHW and the Hospital began in August 2010 and are ongoing. (Tr. 46:11-13, 55:23-56:3). The Hospital and NUHW have met for contract negotiations more than a dozen times and, according to NUHW’s representative, are close to an agreement. (Tr. 274:24-275:11, 278:24-279:10, 865:23-866:8, 868:2-15). Although neither the Hospital nor NUHW is a party to the Tenet-SEIU contract, NUHW contends that the Hospital is obligated to maintain the terms and conditions of employment established by that contract and by “past practice with SEIU” completely unchanged “until we are able to negotiate a new agreement.” (Tr. 386:15-387:6, 387:11-13 and GC-4).

¹ The professional employees voted “no union” in the election and are no longer represented by any union.

Case No. 39799

CASE NO. 39799

I. SUMMARY OF ARGUMENT

In Charge No. 39799, General Counsel initially asserted that the Hospital had a policy of not counting employees as tardy if they arrived at work within seven minutes of their actual start time. General Counsel took the position that this policy was “unilaterally changed” in March of 2011.

Over time, these assertions changed, so that General Counsel eventually alleged that the Hospital, at various times, and in three departments, had some managers, but not others, who did not discipline employees for tardiness if they were less than seven minutes late.

In truth, the Hospital has had the same Hospital-wide tardiness policy since 2002. It has never had a “seven minute grace period”. Employees throughout the Hospital, including employees in the three departments General Counsel eventually selected, have been disciplined for tardies, even tardies that were seven minutes or less, throughout that entire period of time and to this day. In fact, the very witnesses who testified that there was a seven minute grace period were themselves counseled for tardiness with incidents of seven minutes or less by the same managers they claim told them a grace period existed. Moreover, the idea that there are different fundamental work rules and disciplinary standards in different departments and that one supervisor can unilaterally alter the bargaining unit wide practices of the employer for a small group of employees is not supported by any evidence and flies in the face of the very concept of collective bargaining.

II. STATEMENT OF FACTS

A. The Hospital’s Attendance and Punctuality Policy has Never Provided for a Grace Period for Tardiness.

NUHW initially charged, and General Counsel initially complained, that the Hospital had a long standing policy of allowing employees to be tardy up to seven minutes without any discipline. According to these initial accusations, this policy was unilaterally changed by the

Hospital in or about March of 2011 to require employees to be on time. (Amended Consolidated Complaint ¶ 15(a) (b) and (c)). These allegations were demonstrably untrue.

Although General Counsel made no effort to introduce any attendance and tardiness policies, the Hospital did. Those documents showed that the Hospital first issued its Attendance and Punctuality Policy in 2002. From that time through to the present, that policy has been applied Hospital-wide and has been clear and consistent in stating that employees will be considered tardy unless they are at their work stations and fully ready to perform their work duties at the start of their scheduled shifts. (Tr. 499:13-500:7, 526:13-25, 704:17-22, 707:3-7, 765:22-24, 768:6-10, 844:19-845:4). Thus, the 2002 policy defines tardiness as:

Any time an employee arrives late at workstation and/or is not dressed appropriately and ready to work at the beginning of the assigned shift. **There is no grace period.**

(Tr. 839:19-840:17 and R-65 at page 2) (Emphasis added).

In compliance with the guidelines of the Joint Commission on Accreditation of Hospitals, the Hospital reviewed its policies in 2005. The 2005 version of the Attendance and Punctuality Policy again provided a definition of tardiness and again disavowed any grace period as follows:

Tardiness: Any time an employee arrives late at workstation, which includes returning from breaks and meal periods and/or is not dressed appropriately and ready to work at the beginning of the assigned shift. Start times have no grace period for dressing or clocking i.e., if a shift starts at 7:00 a.m. employee must be ready to report to work at that time.

(Tr. 840:18-841:9 and R-66 at page 1).

In 2006, Michael Torres (“Torres”), a respiratory therapist and SEIU steward, filed a grievance complaining that the Hospital (then owned by Tenet) had changed a “past practice” of not disciplining employees who clocked in within a “grace period” for tardiness. (Tr. 841:16-843:8, 844:19-845:8). The issue of the purported “grace period” was submitted by the parties to “hot button arbitration” and resolved in the Hospital’s favor. (Tr. 845:9-846:2, 885:7-20).² After

² The grievance was submitted by Torres on his own behalf and on behalf of all employees in the respiratory department. (Tr. 845:14-16). Torres testified that he did, in fact, file the

the Hospital prevailed in the “no grace period” arbitration, it reinforced the policy by issuing a memorandum which was distributed to all employees with their paychecks or direct deposit stubs and posted, along with the policy, throughout the Hospital. (Tr. 846:7-847:15 and R-3 and R-63). The memorandum reiterated that the attendance and punctuality policy does not provide for a grace period for tardiness, and that the policy applies to all employees and must be adhered to. It also made clear that discipline could be imposed for being tardy, as defined in the policy. (R-3).³

The Attendance and Punctuality Policy was reissued with minor revisions in 2010. 764:21-765:21 and R-1). To the definition of tardiness, the 2010 version adds: “Tardiness is not associated with time reporting or payroll clock in times.” (Tr. 765:25-766:4 and R-1, at page 1). The Hospital deemed this clarification on the first page useful because of the “Kronos” timekeeping software, which rounds clock-in times up or down to the quarter hour for purposes of payroll. (Tr. 766:5-9). As both employee and management witnesses testified, employees are paid in 15 minute increments. Kronos rounds their time for payroll purposes. (Tr. 124:19-125:10, 766:10-767:1). They receive pay for the whole hour if they clock in within seven minutes of their start time. At eight minutes, their time is rounded forward to quarter after the hour. (Tr. 59:11-18, 160:5-161:1, 206:18-207:3, 220:9-21, 224:4-13, 766:10-14).

This rounding does not apply to the Hospital’s expectations on tardiness. If employees are scheduled to start at 7:00 a.m., then they are expected to be at work at 7:00 a.m. (Tr 766:10-767:1 and R-1). If they are less than seven minutes late, they are paid as if they were on time but they are still considered tardy. By the same token, if an employee clocks in at 7:08 and his pay is

grievance after he received an oral warning for tardiness with one occurrence of less than seven minutes. He further testified that there was a “hot button,” i.e., expedited arbitration, on the issue of the grace period and that he travelled to Oakland to testify at the hearing. He claims ignorance as to the arbitrator’s findings. (Tr. 102:20-103:9, 104:18-105:10 and R-2). General Counsel has, inexplicably, taken the position that there never was an arbitration at all. (Tr. 844:8).

³ On this point too, Torres was deliberately vague. With respect to the Hospital issuing the memorandum reiterating that there is no grace period, he testified that it “sounds familiar” and that he “might have seen” the memorandum. (Tr. 103:1-14, 104:3-17 and R-3).

rounded to 7:15, he is not judged to be tardy as of 7:15, but rather as of the time he actually punches the clock. (Tr. 220:9-21, 768:15-20). This has always been the policy and was stated in prior policies (R-63, at page 2 item 1; R-65, at page 3, item 10; R-66, at page 2, item 11), however, in the 2010 version the Hospital stated it upfront. (R-1, at page 1, Definitions, “tardiness”).

General Counsel has suggested that the employees were somehow unaware of the Hospital’s Attendance and Punctuality Policy. The Hospital’s policies are reviewed with the employees at the time of new employee orientation and when individual employees first join the Hospital. (Tr. 767:9-12). Employees can access Hospital policies through the Hospital intranet, available on computers in every department and at the Human Resources office and in printed form at each department. (Tr. 499:7-23, 767:2-8).

Since the evidence so conclusively established that the initial accusations of NUHW and General Counsel were completely wrong, General Counsel amended the Complaint to allege that a couple of departments had a seven minute grace period, and these departments changed their policy. However, this amendment, like the original allegations, has no evidentiary support, and in any event, could not support an unfair labor practice charge, as a matter of law.

Preliminarily, the uncontradicted evidence is that no individual manager or supervisor has the authority to alter or modify the Hospital’s policies. (Tr. 764:2-4). There is a specific procedure that must be followed when personnel policies are changed or revised. When the Human Resources Department proposes a change, it is submitted to a committee made up of senior leadership for the Hospital. If that management committee approves changes, the new or revised policy must then be approved by the Hospital’s governing board. (Tr. 763-11-24). This procedure of reviewing and reissuing policies on a Hospital-wide basis is required in order for the Hospital to maintain its accreditation. (Tr. 767:21-768:5, 785:5-786:17, 840:23-25). The Hospital notifies employees of revisions to policies by distributing them to the employees directly or discussing them at department meetings. (Tr. 767:13-768:5).

Additionally, an employee is not disciplined every time he or she is late. Discipline may be issued at the supervisor's discretion when there is a pattern of violations of the punctuality standards. The Attendance and Punctuality Policy provides for five progressive discipline steps ranging from verbal warning to termination based on the number of occurrences within a 12 month period. (R-1, at Pages 3-4, "Supervisor Responsibilities," Item 6).

Supervisors do not necessarily know when an employee has arrived late to work and they are not charged with policing timeliness on a daily basis. (Tr. 223:3-25, 534:8-15). It is only when an employee has a pattern of tardiness, which may, for instance, be reflected in his or her pay, that supervisors will know there is a problem and are likely to use the progressive discipline process to attempt to modify the employee's behavior. (Tr. 534:8-15). Nonetheless, in the time period alleged in the complaint (April 1, 2009 through February 2011), dozens of employees throughout the Hospital were disciplined for tardiness based, at least in part, on instances when they were late to work seven minutes or less. (Tr. 539:3-540:2, 543:13-546:8, 558:22-559:8, 587:24-589:19, 693:14-694:1, 696:11-697:20, 702:20-22, 704:4-707:2, and J-1, R-16, R-17, R-23, R-25 to R-34, R-60 to R-62).

NUHW representative Sophia Mendoza ("Mendoza") testified that the sole basis for her belief that the three selected departments had a seven minute grace period for tardiness is that she had "heard" it from employees and then she received complaints from environmental services ("EVS") worker Melissa Lynch ("Lynch") and laboratory technician Traci Mills ("Mills") around May of 2011 complaining that they had been disciplined for tardiness. (Tr. 316:2-317:2, 387:21-388:24). Her "investigation" consisted solely of discussing the issue with those employees and stewards in the EVS and respiratory departments. (Tr. 389:7-16). She did nothing else to research whether the Hospital's attendance policy, which she admits does not provide for a seven minute grace period. (Tr. 390:16-391:3, 391:20-392:2). In fact, three of the four employees Mendoza spoke to before filing a grievance, Lynch, Alex Corea ("Corea"), and Noemi Aguirre ("Aguirre"), had themselves previously been disciplined for being less than seven minutes tardy, a fact they apparently failed to mention to Mendoza. (Tr. 389:4-6, 390:3-15

and GC-13 to GC15, GC-18-GC20, R-16 to R-19, R-21 to R-23). This lack of candor on the part of the employees does not constitute evidence in support of General Counsel's case.

NUHW's and General Counsel's allegations regarding the seven minute grace period have been moving targets. At the grievance meeting with Hospital management, Mendoza maintained that the entire Hospital had had a "past practice" "that employees never got written up or disciplined for being late within the seven minute grace period" (Tr. 318:10-15). In its charge filed May 9, 2011, NUHW alleged that the Hospital had "changed the seven (7) minute grace period under the attendance policy and is now penalizing employees for being one (1) minute late." (GC-1(p)). As noted above, the original Consolidated Amended Complaint, filed July 29, 2011, continued to allege this broad Hospital-wide policy: "Since at least 2009, [the Hospital] has allowed employees a 7-minute grace period when clocking in from the start of the shift or when clocking out at the end of the shift" but "eliminated the 7-minute grace period" in "early 2011." (GC-1(a1) ¶¶15). On the first day of the hearing, however, those allegations were amended to state that there was a "past practice" of allowing that grace period in three of the Hospital's 51 departments, i.e., "the laboratory, EVS and pulmonary service/respiratory therapy departments," and that the Hospital "made a unilateral change by eliminating the grace period" in those departments in February 2011. (Tr. 14:14-17:17, 18:24-19:4, 699:23-700:2 and GC-2). Apparently General Counsel concedes that the other 48 Hospital departments have not had and do not have a grace period for tardies.

B. The Respiratory Department did not Have a Separate Tardiness Policy.

As previously noted, policies are issued Hospital-wide and no individual supervisor has the authority to craft unique policies that only apply to his or her small group of employees. Nonetheless, even if a supervisor could do so, there is no evidence that such a thing happened in the respiratory services department.

Respiratory therapists work with patients suffering from acute or chronic respiratory problems like asthma or emphysema. They perform therapeutic treatments, such as bedside

bronchoscopy. They also perform diagnostic procedures such as testing a patient's breathing capacity and blood oxygenation and they care for patients on life support in intensive-care units. (Tr. 57:8-13, 503:25-504:5). As explained by Administrative Director, Respiratory and Pulmonary Diagnostic Services, George Sarkissian (“Sarkissian”), it is crucially important for respiratory therapists to be at work on time. The patients they care for are often in intensive care and very fragile and it is important that there must be no gaps in their care. (Tr. 503:25-504:8). When a shift begins, which is at 6:00 a.m. for the day shift (6 p.m. for the night shift), each therapist must get his or her assignments, then get to the bedside to relieve the respiratory therapists from the previous shift whose areas and patients they are about to take over so those employees can go home on time. The leaving and arriving therapists must communicate about the patients and their conditions. This process needs to be completed by 6:20 a.m. (Tr. 501:7-503:3) Sarkissian and Department Manager, Tracy O’Connell (“O’Connell”) thus made clear to the respiratory therapists and “stated again and again” that the expectation was that they would be at their station and ready to work at 6:00 a.m. (Tr. 504:22-505:2).

Sarkissian and O’Connell assumed their current positions in September 2010. (Tr. 498:19-499:1, 525:20- 526:1). Shortly thereafter, they held a Department Meeting to introduce themselves. (Tr. 62:4-63:3, 64:13-17, 503:4-14). It is undisputed, that the issues of attendance and tardiness were discussed in that meeting. (Tr. 503:15-504:8). Respiratory therapists Torres and Aguirre initially claimed that Sarkissian and O’Connell stated that they would “continue” a “previous practice” in the Respiratory Department of allowing a seven minute grace period for tardiness and that “nobody” would be written up if they were late within that seven minute grace period. (Tr. 63:4- 64:12, 135:20-136:7, 145:12-148:23). This testimony was demonstrably not true.

First, both Torres and Aguirre had been written up PRIOR to the arrival of O’Connell and Sarkissian for being tardy less than seven minutes. Therefore, they each knew, as a matter of personal experience, that there was no seven minute grace period for the new managers to “continue.” (GC-13, GC-15; R-2-R4).

Additionally, Sarkissian testified that what he said at the meeting was that he understood situations could arise that cause people to be late or absent and that so long as there was no pattern of tardiness they would not necessarily be taking action. (Tr. 504:9-21, 515:16-25). Indeed, even Torres acknowledged that, only weeks later, on October 29, 2010, he met with O'Connell and Sarkissian, who counseled him and presented him with proposed disciplinary notices for his pattern of tardiness and poor attendance. (Tr. 61:15-62:2, 64:18-68:11, 505:6-25, 529:7-9). Although his testimony was at first confusing on this point, Torres eventually acknowledged that O'Connell explained to him at that meeting that the Hospital's tardiness policy was applicable to the respiratory department and that the department's expectation was that he would be at work by the beginning of his shift and that there would be no grace period for tardiness even though the payroll system rounds the time to the nearest quarter hour. (Tr. 68:24-69:6, 71:25-72:5, 89:3-12, 97:19-22, 109:24-111:2). Thus, the evidence established that Sarkissian and O'Connell who have been managing the department since October of 2010 understood and applied the Hospital's policy to the respiratory department. They clearly changed nothing in "February 2011," and NUHW's charge filed May 9, 2011 would not be timely if NUHW were protesting a "change" in October of 2010.

However, there was no evidence of any "change" in policy or that respiratory ever had a seven minute grace period. Torres initially contended that the basis for his assertion that there was a seven minute grace period in the respiratory department was solely his own experience of allegedly not receiving such discipline. (Tr. 91:11-92:4, 93:1-3). He first claimed that he had never been disciplined for tardiness at all before February 2011 and that no supervisor had told him there was no seven minute grace period for tardiness before O'Connell did in October 2010. (Tr. 60:8-11, 93:17-94:19, 96:18-20). He was forced to acknowledge that, in reality, he received verbal warnings for tardiness with tardies of less than seven minutes in 2006 and again in April 2010. (Tr. 100:11-102:11, 107:3-108:25 and R-2 and R-4). He grieved both of these write-ups, and never prevailed, including losing the 2006 grievance in arbitration. (Tr. 102:20-103:14, 104:3-7, 104:18-105:10, 108:21-109:10, 841:16-843:8, 844:19-846:2, 885:7-20 and R-1 to R-4).

Torres then tried to save his position by claiming that the supervisor who preceded O’Connell, Victor Perez (“Perez”), did not discipline employees who were late seven minutes or less and that Perez “acknowledged or agreed” that there was a seven minute grace period for tardiness. (Tr. 89:13-16).⁴ In fact, Perez disciplined Aguirre on April 21 2010 with seven of the eight occurrences listed on the write-up being less than seven minutes. (Tr. 144:22-145:4 and GC-15). That same month, Perez also disciplined respiratory therapists Margaret Knight, with five of the eight occurrences listed being less than seven minutes (R-35) and Richard Rea, with all eight occurrences being less than seven minutes. (Tr. 558:22-559:8 and R-23). Corea received a verbal warning for tardiness with occurrences of less than seven minutes in April 2010. (Tr. 539:3-540:2 and R-16). So did Alan Ravago. (Tr. 543:13-546:8 and R-17). Thus, Torres was completely discredited as to any claim that Perez had a policy of allowing people to be tardy.

Prior to 2010, previous supervisors in the department also applied the Attendance and Punctuality Policy as written. Aguirre was issued disciplinary notices twice in 2006 after being less than seven minutes late on numerous occasions. (Tr. 142:6-143:12, 143:20-144:7 and GC-13 and GC-14). Rea received four separate disciplinary notices and a 24-hour suspension in 2006, all based on occurrences of being late seven minutes or less. (Tr. 548:4-551:18, 551:22-552:18, 556:22-557:7, 557:14-558:20 and R-18 to R-22).

At this point, with not one shred of evidence to support the new theory of the “department based” seven minute grace period, General Counsel seemed to completely change the theory of the case. General Counsel called Aguirre who testified that she understood O’Connell was applying a seven minute grace period because Aguirre’s two write-ups for

⁴ Perez served as the respiratory services supervisor for approximately one year, prior to O’Connell’s arrival in September 2010. (Tr. 89:3-12). Torres told Sarkissian and O’Connell that Perez had sent out a memorandum in 2010 stating that there was a seven minute grace period. Torres could not produce the document when Sarkissian requested it and Perez told Sarkissian no such document ever existed. (Tr. 506:1-17). General Counsel did not introduce any such document, and such alleged document is entirely inconsistent with Perez’s documented history of writing up employees for being tardy less than seven minutes.

tardiness in 2011 cited instances where she was late more than seven minutes. (Tr. 148:24-149:4). Apparently, General Counsel was claiming that the department used to discipline employees, including Aguirre, for being less than seven minutes late, but in 2011 began ALLOWING employees to be seven minutes late. However, since General Counsel's amended complaint is that the respiratory department ELIMINATED the seven minute grace period in 2011, evidence of someone being written up for of being over seven minutes late is contrary to the allegations and does not prove General Counsel's case.

In fact, the evidence shows that respiratory therapists both before and after February of 2011 have been written up for patterns of tardiness, whether those patterns involved lateness over or under seven minutes. The point is to change behavior. It usually works. After receiving her warnings in May and July of 2011, Aguirre, unlike Torres, changed her behavior and there has been no need to write her up for tardiness since. (Tr. 535:22-536:2).

C. The Laboratory Department did not Have a Separate Tardiness Policy.

General Counsel presented evidence from just one employee in the laboratory in support of the allegation that there was a seven minute grace period in that department prior to February 2011. Laboratory assistant Mills testified to a hearsay statement allegedly made by her previous supervisor, Liz Sanchez, that there was "a seven minute grace period with regard to [her] time being recorded in the Kronos system." This is reflected in her pay. (Tr. 220:9-15).

Preliminarily, such a statement has nothing to do with the tardiness policy – the Hospital has never denied that the Kronos payroll system rounds the time. Mills further opined that "it was pretty loose in the laboratory" when Sanchez was the supervisor.⁵ (Tr. 207:19-20).

Sanchez allegedly told Mills that she would not be disciplined for being seven to ten minutes late "as long as it wasn't excessive." (Tr. 207:4-208:5). Mills statement is inherently not credible. Neither General Counsel nor NUHW has ever contended that anyone was allowed to be ten minutes late and there was never any evidence or even suggestion that the Kronos pay

⁵ Sanchez no longer works at the Hospital. (Tr. 219:12-24).

system rounded so as to give full pay to someone ten minutes late. Furthermore, since Sanchez wrote Mills up for being tardy less than seven minutes, it is clear Sanchez had no such policy. (Tr. 210:9-211:13 and GC-25). To the extent that Mills perceived Sanchez as “lenient,” she admitted that she took advantage of Sanchez’s leniency by coming in late, knowing that her pay would not be “docked.” (Tr. 222:12-21). Mills further admitted that Sanchez would not have necessarily known when she arrived at work as she did not check in when she arrived. Further, Mills admitted that she had different start times throughout the week. The laboratory supervisor would have to look at punch-in records to find out when an employee arrived each day and whether he/she was on time. (Tr. 223:3-25).⁶

Mills did admit, however, that, at her grievance meeting, the human resources representative asked Mills if she were aware that she could view the Hospital’s policies online and told her that the Hospital’s policy on tardiness has long stated that there is no grace period for tardiness. (Tr. 211:24-216:7). At the hearing, Mills admitted that the definition of tardiness in the Attendance and Punctuality Policy is consistent with what she was told at that meeting. (Tr. 220:22-222:11 and R-1 at page 1).

General Counsel’s evidence falls woefully short of establishing a “policy” in the laboratory department. One hearsay statement of a “seven to ten minute “tardiness leeway, which is inconsistent with General Counsel’s contention and is attributed to a terminated manager by an employee who admitted to deliberately gaming the system because her manager would not know what time she arrived, and is inconsistent with the actual discipline administered by that manager to that employee does not establish an unfair labor practice by the Hospital.

⁶ Mills claimed, based on hearsay, that “just about everyone else in the department” was disciplined for tardiness in or around April of 2011. (Tr. 218:1-22). General Counsel introduced no such evidence.

D. The Environmental Services Department did not Have a Separate Tardiness Policy.

On April 21, 2011, acting EVS supervisor, Kevin Kaldjian administered a verbal warning to EVS worker Lynch, based on eight separate occurrences when she arrived to work late. (Tr. 166:5-12, 740:5-21, 749:11-21, 753:11-22 and GC-22). Two of those eight instances were for six and seven minutes. (Tr. 742:3-5, 754:8-756:3 and GC-21, at pages USC 2425 and USC 2426). Although Lynch wrote in the comments section of the write-up form, she mentioned nothing about a seven minute grace period, writing instead that she understood her being late was a problem and promising to do better. (Tr. 182:9-25, 740:22-741:11, 756:4-757:20 and GC-22).

Lynch received a written warning on May 11, 2011, after she was late to work on a ninth occasion in twelve months, this time clocking in 25 minutes late. In the comments section, she apologized for being late and blamed it on car trouble. (Tr. 741:12-742:2 GC-21, at page USC 2426, and R-44; Amended Consolidated Complaint ¶ 15(d)(3)).

Lynch claimed that she raised the issue of the seven minute grace period in a meeting with Kaldjian and Human Resources Manager Eva Herberger (“Herberger”) and in a subsequent department meeting with Kaldjian. (Tr. 168:7-169:5). She testified, on the one hand, that they told her that this was a “new policy” and that, since USC now owned the Hospital, it would “be implementing new things.” (Tr. 169:14-170:3, 171:1-174:1).⁷ At the same time, Lynch testified that Kaldjian told her “we never had a seven-minute grace period” for tardiness and “we start at the hour.” (Tr. 168:24-169:5, 190:3-21). The second version is entirely consistent with Kaldjian’s testimony and the documentary evidence.

Lynch admitted that she had never read the Hospital’s Attendance and Punctuality Policy despite being referred to it by Kaldjian and Herberger and despite the fact that it is available on

⁷ This statement is entitled to no credibility. Although the Hospital changed ownership on April 1, 2009, it is undisputed that the Attendance and Punctuality Policy with its language specifying that there is no grace period for tardiness had been in place since 2002. (R-1 and R-65).

the Hospital's intranet and can be accessed at a computer desk in the EVS department.

(Tr. 183:12-184:15 and R-1).

Contrary to any allegation that this was a "new policy" in the EVS department, 2011 was not the first time Lynch had been disciplined for tardiness nor was it the first time the pattern of tardiness for which she was disciplined included occurrences of being late seven minutes or less. She received two verbal warnings and a written warning for tardiness between May and November 2008. (Tr. 161:12-163:21 and GC-18 to GC-20). As was the case in 2011, Lynch wrote in the comments section on each of those write-ups, yet said nothing about a seven minute grace period. (Tr. 180:1- 181:25 and GC-18 to GC-20).

Lynch was not written up for tardies between November 2008 and her first write-up in early 2011. This was, however, a turbulent period in the EVS department. The manager who wrote Lynch up for tardiness in 2008, Marvin Granados, went on an indefinite leave of absence. (Tr. 182:1-8). Kaldjian took over responsibility for managing the department as interim director in December 2010. (Tr. 736:3-11, 737:2-7, 744:18-745:4, 747:6-9). By that time, two of the supervisors had been demoted and two others, including Granados' replacement, had resigned. (Tr. 736:12-23).

If Lynch or any other EVS employee should have received a verbal or written warning for a pattern of tardiness in 2009 or 2010, there was no consistent management in place to necessarily stay on top of the situation. In any event, it is hard to determine whether such discipline was in fact issued before Kaldjian took over because the department was flooded in October 2010, destroying many of the department's files, including personnel files. (Tr. 742:24-743:21).

Other than Lynch's inconsistent testimony, no evidence was offered that a seven minute grace period ever existed in EVS, and Lynch's testimony established no such policy. She contradicted her own testimony, she made no mention of such a policy in her contemporaneous notes written on her disciplinary notices both before and after February of 2011, her own disciplinary history of prior write-ups for being less than seven minutes tardy is inconsistent with

such a “grace period” and the documentary evidence, and her manager’s testimony contradicts such a policy. General Counsel utterly failed to prove its case.

III. LEGAL ARGUMENT

A. The Hospital is Entitled to Enforce its Existing Rules.

General Counsel bases this charge on the issuance of verbal warnings for tardiness to employees in the period of February through May 2011. (Consolidated Amended Complaint ¶15(d)). An employer can enforce existing rules or standards regarding discipline or efficiency standards without bargaining with the union. See The Trading Port, Inc., 224 NLRB 980, 983 (1976). Here, the Hospital’s Attendance and Punctuality Policy has been continuously in effect since 2002, has always provided that there is no grace period for tardiness, and requires to be at their work station and fully ready to perform their work duties at the start of their scheduled shift. (Tr. 499:24-500:7, 526:13-25, 704:17-22, 707:3-7, 765:22-24, 768:6-10, 844:19-845:4 and R-1, R-63, R-65 and R-66). The Hospital has introduced voluminous evidence of employees throughout the Hospital being disciplined for tardiness with occurrences of less than seven minutes before February 2011. (GC-13 to GC-15, GC-19 to GC-21, R-16 to R-19, R-25 to R-32, R-60 to R-62). The Hospital won the issue in arbitration. Contrary to the allegations, the evidence establishes a “no grace period” tardiness policy enforced throughout the Hospital.

B. The General Counsel has Failed to Prove that the Respiratory, Laboratory or EVS Departments Had Different Tardiness Standards.

General Counsel’s evidence was entirely unpersuasive. Torres’ testimony was contradicting and consistently disproven. The only thing that is conclusively shown by Torres’ testimony is that he routinely tries to avoid discipline for his tardiness by claiming a seven minute grace period – a claim which he always loses. He lost the claim in arbitration and he and his fellow therapists have been consistently disciplined for tardiness of less than seven minutes since that time.

General Counsel’s entire case with respect to the Laboratory comes down to one hearsay statement which is inconsistent with General Counsel’s theory, and attributed by Mills to

terminated manager Sanchez, who Mills admits was “lenient” and who would not, in any event, have known what time Mills arrived at work. (Tr. 223:3-25). However, even the lenient Sanchez wrote Mills up for tardies under seven minutes.

As for EVS, Lynch was written up before 2011 for tardies of less than seven minutes and never mentioned a grace period in her “comments.” She does not claim anyone told her of a seven minute grace period and admits that Kaldjian told her there was none.

In light of the overwhelming documentary and testimonial evidence to the contrary, this comes woefully short of the evidence necessary to support General Counsel’s allegation. General Counsel has failed to prove the Amended Complaint.

C. Individual Managers Cannot Create Ad Hoc Terms and Conditions of Employment that Favor Some Employees Over Others.

Even if General Counsel had produced some credible evidence in support of its amended complaint, the amendment does not state an unfair labor practice as a matter of law.

General Counsel apparently relies on testimony by Torres that each time there is a change in supervisor, there is a whole new set of rules and expectations in the department. (Tr. 92:12-15). Putting aside Torres’ utter lack of credibility, that is completely nonsensical. No individual manager or supervisor has the authority to alter or modify the Hospital’s policies. (Tr. 764:2-4). Changes to personnel policies occur at the senior levels of the Hospital’s administration following a strict set of procedures. (Tr. 763-11-24). Any other practice would jeopardize the Hospital’s accreditation. (Tr. 767:13-768:5, 785:5-786:17, 840:23-25).

Further, for individual managers to make separate deals with the employees they supervise that exclude them from the punctuality standards that apply to everyone else in the Hospital would violate the rule that an employer cannot deal directly with employees represented by a union with respect to their pay and the terms and conditions of employment. See NLRB v. McClatchy Newspapers, Inc., 964 F.2d 1153, 1159 (D.C. Cir. 1992) (“Direct dealing between the employer and its employees cuts to the heart of collective bargaining and substantially weakens the union’s role as collective representative of the workers.”). This rule is so

fundamental to labor relations that it is specifically recited in the Tenet-SEIU contract. (GC-4, at page 61, Article 13.Q, “Modification of Practices.”) (“There shall be no individual bargaining with employees over wages, hours and working conditions.”)

By General Counsel’s logic, an employer, through any one or more of its supervisors, could simply bypass the unit-wide rules, favor those employees it chooses, and the Hospital could be compelled to continue this favoritism perhaps until some other supervisor came along who initiated a different set of standards. Individual supervisors could bind the Hospital to whatever secret arrangements they made with selected employees they supervised, thus creating a patchwork of different policies and practices, throughout the unit. That is precisely the kind of situation the Act was designed to prevent. See Vaca v. Sipes, 386 U.S. 171, 182 (1967) (“The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.”). This is not a case where an individual employee claims an unfair termination because he or she was not personally advised of a Hospital policy. This is a case where General Counsel wants to create preferential work rules for a couple of departments based on nothing more than hearsay allegations of a prior supervisor’s poor performance. The NLRA is not a vehicle for turning poor performance by a supervisor into national labor policy. In the face of a consistent, documented, frequently enforced tardiness policy, upheld in arbitration, General Counsel has no legal authority to carve out exceptions for a couple of departments because the employees wish the policy did not exist.

Case No. 39808

CASE NO. 39808

I. SUMMARY OF ARGUMENT

In Case No. 39808, the General Counsel alleges that in March and April of 2011 the Hospital targeted Torres and retaliated against him because of his union activities by writing him up for his attendance. The opposite is true. Torres has repeatedly violated the Hospital's Attendance and Punctuality policy. There is no evidence that any of the three write-ups on which this allegation is based were not warranted or that the Hospital would not have disciplined him but for his union activity. Each of Torres' excuses for why he should not be considered late or absent is demonstrably false and known by him to be false. Specifically, there is no seven minute grace period; being late on consecutive days does not mean that all the days are combined into one tardy; a medical note does not magically turn an unscheduled and unauthorized absence into a "non-absence," and; he was not on an approved medical leave on any of the dates he claimed to be. What is more, Torres was disciplined for only a fraction of the times that he was late and/or absent. In fact, the number of his absences and "tardies" would warrant termination under the plain terms of the policy. The only conclusion that can be deduced from the evidence is that Torres received preferential consideration throughout this time. Had he been anyone else, the Hospital likely would have taken more serious action and sooner. Instead, Torres' supervisors have tried again and again to work with him. For him to claim "discrimination" on the basis of his union activity (or for that matter any other basis) is ludicrous.

II. STATEMENT OF FACTS

A. Torres' Pattern of Tardiness Warrants Termination.

Torres is employed at the Hospital as a respiratory therapist under the direct supervision of O'Connell. (Tr. 48:7-15). He is a steward and officer in NUHW, as he was for many years under SEIU. (Tr. 51:9-19). He is one of 25-30 members of NUHW's bargaining committee. (Tr. 52:12-15). Torres testified that he clocks in each day by swiping his ID card on a Kronos clock. (Hearing Tr. 58:9-14). Sometimes, however, he "adjusts" his time on the computer. (Tr. 58:25-59:6).

On October 29, 2010, O’Connell met with Torres and NUHW representative, Antonio Orea, and presented Torres with verbal warnings for tardiness and attendance. O’Connell explained to Torres her expectations on timeliness and attendance along with the Hospital’s policy. (Tr. 61:15-62:2). O’Connell memorialized their conversation in an email dated November 2, 2010. She attached the Hospital’s attendance and punctuality policy and a list of 16 occurrences, nine of which were for *more* than seven minutes late. (Tr. 65:17-21, 530:13-531:12 and R-1 and R-14). Torres offered the “grace period” and a number of other excuses. (Tr. 64:18-68:1, 68:24-69:6). O’Connell did not submit the warnings because she felt that, as a new manager, it would be better to start off with a clean slate while making clear the expectations of the Hospital going forward. (Tr. 109:24-111:2, 529:14-530:8).

At around the same time, O’Connell disciplined Aguirre for time and attendance. (Tr. 534:16-535:21 and R-15). Aguirre changed her behavior and as of the hearing date, had not been written up for tardiness for months. (Tr. 535:22-536:2).⁸ The same is not true for Torres. After the October 29 meeting, Torres’ time and attendance did not improve. (Tr. 533:4-7). To the contrary, Torres was late to work numerous times. (Tr. 533:20-534:8). In the period of September 30, 2010 through February 4, 2011, he was late more than seven minutes on 20 separate occasions, with 35 total tardies. As a result, Torres received a verbal warning for excessive tardiness on February 4, 2011. (Tr. 111:5-112:5, 580:15-582:5 and GC-5, at USC0615-USC0617). Under the Attendance and Punctuality Policy, that many occurrences call for discharge. (R-1, at page 2, “Tardiness Standards.”) O’Connell, however, chose to give him a verbal warning only. (Tr. 60:12-61:14, 580:15-582:5 and GC-5).⁹

⁸ Aguirre is not a union steward, however, she is an active member of the NUHW bargaining committee. (Tr. 140:11-22).

⁹ The General Counsel has not disputed that Torres was late on the dates listed in the handwritten pages attached to Exhibits GC-5 and R-14, which was prepared by the department secretary, or the accuracy of the times listed. (Tr. 532:9-16 and R-14 at page 2, and GC-5 at USC 0616-17). No one has disputed the accuracy of the typewritten list prepared by O’Connell that is also attached. (Tr. 580:15-582:5 and GC-5 at USC 0615). Those dates and times, after all, can be easily checked against Torres’ Kronos records (Exhibit GC-12). Instead, General Counsel complains that, while O’Connell shared the handwritten log with Torres at the time she

On March 18, 2011, Torres received a further written warning based on nine occurrences of tardiness over a 12-month period. (Tr. 70:12-71:19 and GC-6; Amended Consolidated Complaint ¶¶ 15(d)(1) and 7(b)). Torres again claimed that he should not have been considered late on dates where he clocked in or adjusted his time to being seven minutes late or less even though he acknowledged on cross-examination that O’Connell had told him on October 29 that he had to adhere to the Hospital attendance and tardiness policy. (Tr. 110:13-111:2). She had reconfirmed that in the February disciplinary session: regardless of what the payroll system does, he is still considered late if he is not at his station and ready to work by the beginning of his shift. (Tr. 71:25-72:5). Torres also claimed that he was only late eight times, not nine, because consecutive “tardies should be grouped” so that they only count as one. (Tr. 72:3-21 and GC-6 at page 2). No such rule is set forth in the Attendance and Punctuality Policy or anywhere in the Hospital’s policies. No evidence was presented of that rule ever being applied. Torres himself had been written up for consecutive tardies in 2010. (Tr. 107:3-108:25 and R-4). Furthermore such an assertion is idiotic. The logical conclusion of such a statement is that, as long as someone is tardy every day, that person cannot be written up for a second tardy because the tardies are all consecutive. The only way to ever be tardy two times under Torres’ theory would be to accidentally come to work on time one day and break the “consecutive” chain.

On April 7, 2011, Torres received a written warning and a 24 work hour suspension based on ten separate occurrences of tardiness in 12 months. (Tr. 74:2-17 and GC-7; Amended Consolidated Complaint ¶ 17(c)). Torres disputed the occurrence on January 6, again raising the oft-referenced “seven minute grace period” excuse. (Tr. 75:5-9). On March 31, 2011, Torres was over one hour late. He raised two excuses for his tardiness that day, both of them false. First, he claimed that he was on “approved intermittent family leave” that day. (Tr. 114:7-115:11 and GC-7). In reality, he was at union negotiations long past his report time of 6 p.m.

met with him to discuss the write-up, she did not show him the list she typed containing the same information. (Tr. 66:15-25 and GC-5 at USC 0616 and USC 0617). This objection is of no relevance.

(Tr. 116:17-117:3). Torres then claimed that this was “approved time off” because he called the clinical coordinator on duty to let him know he was going to be late. The Attendance and Punctuality Policy does provide supervisors with discretion to approve requests for time off when they are made in writing in advance of the date the employee wishes to take off. (R-1, at page 2, “Employee Responsibilities”). Torres never claimed to have made any such written, prior request or to have had any prior approved time off. Calling in to advise the supervisor of an unscheduled absence or tardy is required by the policy. (R-1, p. 2 “Employee Responsibilities,” #2). This is so the department can plan and make other arrangements for patient coverage. That does not excuse the absence or tardiness. (Tr. 527:1-12). Calling in may avoid a second disciplinary action for “no call/no show,” but it does not magically make the absence or tardiness disappear. (Tr. 681:16-25, 685:12-686:3).

On September 14, 2011, Torres received a final warning for excessive tardiness based on 12 occurrence of tardiness. (Tr. 81:8-82:5 and GC-10 at USC 0574-75). Under the Hospital’s Attendance and Punctuality Policy this number of incidents warrants discharge. (R-1, at page 4). Torres again disputed the occurrence on January 6, 2011 and also disputed August 31, 2011 because he was purportedly seven minutes late exactly. (GC-10, at USC 0574).

In addition to the frivolous nature of this excuse, since Torres had already lost this issue in arbitration, the frequency with which Torres’s time records show him arriving exactly seven minutes after his start time was apparently not a coincidence. On September 2, 2011, O’Connell observed Torres arriving at the department at 6:11 p.m. He clocked in at a different clock than the one designated for his department, then adjusted his time on the computer to 6:07. (Tr. 125:11-22 and GC-10, at USC 0574). O’Connell noted the discrepancy on the final warning by listing the time as “6:07/6:10.” (Id.)

O’Connell also issued Torres a verbal warning for his violation of the Hospital’s Kronos Clocking Policy. (Tr. 125:11- 126:3 and R-7). Under that policy, “employees are required to “swip[e] their badge ... to log in their time worked at their designated Kronos clock.” (Tr. 572:5-22, 769:1-9 and R-24, at page 2). When an employee uses his/her badge to clock in,

the system identifies where in the Hospital the employee is. (Tr. 126:20-127:7). Torres admits that the Hospital's policy states that he must clock in at his own department, in his case the Kronos clock in the respiratory services department report room. (Tr. 126:4-10). Nonetheless, he sometimes clocks in at other locations, such as the basement, where he is still five minutes away from where he is supposed to report to work. (Tr. 134:9-135:6). He testified that, on other occasions he "adjusts" his time on the computer. (Tr. 58:25-59:6).

B. Torres' Pattern of Absenteeism Warrants Termination.

Under the Hospital's Attendance and Punctuality Policy, an employee is considered absent every time he/she has "an unscheduled and/or unauthorized absence from work." Each such absence is considered an "occurrence." (Tr. 97:23-100:10, 500:8-19, 527:19-528:3, 681:16-18 and R-1 at page 1, "Definitions.") An *unscheduled and unauthorized* absence from work is one where the employee had not previously requested vacation or time off, was placed on the schedule and did not swap or trade the day, and yet did not come to work. (Tr. 527:25-528:8). A *scheduled and authorized* absence, on the other hand, is one where the employee is "required or approved to be away from work" and includes sick leave, and family medical leave. (R-1, at pages 1-2, "Scheduled/Authorized Absences"). By definition, a scheduled and authorized absence is one that has been preapproved and prescheduled. (Tr. 680:18-681:15, 689:11-20). An employee cannot simply not come to work and present an excuse later. Every unscheduled absence is considered an occurrence regardless of whether the employee called in to let the department know he/she was not coming or brings a doctor's note later explaining the reason for his/her absence. (Tr. 528:11-24, 573:5-579:14 and R-1). Furthermore, the employees' choice to use accrued sick leave or Paid Time Off to cover his/her pay for the day does not turn an unscheduled absence into an authorized absence. (Tr. 573:5-579:14, 682:11-25).

An employee is subject to discipline when he/she exceeds a certain number of occurrences in a 12 month period. As is the case with tardiness, the Attendance and Punctuality Policy provides for progressive discipline steps for violations of the attendance standards. (R-1, at page 4, "Supervisor Responsibilities," Item 5).

During her October 29, 2010, meeting with Torres, O’Connell presented him with a verbal warning for attendance (seven unexcused absences in 12 months). (Tr. 110:18-111:4, 529:7-9 and R-14). O’Connell explained the Hospital’s Policy and her expectations on attendance. However, as with the tardiness write-up, O’Connell agreed not to forward the verbal warning to Human Resources in the hope that Torres would endeavor to do better. (Tr. 529:14-530:8). He did not. (Tr. 533:4-7).

On February 4, 2011, Torres received a new verbal warning for poor attendance, based on six unexcused absences in the period between March 19, 2010 and January 27, 2011. (Tr. 77:5-21, 533:8-14 and GC-8). Torres told O’Connell the write-up was unfair because he had been on an “approved medical leave of absence” during that time. (Tr. 77:22-78:7). That is not true. As testified by Human Resources Specialist Dora Castañeda-Gálvez , none of the dates identified in the February 4, 2011 verbal warning (March 19, April 16, August 27, September 11 and December 30, 2010 and January 27, 2011) are within the range of dates when Torres was actually on medical leave. (Tr. 656:24-658:18 and R-48, GC-8, at USC 0558).

On March 18, 2011, Torres received another written warning, based on seven unexcused and unauthorized absences in a 12-month period. (Tr. 78:17-79:3 and GC-9). Torres presented a doctor’s note which he claimed “retroactively” excused him for being absent on March 16 and claimed it was Hospital policy that an absence “will not count against you” in those circumstances. (Tr. 79:14-80:5,117:4-118:19 and GC-9 and R-5). No evidence of such a practice ever being followed at the Hospital was presented. The uncontradicted testimony of Hospital personnel is that no such policy exists. (Tr. 528:19-24, 681:16-25, 685:12-686:12, 689:11-19, 708:18-709:18). Indeed, Torres had made a similar claim in 2004, when he received a written warning for excessive absences and claimed that under Hospital policy “most absences [are] cleared through medical excuses documentation.” Torres was wrong then as he is now. The discipline has remained in Torres’ personnel file. (Tr. 118:22- 120:21 and R-6).

On September 2, 2011, Torres received another verbal warning based on poor attendance. (82:16-84:12, 569:20-571:4 and GC-11). Torres, as usual, objected to the dates listed in the

write-up. He argued that his absence on the previous September 2, 2010 should not count because it was more than a year before the date of the write-up. Actually, the write-up was delayed because Torres comes to work so infrequently that it took time for O’Connell to be able to meet him and present him with the document. His excessive absenteeism made it hard to counsel him on his absenteeism. (Tr. 569:21-571:4 and GC-11). In any event, the policy clearly states that discipline is based on the number of absences within the last 12 months, not the date of the write-up. (R-1, at Pages 3-4, “Supervisor Responsibilities,” Item 6).

Once again, in an effort to do absolutely anything else except take responsibility for his behavior, Torres also claimed that he had been on an “approved medical leave” on March 16 and 17, 2011 (the same dates he previously claimed did not count because of a doctor’s note) as well as on July 22, 2011. (Tr. 83:5-18, 121:11-124:9). That is also not true. (Tr. 571:8-11, 664:1-17 and GC-11 and R-48). On April 11, 2011, Torres made a request for a family medical leave retroactive to March 1. It was approved for the period starting the date of the application through June 1. No leave was ever approved for March 16 and 17. (Tr. 669:19-670:18, 671:7-17 and R-53 and R-54)¹⁰. Torres never even requested leave for July 22, 2011. (Tr. 675:5-13).

On September 15, 2011, just one day after he received a final warning for excessive tardiness (GC-10), Torres requested another FMLA leave. This leave could not be approved because, despite the fact that he is supposedly a full time employee, he comes to work so rarely that he had not actually worked the required 1250 hours in the previous year necessary to qualify for leave. (Tr. 675:22-679:17 and R-58 and R-59).

¹⁰ An employee can be approved for leave retroactively when that employee would not have been able to notify the department in advance, but not when the employee was scheduled to work and did in fact (occasionally) come to work during that period, as was the case with Torres. (Tr. 687:5-688:2).

III. LEGAL ARGUMENT

A. Each of the Write-Ups Torres Complains of Was Justified.

The General Counsel bases this complaint on three of Torres' many write-ups. There is no evidence that any of these write-ups was unfair or that it would not have been given to Torres if he had not been active in NUHW. Indeed, if anything, his disciplinary history shows unbelievable patience and tolerance by the Hospital towards an incorrigible employee:

1. The March 18, 2011 written warning for poor attendance.

(Consolidated Amended Complaint ¶17(a); GC-9). This write-up was clearly justified and no reasonable conclusion can be drawn that it was motivated by union activity. As documented above, Torres' objected to one of the seven occurrences because he brought a doctor's note. This was not well taken. Under the Hospital's longstanding policy, an occurrence is any "unscheduled and/or unauthorized absence from work." (Tr. 97:23-100:10, 500:8-19, 527:19-528:3, 681:16-18 and R-1 at page 1, "Definitions.") An absence is *unscheduled and unauthorized* when the employee was scheduled to work but did not show thus forcing the Department to find a last minute replacement or saddle other employees with his work. A later doctor's note explaining the reason for the employee's absence does not turn his unscheduled and unauthorized absence into a scheduled and authorized one. (Tr. 527:25-528:14, 528:14-24, 573:5-579:14 and R-1). Torres knows this. He tried the same excuse when he was written up for absenteeism in 2004, to no avail. (Tr. 118:22- 120:21 and R-6).

Furthermore, even if Torres were right that he should not have been counted as absent on March 16, he would still have received a verbal warning for six occurrences in a 12 month period. (See R1, at page 2, "Supervisor Responsibilities," Item 5). Additionally, General Counsel fails to consider that this write-up was only issued after O'Connell gave him a complete break on October 29, 2010 and issued no write-up at all. The write-up was entirely justified.

2. The March 18, 2011, written warning for excessive tardiness.

(Consolidated Amended Complaint ¶17 (b); GC-6)- Torres claimed that he should not have been considered late on dates where he clocked in or adjusted his time to being seven minutes late or

less because of the non-existent seven minute grace period. Torres also claimed that he was only late eight times, not nine, because consecutive “tardies should be grouped” so that they only count as one. (Tr. 72:3-21, 11-19 and GC-6 at page 2). Again, he knows these “excuses” are not true. He had been written up for consecutive tardies in 2010 and lost the “seven minute grace period arbitration.” The write-up was amply justified. (Tr. 107:3-108:25 and R-4).

3. The April 7, 2011 written warning for excessive tardiness.

(Consolidated Amended Complaint ¶17 (c); GC-7). On April 7, 2011, Torres received an additional written warning based on nine separate instances of tardiness in a 12-month period. Torres again disputed the occurrence on January 6, 2011 because it was exactly seven minutes. (Tr. 75:5-9). He has raised two different excuses for being over an hour late on March 31, 2011. First, he claimed that he was on “approved intermittent family leave” when he was, in fact, at union negotiations. (Tr. 114:7-115:11, 116:17-117:3 and GC-7). Then he claimed that calling in to report he was going to be tardy makes him not tardy. Calling in is required. It does not excuse tardiness. (Tr. 527:1-15).

B. Torres has no Credibility.

The list of Torres’ false statements and prevarications is voluminous. For example:

1. Torres testified that his previous supervisor, Perez, did not write people up if they were late less than seven minutes. He did. (Tr. 89:3-16, 144:22-145:16, 539:3-541:2, 543:13-546:8 , 558:22-559:8 and GC-15, R-35, R-16 to R-17, R-23, R-35). Torres even told his new supervisors that Perez had written a memorandum announcing a seven minute grace period. He had not. (Tr. 506:1-17);

2. Torres testified that he was never disciplined for tardiness under seven minutes or at all before Tracy O’Connell was his supervisor. (Tr. 60:8-11, 93:17-94:12, 96:16-20). He had been disciplined at least twice. (Tr. 100:11-102:11, 107:3-108:25 and R-2 and R-4);

3. Torres first testified O’Connell told him she would continue to allow a grace period. (Tr. 68:24-69:23). Then he testified that she told him the opposite. (Tr. 71:25-72:2, 89:3-12, 97:19-22, 109:24-111:2);

4. Torres testified that the Hospital's past practice had "always" been that "consecutive tardies" count as one. This is not true. He had tried that argument before and failed. (Tr. 72:3-21, 107:3-108:25 and GC-6 at page 2, R-4);

5. Torres testified that he travelled to Oakland in 2006 and testified at a hot button arbitration regarding his own grievance alleging the seven minute grace period. He claimed he did not know what the outcome of that arbitration was. At the same time, he admitted that he "may" have seen the memorandum the Hospital issued immediately after the hot button arbitration *reiterating* that there is no grace period. (Tr. 102:20-103:14, 104:3-105:10 and R-3). That Torres, the grievant and a union steward, would claim not to know the outcome of his own arbitration defies credulity.

6. Torres claimed that, based on "past practice" he should not have been counted as absent on a day for which he later produced a medical note. (Tr. 79:4-80:5, 117:4-118:19 and GC-9 and R-5). He had also unsuccessfully attempted to use that excuse in the past. (Tr. 118:20- 120:21 and R-6). He then changed his story to claim he had been on an "approved intermittent family leave" on that same date. That was also not true. (Tr. 83:5-18, 121:11-124:17, 571:8-11, 664:1-17 and GC-11 and R-48); and

7. Torres arrived more than an hour late to work on March 31, 2011 because he was at union negotiations. He claimed, however, that he was late because he was on an "intermittent" medical leave on that day. He was not. (Tr. 114:7- 115:11, 116:17-117:3, 669:19-671:17 and GC-7, R-53, R-54).

Torres has no credibility and any statement by him must be dismissed and disregarded.

C. Torres was Treated More Favorably, Not Less.

In an action alleging that an employee has suffered an adverse action because of union activity, the accusing party must establish that "the employee's protected conduct was a substantial or motivating factor in the [employer's] adverse action." Wright Line, 251 NLRB 1083, 1089 (1980). General Counsel's allegation of anti-union animus is premised entirely on the fact that Torres has been active with NUHW and has sat with NUHW's bargaining

committee. There is no evidence of any anti-union statement. There is no evidence of hostility to NUHW or any of its agents. There is no evidence of hostility to Torres. Indeed, Torres was treated more favorably than other employees under similar circumstances. Given Torres' blatant and continued disregard for the Hospital's attendance and punctuality standards, the Hospital could have terminated his employment long ago. In fact, as of February 4, 2011, Torres had far more tardies than necessary to trigger termination of employment. (Tr. 111:5-112:5, 580:15-582:5 and GC-5, at USC615-USC617, R-1, at page 2, "Tardiness Standards.") That the Hospital chose not to exercise that right reflects more favorable treatment, not retaliation.

The General Counsel has "suggested" that there is evidence of anti-union animus because the employees who were disciplined were all NUHW activist. No such evidence was produced. The tardiness write-ups presented by the Hospital at the hearing are a microcosm of all of the discipline issued at the Hospital, selected for relevance to the claim that there was a seven minute grace period for tardiness within a specific time period. On the general issue of tardiness, Alex Sylla testified that there are hundreds of write-ups contained in the personnel files. (Tr. 710:8-712:24). Even with those limitations, the Hospital produced write-ups for tardiness for nearly two dozen employees, the vast majority of which General Counsel has not alleged were active union members. (GC-13-GC-15; R16-R23, R25-R34, R60-R62). Indeed, one of the employees with discipline for tardies of less than 7 minutes, Margaret Knight, is not only not an NUHW activist, she has accused Torres and his associates in a pending lawsuit of conspiring to deprive her of more favorable work assignments because of her race. (R-35-R-37; Los Angeles Superior Case No. BC 460109).

Further, the employer cannot be held to have violated the National Labor Relations Act if it can show that it would have taken the same action even if the employee had not been involved in union activities. See NLRB v. GATX Logistics, Inc., 160 F.3d 353, 355-56 (7th Cir. 1998); NLRB v. Transportation Management Corp., 462 U.S. 393, 401 (1983). As explained above, each of the three write-ups issued to Torres was justified and there is no evidence the Hospital

would not have issued them to someone else. To the contrary, the undisputed evidence is that Torres could have been disciplined far more severely. General Counsel's case fails.

**Cases Nos. 39798 and
39870**

CASES NOS. 39798 AND 39870

I. SUMMARY OF ARGUMENT

In Case No. 39798, the General Counsel alleges that the Hospital unlawfully barred union members from wearing union insignia. In Case No. 39870, the General Counsel alleges that, in doing so, the Hospital unilaterally changed its dress code.

This entire complaint is unsupported by either the facts or the law and is completely trivial. The Hospital barred *one* inflammatory sticker that accused the Hospital of “union busting” and attempted to rally an outpouring of controversy over a properly terminated employee. The Hospital barred this sticker from being worn in immediate patient care areas. In doing so, the Hospital was acting within its rights under Board and Ninth Circuit precedent. It was also acting consistently with past practice as embodied in its dress policy. No one was disciplined. No one lost his job. NUHW has simple stickers that say “I support NUHW.” The employees have continued to wear those stickers and other NUHW insignia throughout the Hospital.

II. STATEMENT OF FACTS

The Hospital’s policy entitled Dress Standards and Hygiene, provides that management has the authority to determine whether employees are appropriately groomed and garbed and “reserve[s] the right to determine the appropriateness of employee appearance and attire.” (Tr. 786:18-787:7 and R-11, at page 1, “Purpose,” and “Policy,” Item 4). It further provides that buttons or emblems or pictures not relating to the Hospital or to USC are generally not allowed. Tr. 424:9-425:22 and R-11, at page 1, “Procedure,” Item 6). Under the policy, the Hospital has the discretion to authorize exceptions to that rule “with prior management approval” under its general discretion to determine what is appropriate to wear at the Hospital. (Tr. 786:18-787:10, 833:13-834:4 and R-11 at page 1, “Procedure,” Item 6). On its face, the policy has existed since 1991 and has not been revised since November of 2009. (R-11).

It is undisputed that, in the exercise of its discretion, the Hospital has allowed union members to wear NUHW insignia. (Consolidated Amended Complaint ¶ 16(a)). Several

employees have regularly worn buttons, lanyards and other insignia from one of the collective bargaining organizations present at the Hospital, i.e., NUHW or the California Nurses Association. (Tr. 177:14-20, 179:6-7, 787:11-23). They have continued to do so to this day. (Tr. 739:25-740:4, 789:9-14). NUHW members regularly wear pins and other insignia that say “NUHW,” “I Support NUHW” or “I ♥ NUHW” without any objection by the Hospital. (Tr. 425:23-426:7, 738:11-14).

In May 2011, NUHW distributed stickers to its members which read “Respect Our Work. Stop Union Busting!” and “We Support William Hooper.” (Tr. 306:8-307:5, 787:24-788:2 and GC-23). Union representative, Mendoza, testified that she created and distributed the stickers for the purpose of generating controversy over the firing of EVS worker William Hooper. (Tr. 306:4-7).¹¹ There is no dispute that NUHW was using confrontation to create issues and protest a perfectly legal termination. Mendoza intentionally used the term “union busting” which she meant to be derogatory. (Tr. 430:2-14). By Mendoza’s admission, these stickers were worn by NUHW activists on their sleeves, chests, or the backs of their scrubs everywhere in the Hospital, including patient care areas. (Tr. 307:11-308:13).

The Hospital objected to the Hooper stickers because it considered the statements they contain inflammatory and did not want the staff to be wearing those stickers in areas where they would have contact with patients. (Tr. 788:3-10). The Hospital did not ask, and has never instructed managers to ask, the staff who were just wearing their regular “NUHW” or “I support NUHW” stickers, buttons, or lanyards to remove those. Indeed, specific instructions were given to managers that staff could continue to wear those. (Tr. 788:13-18).

EVS worker Lynch testified that, on or about May 6, 2011, Acting EVS supervisor Kaldjian asked her not to wear the Hooper sticker “while [she was] working.” (Tr. 175:5-21, 186:24-187:2 and GC-23). Lynch had placed the sticker on a small purse she carries around her

¹¹ William Hopper was terminated on May 2, 2011, after violating a last chance agreement. (Tr. 305:24-306:3, 738:21-23, 428:7-11). NUHW’s unfair labor practice charge on that termination was dismissed by Region 21 and its appeal was denied by the Office of the General Counsel. (Tr. 428:12-23, 430:15-431:17 and R-12 and R-13).

neck. (Tr. 748:4-13). Lynch testified that she works inside the Hospital, including patients' rooms and areas where patients are being treated, sometimes while the patients are there. (Tr. 187:3-23). When Kaldjian spoke to her about the sticker, she was in the lower level lobby. That area contains several patient care areas, including MRI, and is the main hallway where patients are transported into the Hospital from ambulances and outpatient clinics in the area. (Tr. 739:10-19). Lynch insisted, and Kaldjian agreed, that she was allowed to wear a sticker that stated her support for NUHW. (Tr. 738:1-14, 748:14-21). She continued to wear other union insignia. (Tr. 739:20-24). In fact, although she told Kaldjian she would remove the sticker, she now claims that she actually did not remove the sticker until December 2011. (Tr. 188:17-19, 905:15-18). Neither Lynch nor anyone else was disciplined for wearing the Hooper sticker. (Tr. 427:20-22, 738:18-20).

The Hospital clearly communicated its objection to the Hooper sticker and its request that it not be worn by employees working in immediate patient care areas to NUHW. On May 9, 2011, Human Resources Manager, Eva Herberger, wrote Mendoza and advised her that, because of the inflammatory nature of the stickers, the Hospital was exercising its right to ban them in immediate patient care areas. (Tr. 310:12-311:5, 874:15-22 and GC-41).¹²

Despite the Hospital clearly stating its position on May 9, Mendoza sent an email to Herberger on May 11, 2011, falsely claiming that "management has been telling employees they are not allowed to wear stickers in support of their union" anywhere in the Hospital. (Tr. 309:6-310:11 and GC-40).

¹² Mendoza denies that she received this letter by fax. Herberger produced a confirmation sheet showing that the fax was received at a number NUHW uses as its office number and from which Mendoza has faxed documents to Herberger. (Tr. 874:23-879:15, 900:22-901:2 and R-71, R-72). While Mendoza claimed that the number was a "telephone" number not a "fax" number, the testimony is simply not credible. Receipt of the fax was confirmed (See R-71, at page 3, "Result: OK") and there are a variety of devices that can receive a fax in addition to voice calls that NUHW could have been using with that number.

On May 13, 2011, Herberger wrote Mendoza again and reiterated the Hospital's position that inflammatory propaganda is not to be displayed in immediate patient care areas. (Tr. 311:6-23 and GC-42).

The Hospital has not asked that any other stickers in support of NUHW be removed from workers. (Tr. 311:25-312:18, 788:21-789:2). It did not object when NUHW members wore stickers during informational picketing outside the Hospital that said "Safe staffing, not cheeseburgers," for the simple reason that the Hospital did not consider them inflammatory. (Tr. 313:2-314:10, 382:8-25 and GC-51). Mendoza claims that she also created a sticker that said "I Support Michael and Julio." (Tr. 312:18-313:1, 314:5-7).¹³ The Hospital is not aware of any such sticker and no one in management reported seeing an employee wearing it. (Tr. 789:3-8). Unlike the Hooper and the Cheeseburgers stickers, no copy or picture of that purported sticker was introduced into evidence, and General Counsel produced no employee witness who ever claimed to have seen or worn that alleged sticker.

III. LEGAL ARGUMENT

The Supreme Court has reasoned that it is appropriate to grant hospitals special latitude to restrict union activity in patient-care areas since hospitals "are not factories or mines or assembly plants" but rather facilities "where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family - irrespective of whether that patient and that family are labor or management oriented - need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed." NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 783, n.12 (1979). It is, thus, well established that a hospital may restrict the wearing of union propaganda in immediate patient care areas. See Casa San Miguel, 320 NLRB 534, 540 (1995). See also

¹³ This is an apparent reference to the suspension of Julio Estrada and Torres in 2010 for violating several Hospital policies and Torres' subsequent demotion. The Hospital's actions in that regard were upheld by Judge Kocol after an evidentiary hearing in consolidated cases Nos. 21-CA-39086, 39109, 39328, and 39403.

Washington State Nurses Association v. NLRB, 526 F.3d 577, 580 (9th Cir. 2008) (“restrictions on the wearing of union insignia in ‘immediate patient care’ areas are presumptively valid”).

The Board explained the applicable legal principles in Mesa Vista Hospital, 280 NLRB 298, 299 (1986), as follows:

[E]mployees have the right to wear union insignia even while at work. A hospital's prohibition of the wearing of insignia, however, on working and even on nonworking time in immediate patient care areas is presumptively valid. Outside immediate patient care areas, and outside other areas where the hospital establishes an adverse effect on patient care, employees retain the right to wear union insignia while working. An employer may further restrict the right by demonstrating “special circumstances.”

It has long been the rule that restrictions on the wearing of union insignia in immediate patient care areas do not need to be justified by showing specific special circumstances. That requirement applies only outside immediate patient care areas, where such restrictions are presumptively invalid and an employer must show that the restriction is “necessary to avoid disruption of health care operations or disturbance of patients.” See Washington State Nurses Association, 526 F.3d at 580; Casa San Miguel, 320 NLRB at 540; Mesa Vista Hospital, 280 NLRB at 290. See also Beth Israel Hospital v. NLRB, 437 U.S. 483 at 507.

On December 30, 2011, a divided panel of the NLRB, lead by departing Member Becker found that a hospital could not rely on the presumption of validity of a restriction applicable only in patient care areas because the hospital itself had “allowed employees to wear a hospital endorsed ribbon that was almost identical to the one issued by the Union” and had also allowed “other union insignia and political buttons to be worn throughout the hospital including in immediate patient care areas.” Saint Johns Health Center and California Nurses Association National Nurses Organizing Committee, 357 NLRB No. 170, at page 2-3 (2011). The hospital had asked union members not to wear a ribbon which read “Saint John’s RNs for Safe Patient Care” while distributing and allowing a ribbon that read “Saint John’s mission is patient safe care.” Having disregarded the presumption of validity, the majority then held that the hospital had failed to show “special circumstances” justifying that the restriction was “necessary to avoid disruption of health-care operations or disturbance of patients.” There was, they found, “no

evidence that the ribbon was likely to disturb patients or otherwise disrupt healthcare operations.” Moreover, “[t]he Respondent's asserted justification is further weakened by the fact that the Respondent itself distributed a virtually identical ribbon and allowed nurses to wear it in immediate patient care areas.” Id. Other than the special circumstances of the case, the majority offered no explanation for its departure from long established precedent. Moreover, with the departure of Member Becker the day after this opinion was announced and the likelihood of an appeal to the Ninth Circuit, which decided Washington State Nurses Association, the validity of the decision is questionable. In any event, that case is clearly distinguishable from the situation in this case.

First, there is no evidence that the Hospital ever distributed any stickers to the employees, nor is there any evidence that the Hospital permitted the wearing of stickers or other items containing controversial statements of any kind. The evidence is that the Hospital permitted only items which advertised a simple display of affiliation with, support or even affection for a particular union. (Tr. 177:14-20, 179:6-7, 425:23-426:7, 738:10-14, 739:25-740:4, 787:11-23, 789:9-14). Thus, there is no basis under the rationale used in Saint Johns Health Center to deprive the Hospital of the presumption of validity to a restriction applicable in patient care areas.

Even if the Hospital were required to show the existence of special circumstances, however, it can do so. The sticker is “facially controversial and inflammatory.” See Columbia Memorial Hospital and 1199 SEIU, United Healthcare Workers East, 2011 WL 3800188, *1 (NLRB Division of Judges, August 26, 2011) (Case No. 3-CA-27921, N.L.R.B. Division of Judges Aug 26, 2011). In Columbia Memorial, the ALJ reviewed a hospital’s prohibition of several stickers worn by union members. His analysis of why the hospital was justified in barring one of those stickers is particularly instructive:

Stomp Sticker: Regarding the stomp sticker, I conclude that the General Counsel has failed to meet the burden of showing that the Respondent's prohibition of that sticker was discriminatory or without a legitimate basis. The sticker, which shows a small man about to be crushed by a giant boot, **is more than the type of display of affiliation that the Respondent has traditionally permitted irrespective of union content.** Rather I find

that the sticker is facially controversial and inflammatory. [] It uses an image of imminent violence and bodily harm, and anxiety over personal physical safety. Display of such an image in patient-care areas would reasonably be expected to interfere with the maintenance of the “restful, uncluttered, relaxing, and helpful atmosphere” that the Supreme Court has recognized patients require. It is hard to imagine that seeing the stomp sticker on their caretakers would not disturb the hospital's patients, especially some of those in the emergency department who are in acute medical or psychological distress.

Id., at pages 11-12. (Emphasis added).

Likewise here, the Hooper sticker was not a mere statement of affiliation but rather a derogatory and accusatory statement that the Hospital was a “union buster,” did not respect its employees, and called for support on behalf of a terminated employee. That the sticker may be disturbing to the Hospital’s severely ill patients is not just a matter of speculation. The testimony of NUHW’s own witnesses confirms that the Hooper sticker was designed and intended to be disruptive. NUHW admits that the language was intended to be derogatory of Hospital management and intended to create controversy. (Tr. 306:4-7, 306:8-307:2, 430:2-14 and GC-39). Moreover, the sticker was designed to stir up controversy over a legally justified termination. NUHW also admits that the stickers were being worn in immediate patient care areas. (Tr. 307:11-308:13). Unable to dispute Hooper’s termination legally, NUHW elected to take the fight to the patients’ bedsides. Such recourse is entirely inappropriate, even under the most liberal reading of Saint John’s Health Center.

General Counsel might try to argue that the analysis of Saint John’s Health Center is implicated by the “I Support Julio and Michael” stickers. There is no evidence that anyone at the Hospital ever saw such stickers, that anyone ever wore them or even that they existed. What the Hospital would have done had such stickers appeared is pure conjecture. As noted previously, the “Cheeseburgers” stickers are not inflammatory and there was no testimony that they were intended to be confrontational or derogatory, so again, they are of no relevance.

The Hospital made its position that the Hooper sticker was inflammatory and should not be worn around the patients clear in two letters to union representative Mendoza. (Tr. 310:12-311:23, 874:15-22 and GC-41, GC-42). Lynch, the one employee who testified that she was instructed to remove the sticker, admitted that her supervisor, Kaldjian, told her she should not

be wearing it “while [she was] working.” (Tr. 186:24-187:2). Lynch’s work takes her to immediate patient care areas and that is where she was when Kaldjian asked her to remove the sticker. (Tr. 187:3-23, 739:10-19). In addition to being completely within its rights, the Hospital was also tremendously restrained in the exercise of those rights. Not only was Lynch not disciplined for wearing the sticker, according to her, she did not even follow Kaldjian’s request that she remove it. (Tr. 188:17-19, 427:20-22, 738:18-20, 905:15-18). General Counsel offered no evidence that any employee received any discipline over the stickers or even that any other employee was specifically asked to remove the sticker. Clearly, the Hospital engaged in perfectly legal activity and did not “coerce” union members.

Further, it is not true that the Hospital “changed” its dress code policy when it objected to the Hooper sticker. The Hospital’s Dress Standards and Hygiene Policy, is dated 1991 and has not been revised since November of 2009. The policy gives management the authority to determine whether employees are appropriately attired and peremptorily restrict any non-Hospital or non-USC buttons, pictures, and emblems. In the case of the Hooper sticker, the Hospital used the authority conferred on it by longstanding law and its policy to bar inflammatory materials in immediate patient care areas. Given that the Hospital has never forbidden NUHW members from wearing non-inflammatory insignia displaying their union affiliation, and that they wear them to this day, General Counsel has failed to prove its case. NUHW members were not unlawfully “restrained” or “coerced” and the Hospital did not “unilaterally change” its policy.

Case No. 39656

CASE NO. 39656

I. SUMMARY OF ARGUMENT

In Case No. 39656, the General Counsel alleges that the Hospital unilaterally changed the schedule of the echocardiography technicians (“echo techs”) without first bargaining with NUHW. General Counsel’s case fails because the Hospital had no duty to bargain over that change.

The process for implementing schedule changes is specified in the contract (Article 11, Section F.7) and was specifically bargained for between the Hospital’s previous owner and the previous union. Under the contract and past practice, the Hospital is only required to give 30 days’ notice of the impending change to NUHW through its officers, agents or directly through the employees affected. If NUHW requests, the Hospital will “meet” to discuss ways to minimize the impact on the employees. NUHW admits that this procedure, when used to change the schedule of another group of employees in the same department and at the same time as the echo techs, was perfectly proper. The essence of General Counsel’s case is that the contractually provided procedure was proper as to the vascular lab tech schedule change but was an unfair labor practice when applied at the same time to another group in the same department, the echo techs. This position cannot stand.

Based on the plain language of Article 11.F.7, past practice under SEIU’s tenure, and NUHW’s own acquiescence to the same procedure with respect to another job classification, it is clear that there has been a “clear and unmistakable waiver of bargaining” on the issue of schedule changes. See Provena St. Josepha Medical Center, 350 NLRB 808, 811 (2007). Further, when an employer has frequently invoked a practice of implementing a work change on a unilateral basis, that practice becomes an established term and condition of employment. See Shell Oil, 149 NLRB 283, 287 (1964).

Additionally, even if there were no specific contract provision and past practice waiving bargaining over schedule changes, the Hospital had no obligation to bargain in this instance because that change was necessary in order for the Hospital to be able to effectively treat its

severely ill cardiac patients. This issue is not just “at” the core of the Hospital’s business; it is the Hospital’s core purpose. Peerless Publications, 283 NLRB 334, 335 (1987); Virginia Mason Hospital, 357 NLRB No. 53, *5-6 (2011). Given the severity of the problem, NUHW could not have blocked the change. NUHW does not have the power to force the Hospital into unsafe medical practices that are documentedly below the recognized standard of care.

II. STATEMENT OF FACTS

A. The Collective Bargaining Agreement and Past Practice Provide for the Implementation of Schedule Changes

Both NUHW and Hospital witnesses admit that, since the adoption of the Tenet-SEIU contract in 2007, the Hospital’s schedule changes are governed by Article 11.F.7 of the Tenet-SEIU contract. (Tr. 295:19-22, 392:11-393:4, 867:9-15, and GC-4, at page 32). The procedure set forth in Article 11.F.7 consists of 1) notification, 2) discussing the effects of the change if requested, and 3) implementing the change. (Tr. 867:9-15).

Article 11.F.7 provides as follows:

Should the Employer determine that it is necessary to change/revise a schedule(s) for more than sixty (60) days and start & or end time(s) by more than sixty (60) minutes, and if the change affects more than three (3) current employee(s) in positions covered by the CBA, the Employer agrees to notify the union in writing no less than 30 days prior to the implementation date. If the union requests, the Employer will meet with the union steward and or union representative to make a reasonable attempt to review/revise the schedule so as to have the least impact on the fewest number of full-time and part-time staff possible. Once the new schedule is established, bidding will be accomplished by seniority within each classification. None of the foregoing shall affect the Employer’s ability to make any changes or exercise any rights provided for in Article 21-Management Rights.

(GC-4, at page 32).¹⁴

¹⁴ Mendoza testified that when NUHW speaks of the “terms and conditions of employment” that they contend the Hospital must maintain, they are referring to the agreement between Tenet and SEIU *and* to past practice while SEIU was representing the bargaining unit. (Tr. 386:15-387:6 and GC-4). Further, Mendoza admitted that if NUHW wanted to do something differently from the way it had been done under Tenet and SEIU, that would have to be part of new negotiations. (Tr. 387:17-20).

Cory Cordova was SEIU's designated representative at the Hospital from 2005 through 2007 and February 2009 through May 2010 and had responsibility for overseeing the implementation of the contract between Tenet and SEIU. (Tr. 721:16-722:1, 726:11-15). He testified that Article 11.F.7 gives the Hospital the *right* to make schedule changes, so long as it follows the procedure laid out in that article. (Tr. 722:2-723:10). NUHW's own representative, Orea, testified that it is the only provision of the contract he is aware of that deals with changes in schedules. (Tr. 488:14-22).

The purpose of Article 11.F.7 is to prevent last minute schedule changes and give some reasonable timeframe, in this case 30 days, so as to minimize hardship to the employees. (Tr. 723:22-724:6, 727:16-22). It was a procedure Tenet and SEIU specifically bargained for. (Tr. 867:18-23). The previous contract between Tenet and SEIU, effective from 2004 through 2007, does not contain any provision regarding the procedure for making a change in the schedule. (Tr. 871:3-12 and R-70 at pages 21-30).

During the time SEIU was the representative for the bargaining unit, the practice for a change in the schedule of a group of employees was for the Hospital to give 30 days' advance notice, be it by letter, telephone call or directly to the employees. (Tr. 724:10-18, 727:7-15). Although Article 11.F.7 speaks of "written notice" of a schedule change, in practice, the Hospital has given notice through many avenues, both verbal and written. (Tr. 729:11-14). SEIU never insisted on the notice being in writing and always deemed notice to the employees the same as notice to a union official. (Tr. 726:20-727:15, 729:11-14, 867:16-17). General Counsel introduced no contrary evidence.¹⁵

Once it received notice of a schedule change, SEIU would discuss it with the affected employees and, if the employees had a concern about it, bring it up to the Hospital. (Tr. 724:18-20). SEIU understood that, under the contract, it did not have the power to block implementation

¹⁵ Indeed, both Mendoza and Orea admitted that they never administered the SEIU contract. (Tr. 401:21-402:10, 488:23-489:1). Therefore they have no knowledge of its prior implementation.

of a schedule change, it could only grieve a lack of notice or discuss with the employer ways of ameliorating the effects of the change on the employees. (Tr. 724:21-725:21, 729:16-25).

B. Echo Techs Perform an Essential Function at the Hospital

The job description for echocardiography technicians or “echo techs” describes their function as follows:

As an integral part of the Cardiology Department, the Echo Tech is responsible for performing multiple diagnostic non-invasive Cardiology procedures.

(Tr. 263:1-264:17 and R-10, at page 1).

Echocardiography involves using a machine that uses ultrasound waves to capture the structure of the heart, and the flow of blood moving through it to see if the patient has cardiac function problems. These images are also used to examine the area around the heart to see if there is any bleeding. (Tr. 239:17-240:13, 251:22-252:1, 592:19-593:1). Echo techs also perform stress echo tests, where drugs or exercise are used to test the heart function in a stressed state, and trans esophageal cardiograms during surgery, where a tube is inserted in the patient’s throat. (Tr. 226:14-240: 24, 241:6-16). In performing their jobs, echo techs work in conjunction with other team members in the cardiology department, including nurses, EKG techs, physicians, and anesthesiologists. (Tr. 240:14-241:16). It is a highly skilled team (Tr. 240:25-241:16), and the tests are very complicated and expensive. (Tr. 243:23-244:4). This work is vitally important because the Hospital treats the most acute patients that are often not able to be treated elsewhere: the sickest of the sick. (Tr. 593:2-8).

After performing the tests, it is the echo tech’s responsibility to log in the study and upload the images on the computer, and to fill out a billing sheet. This process needs to be completed as soon as possible and, with respect to billing, done by the next day at the latest. (Tr. 241:17-242:2, 244:5-245:5). Once they review the images taken by the echo tech, doctors may have questions and may ask the technician to get additional images. As General Counsel’s witnesses acknowledged, doctors had to speak to the same technician who did the study. (Tr. 242:3-243:22). The standard of care set by the American Society of Echocardiography is for

close supervision of the sonographers by the physician who specializes in interpreting echocardiography tests, and it is necessary that the physician and the technician interact for quality and training reasons and when additional pictures are necessary to make an accurate diagnosis. (Tr. 624:18-625:19).

C. The Previous Echo Tech Schedule did not Provide Sufficient Coverage or Patient Continuity.

In late 2009, Tarek Salaway (“Salaway”), Executive Administrator for Surgical Services and Cardiovascular Specialties, and Susana Perese (“Perese”), Director Noninvasive Cardiovascular Diagnostic Services, began overseeing the echo techs. (Tr. 591:25-592:18, 634:11-635:6). There were, at that time, 3 echo techs working a schedule of 12 hours a day, three days a week. (Tr. 593:17-594:9, 635:13-19). All the other team members in the cardiology department with whom the echo techs must collaborate to perform complex studies, including anesthesiologists, EKG techs and nurses, as well as the billing department, work a schedule of five days a week, eight hours per day. (Tr. 598:12-19, 599:3-602:5, 640:5-23).

The echo tech’s 12 hours a day, three days a week schedule did not allow them to properly interface with their team members or properly cover the five days a week department. Patient coverage needs were slipping particularly when each tech was off two days every week and, at the same time, the patient load was steadily increasing. (Tr. 635:20-637:10). To address this problem, Perese and Salaway increased the number of echo techs from 3 to 4. (Tr. 594:10-18, 636:9-25). The staffing, however, was still not sufficient to meet the patient care coverage needs of the department. (Tr. 594:19-21).

Medical staff complained that the coverage was inadequate to meet the needs of the patients and negatively impacted their ability to timely read the studies conducted in the department, follow up to address the quality of the study, ask follow up questions of the technician, clarify a critical finding, or order follow up tests. (Tr. 594:22-595:21, 628:6-14).

Physicians also observed that there was deterioration in the quality of the work when the techs were working late into the day on a 12 hour shift with little or no oversight. (Tr. 595:7-10,

628:14-21). Moreover, because the echo techs only worked three days a week, they were not available on the fourth or fifth day to consult with the physicians and follow up on studies they had performed so that the physicians could make a final determination of treatment. (Tr. 595:11-21, 596:7-14, 625:17-24, 637:11-23). In the absence of the echo tech who performed the study, studies had to be repeated, which was a hardship on the patient and for which the Hospital is not allowed to bill. (Tr. 596:7-24, 638:24-640:4) The cardiologists complained that the Hospital was not providing the minimal standard of care and were choosing not to send out-patients to the Hospital. (Tr. 596:25-597:12, 605:3-19).

Dr. Tasneem Naqvi, Director of Echocardiography Services and Noninvasive Cardiology, made clear to Salaway that the echo techs needed to be there five days a week in order for her to be able to address the studies they perform every day because the Hospital is obligated to provide an accurate diagnosis by, at least, the next day. (Tr. 597:20-598:6, 614:14-24, 620:21-624-17). She also observed that tests were being performed too late in the day for physicians to interpret them. (Tr. 623:15-624:8). Some tests on patients in the intensive care unit were not being performed accurately because the schedules of the echo techs and the nurses were not the same so a nurse was not available to assist. (Tr. 625:25-627:13). All of this caused physicians to have to order additional tests that should not have been necessary and caused the patient to stay at the Hospital longer than should have been necessary to make a diagnosis. (Tr. 627:8-628:5).¹⁶

Salaway and Perese considered several alternatives and concluded that the only way to have the necessary coverage every day, the consistency the physicians needed, and to comply with the industry minimum care standards was to go to a five day a week, eight hour schedule. (Tr. 605:20-606:4, 638:16-23). Dr. Naqvi's undisputed testimony was that this is the practice of every other academic medical center in the country. (Tr. 624:9-17; 630:13-25).

¹⁶ Dr. Naqvi is a member of the American Society of Echocardiography and sits on a number of committees. (Tr. 624:18-23). She testified that the standard of care set by other organization is "close supervision of the sonographers by the physician." (Tr. 624:23-25).

D. The Hospital Gave Ample Notice of the Change in Schedule.

Once Salaway and Perese concluded that the schedules needed to be changed, they consulted with Human Resources on how to proceed. (Tr. 615:7-13, 641:8-14). On or about October 20, 2010, Perese spoke to Eva Herberger, who explained they needed to notify the staff and give at least 30 days notice before implementing the schedule change. (Tr. 606:6-607:7, 615:17-22, 847:21-25). Herberger said she would inform NUHW. (Tr. 615:25-616:2, 641:11-23, 848:1-2).

As had been the practice with SEIU, Herberger did not give NUHW a formal written notice of the change in schedule. (Tr. 888:10-22). Herberger testified that she verbally informed NUHW representative Orea during a meeting at her office on October 22, 2010 that the schedule for the echo techs would change from 12 hours to eight hours effective November 23, 2010. Orea expressed no objections and told Herberger to just let him know. (Tr. 848:3-849:3 and R-67). Although Orea denied that the echo tech schedule was discussed during the October 22 meeting he admitted that the meeting did occur. (Tr. 485:17-21). Herberger noted her conversation with Orea on a “post it” note she affixed to the letter that confirmed their October 22 meeting. She kept it in her files. (Tr. 849:4-856:14 and R-67).¹⁷ The next day, on October 23, Herberger informed Perese that she had spoken to the NUHW representative and Perese could now proceed with the schedule change after giving at least 30 days notice to the employees. (Tr. 641:24- 642:4).

Herberger had a similar conversation on the telephone with Mendoza, who replaced Orea as NUHW’s designated representative, shortly after Mendoza’s appointment as the Hospital representative on November 1, 2010. (Tr. 273:14-274:2, 856:23-857:11, 887:14-888:9).¹⁸

¹⁷ The Hospital produced this document to Region 21 during the course of the investigation on the underlying charge. (Tr. 909:6-21). At that time, the Hospital could not have known that Orea would deny the conversation, since the original charge and, indeed, the General Counsel’s Complaint simply alleged that the Hospital had no right to change the schedule, not that the Hospital failed to give proper notice of the change. Indeed, as of the filing of this brief, the General Counsel has never advised the Hospital that failure to give proper notice is the basis of the charge.

¹⁸ Mendoza denies this conversation took place. (Tr. 897:23-898:1).

Irrespective of whether Orea or Mendoza admits to these conversations on October 22, 2010 and the first week of November 2010, it is undisputed that the NUHW and echo techs received notice on November 3, 2010. At that time, Salaway, Perese, and the supervisor, Rafael Llerena, met with the echo techs and announced that, effective December 2010, they would be working a five day, eight hour schedule. (Tr. 252:23-254:3, 607:8-608:12, 642:5-11 and R-45). Bargaining committee member Barry Martin (“Martin”) was at that meeting. (Tr. 252:2-15). Thus, NUHW was admittedly notified by no later than November 3, 2010.

At the November 3 meeting, Salaway and Perese explained that, based on input from the physicians, they had concluded it was necessary to change the schedule to reflect the changing and growing patient needs and to improve patient care and that they would continue to assess and see how the change was working in meeting patient needs. (Tr. 254:4-17, 608:13-25, 642:12-16).¹⁹ Martin testified that Salaway and Perese said that they wanted them to just try it for three months and they would review it and see how it was working. (Tr. 255:5-12). Based on concerns raised by the employees about disruption to their lives, Salaway decided to delay the date of implementation to January 2, 2011. (Tr. 257:13-21, 609:1-11, 642:17-23 and GC-27). Furthermore, written notice was also provided. A memorandum dated November 13, 2010, explaining the change, with the new implementation date, went out to the employees including bargaining committee member Martin. (Tr. 231:20-232:4, 255:13-17, 610:5-15, 646:3-18, 859:10-17, and GC-27). Thus, NUHW received both verbal and written notice of the change.²⁰

¹⁹ Lead Echo Tech Gehan Youssef (“Youssef”) testified that the echo techs inquired if they could vote on the new schedule as they had when the schedule had gone to a 12-hour a day, 3 day a week schedule. (Tr. 234:20-24, 254:13-20). There is nothing in the Tenet-SEIU Contract providing for employees voting on their schedules or changes to their schedules. If the echo techs voted to implement the 12-hour shift schedule, that is because California wage and hour law requires it in order to exempt such a schedule from overtime requirements. Labor Code section 511. No such requirement, obviously, would apply to the implementation of a regular 8 hour a day, 5 day a week schedule.

²⁰ Although Martin admitted that he was at the November 3, 2010 meeting, he contended that he did not get the written notice until December 7, 2010, which is only 26 days prior to the January 2 implementation. (Tr. 255:18-21). It is not clear if General Counsel is contending that this date, if Martin’s testimony is believed, constitutes the unfair labor practice. However, given the amount of discussion that had already gone on between the Hospital, NUHW and the

Shortly after the November 3 meeting, all of the echo techs met with Mendoza (Tr. 232:21-233:18, 256:8 257:12, 296:2-13, 393:17-23, 397:18-25). They explained to Mendoza that they had been informed their schedule was being changed from 12 to eight hours and that this change was being done on a trial basis. (Tr. 296:14-18, 399:13-17). According to Lead Echo Tech Gehan Youssef, Mendoza told them that they needed to “cooperate,” “document if there is any problems” and to let her and management know if the trial was not “working or not working and why.” (Tr. 234:17-235:14). Mendoza testified that she told them that they should do a “step one meeting” with their director “to talk about why the hospital [was] wanting to make this change,” find out the reasons, and think of ways to minimize the impact on them. (Tr. 296:19-297:4). This response by Mendoza, as testified to by General Counsel’s own witnesses, was completely consistent with the requirements of Article 11.7.F.

On November 29, 2010, Mendoza raised the issue of the echo tech schedule during a lengthy meeting she had with Herberger during which they discussed more than a dozen issues. (Tr. 287:15-29, 297:9-19, 857:12-858:20). They also discussed a concurrent change Perese was making in the schedule of the vascular lab techs. (Tr. 393:24-395:2, 857:20-858:2, 858:17-20). Mendoza admits that, at the November 29, 2010 meeting, she specifically mentioned that the echo techs were going from 12 to eight hours. (Tr. 394:13-17). During the meeting, Herberger mistakenly told Mendoza that both the echo techs and the vascular lab techs were going from 12 to eight hours. (Tr. 858:17-22). Herberger corrected her error the same day by sending an email to Mendoza clarifying that “it is the Echo Techs who [were] 12 hour employees.” (Tr. 298:2-21, 395:3-396:17, 858:23-859:9 and GC-34). The next day Mendoza sent Herberger a “summary email” in which she “confirms” their discussion about the schedule change from 12 to eight hours. She purports to confirm this as to the vascular lab techs, however. (Tr. 298:22-299:9, 396:18-397:14 and GC-35). This is clearly an error in her part. Herberger’s email is explicit that it is NOT the vascular techs that are 12 hour employees, it is the echo techs. Furthermore,

employees by December 6 and the undisputed prior practice, such a contention would be both baseless and trivial.

Mendoza had discussed the change with the echo tech in detail and already knew that they were going from 12 to eight hours.

Therefore, as of November 30 any claim by NUHW that it did not have notice of the echo tech schedule change is simply disingenuous game playing. Both echo tech witnesses, one of whom is a bargaining committee member, acknowledged the Perese/ Salaway November 3 meeting; both acknowledged talking to Mendoza about it shortly thereafter; Mendoza admitted talking to the echo techs about it in early to mid November and to Herberger about it on November 29; Mendoza appeared to acknowledge that she had been given a copy of the November 13 letter announcing the change (GC-27) prior to her meeting with Herberger on November 29 (Tr. 299:10-21), and in any event she got an email on November 29 from Herberger confirming that the echo techs were the 12 hour employees, not the vascular lab techs. Furthermore she clearly discussed the matter with Herberger because she confirmed on November 30 that there was a discussion of 12 hour schedules going to eight hours. Although Mendoza asserts that this is the vascular lab schedule, such an assertion is demonstrably not true. Herberger's email specifically disclaims that the vascular lab techs are 12 hour employees, sets out the staggered vascular lab tech schedule and reiterates that it is the echo techs who are 12 hour employees. (GC-34).

Despite these memos, letters, emails and meetings, Mendoza sent no communications to anyone in management about the change in the echo tech schedule between November 30 and December 22, when she emailed Perese demanding that she "cease and desist" in implementing a schedule NUHW had known about for at least a month and a half. (Tr. 300:20-301:7, 400:9-401:9 and GC-36). Mendoza did not copy Herberger on that email. (Tr. 860:2-8). Although the email suggests that the schedule change had just "come to the union's attention," Mendoza admitted that she had known about it since early November 2010. (Tr. 401:5-9).

Since the email (GC-36) was not addressed to Herberger, the first she knew that NUHW wanted to talk about the echo tech schedule was on January 4, 2011 at the bargaining session. Herberger and Hospital counsel met with Mendoza and Martin that day in a side bar.

(Tr. 257:22-258:18, 302:2-10, 860:9-861:2). Martin testified that, during that meeting, Herberger asserted that she had previously notified Mendoza of the change. (Tr. 258:22-259:7). In that meeting, Mendoza stated that they wanted to understand why the Hospital was making the change “so maybe we can address their needs without having such an impact on the schedule of the echo techs.” (Tr. 302:22-303:1). Herberger explained that the change was being implemented for reasons of patient continuity, because the staffing was insufficient and the new schedule would provide more hours of coverage. (Tr. 861:11-23).

Martin and Mendoza acknowledged that they understood the change was being made on a trial basis. (Tr. 302:13-22, 402:24-403:7, 861:24-862:5). Martin specifically acknowledged that he and the other echo techs had agreed to try out the new schedule on a trial basis. (Tr. 264:24-265:8). Martin, as a bargaining committee member, had the authority to bind NUHW to that agreement. Martin and Youssef both admitted that Mendoza had advised them to cooperate in the trial and see how it worked. (Tr. 234:17-235:14). Both Martin and Mendoza acknowledged that they said all NUHW wanted was an opportunity to offer some input on issues pertaining to the evaluation of the trial. (Tr. 265:16-18, 404:5-8). The Hospital agreed to take any suggestions NUHW may have into consideration. (Tr. 862:6-14). Martin testified that there were “items” “they were going to present to management” when the trial was finished. (Tr. 265:16-25). Neither he nor Mendoza ever presented those items to the Hospital, nor offered any kind of input on how to evaluate the three month trial schedule. (Tr. 266:1-2, 404:9-10, 865:19-22).²¹

Although Mendoza sent two additional letters to Herberger (one, the next day), “demanding” that Herberger meet over a multitude of issues, including, once again, the schedule of the echo techs (GC-37 and GC-38), she never provided any input on evaluating the trial. (Tr. 304:10-305:19 and GC-37, GC-38). Between January 4 and March 31, 2011, Herberger met with Mendoza face to face seven times and they also saw each other at contract negotiations an

²¹ There is some disagreement on what was said at the January 4 meeting. The only contemporary evidence is the notes taken by Herberger that day. (Tr. 862:25-865:17 and R-68).

additional seven times. On none of those occasions did Mendoza bring up the issue of the echo tech schedule. (Tr. 865:23-866:8, 868:2-8). Neither she, nor anyone else from NUHW ever offered any input on the evaluation of the schedule.

E. The Hospital Implemented a Concurrent Change in the Schedule of the Vascular Lab Techs in the Same Manner, with no Complaint from NUHW.

In December 2010, Perese also changed the schedule of the vascular lab techs by giving them staggered shifts. (Tr. 643:12-644:6). The procedure followed by the Hospital in implementing the change in the schedule of the vascular lab techs was the same as the one followed in changing the schedule of the echo techs. (Tr. 645:6-646:2, 646:19-647:14, 866:9-20 and R-47). Herberger notified NUHW on November 29; at the same meeting she discussed the echo tech schedule with Mendoza. (Tr. 859:18-860:1). Just as she did with the echo techs, Perese notified the employees in a meeting and in writing and the schedule change went into effect January 2, 2011. (Tr. 646:19-21 and R-47). NUHW did not protest that change. (Tr. 401:10-12, 866:9-20). Mendoza testified that was because NUHW got “proper written notification” of that change even though the same email from Herberger that set out the staggered vascular lab tech schedule also confirmed the 12 hour echo tech change and the form letter to the employees was nearly identical. (Tr. 898:2-11).

The changes to the echo tech schedule and the changes to the vascular lab tech schedule were the first schedule changes the Hospital had implemented since NUHW took over from SEIU. (Tr. 866:21-25). They were implemented the same way schedule changes were implemented when SEIU represented the unit. (Tr. 867:1-8).

The echo techs currently work 40 hours a week and are paid overtime for any hours above that. (Tr. 649:5-11). Youssef testified that, since the new schedule went into effect, her paycheck has increased. (Tr. 248:15-19).

The Hospital has continued to take into account any input offered by the echo techs. Before the new schedule went into effect, the echo techs suggested the starting time be moved up

an hour to better enable them to assist with surgery. Management agreed. (Tr. 245:25-246:12, 644:7-25).

General Counsel has inappropriately sought to challenge the wisdom of the new schedule. Preliminarily, this is outside the prerogative of NUHW. The Hospital is the only entity that can make the judgment on proper patient care. More particularly, their evidence failed to prove such a point. Youssef testified that coverage is more limited because there are usually only 2 echo techs there at one time. (Tr. 235:24-236:23). Martin also opined that, with the new schedule the department is “very thin on patient care.” (Tr. 260:2-13). As Eva Herberger correctly pointed out during the January 4 meeting, however, 4 employees working 40 hours a week instead of 36, means 32 more hours of coverage in every two week pay period. (320 vs. 288). NUHW’s assertions are demonstrably and mathematically wrong. Youssef’s other criticism is that the department is using registry more often than before. (Tr. 236:24-237:20). No evidence was introduced at the hearing that the department has actually used registry more since January 2011 than it did before. Salaway explained that they have used registry to cover employees, including Youssef, who have gone on extended vacations. They usually use the same person because this tech can meet Dr. Naqvi’s exacting standards. (Tr. 612:17-613:23).

III. LEGAL ARGUMENT

Preliminarily, it is not true that the Hospital “refused to bargain” with NUHW over the change in the echo tech schedule. At a minimum, even NUHW concedes that Salaway and Perese met with committee member Martin on November 3, 2010, that Herberger and Mendoza met on November 29, and that Hospital representatives met with NUHW on January 4, 2011. On January 4, 2011, NUHW representatives acknowledged that they had agreed to participate in the three month trial schedule change (Tr. 302:13-20, 402:24-403:7, 861:24-862:5). NUHW asked for the opportunity to provide input on whether that trial was being successful. Although the Hospital agreed, NUHW never provided that input. The Hospital cannot be accused of a “unilateral change” when it implements an agreed to schedule. The Hospital cannot be accused

of failing to bargain over input it never got. NUHW demanded certain considerations, got those considerations, and then completely dropped the ball. This is not an unfair labor practice by the Hospital

In any event, the Hospital was not obligated to bargain with NUHW over the schedule change because 1) The contract waives any right to bargain over schedule changes and the Hospital had consistently used the practice permitted by the contract of implementing schedule changes unilaterally; and 2) the change was necessary for the Hospital to be able to meet its core purpose of treating severely ill patients.

A. The Hospital Followed Past Practice Regarding Schedule Changes.

The Tenet-SEIU contract is not silent on the procedure for changing the schedule of a group of employees within the Hospital. As testified by SEIU's former representative at the Hospital, Cordova, Article 11.F.7 allows the Hospital to make such changes unilaterally, provided that the union finds out about it 30 days in advance, and that the Hospital agrees to "meet" with the union, if the union so requests, and discuss ways to minimize the impact on the employees. (Tr. 722:2-723:13, 724:10-725:21, 729:11-25 and GC-4 at page 32). There is no evidence that contradicts his testimony.

The contract language, including the use of the term "meet" rather than "bargain" and the past practice between SEIU and the Hospital regarding changes in schedules establish a "clear and unmistakable waiver of bargaining" on the issue of schedule changes. See Provena St. Josepha Medical Center, 350 NLRB 808, 811 (2007) ("A party may contractually waive its right to bargain about a subject.") See also Baptist Hospital of East Tennessee, 351 NLRB 71 (2007) (clear and unmistakable waiver of union of bargaining over scheduling of work, where contract stated the employer had the right to determine and change starting times and quitting times).

It is undisputed that the Hospital has, in the past, implemented schedule changes without first bargaining with the union. Evidence of a past practice of unilateral changes during the term of the agreement defeats a claim that a similar change after the expiration of the contract is a

unilateral change in the terms and conditions of employment in violation of Section 8(a)(5) of the Act. See Shell Oil, 149 NLRB 283, 287 (1964) (“We are persuaded and find that Respondent's frequently invoked practice of contracting out occasional maintenance work on a unilateral basis ... had also become an established employment practice and, as such, a term and condition of employment.”) The Sixth Circuit Court of Appeal court explained the applicable principle in Beverly Health and Rehabilitation Services, Inc. v. NLRB, 297 F.3d 468, 481 (6th Cir. 2002):

We interpret Shell Oil and its progeny as standing for the proposition that if an employer has frequently engaged in a pattern of unilateral change under the management-rights clause during the term of the CBA, then such a pattern of unilateral change becomes a “term and condition of employment,” and that a similar unilateral change after the termination of CBA is permissible to maintain the status quo. Thus, it is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract.

Here, the Hospital has relied not on a general management rights clause but on a specific, bargained for contractual term that directly addresses the issue. The Hospital followed the same procedure when it changed the schedule of the echo techs as it always had. First, it gave notice. General Counsel has spent considerable time disputing that the Hospital informed Orea of the change on October 22, 2010 and Mendoza in early November. It is undisputed, however, that Martin got notice in a November 3, 2010 meeting and that Herberger discussed the issue with Mendoza at a meeting on November 29, 2010 and confirmed the schedule change in an email to Mendoza that same day. (Tr. 287:15-24, 297:9-19, 298:2-21, 394:13-17, 395:3-396:17, 857:12-859:9 and GC-34). Mendoza admitted that she knew of the schedule change in November and discussed it with the echo techs. (Tr. 232:12-233:18, 256:8-257:12, 296:2-297:4, 393:17-20). Although Mendoza belatedly tried to contend that the notice had to be some particular form of written notice, such an assertion finds no support in the record. There was no evidence to contradict Cordova’s and Herberger’s testimony that past practice had been that notice was

routinely given orally and/or through the employees. (Tr. 726:20-727:15, 729:11-14, 867:16-17).

Next, the Hospital solicited and accepted input from Martin and the other echo techs on how to best implement the change. Based on this input, it postponed implementation for one month to allow the employees more time to adapt to their own schedules. (Tr. 642:17-23). It also accepted their suggestion that the start time be advanced by an hour. (Tr. 644:7-25).²²

NUHW initially acknowledged that the Hospital was within its rights in changing the schedule. Thus, Mendoza advised the employees that they “need[ed] to cooperate” and to speak to management about ways to minimize the impact of the change on them and whether the change, which was being implemented on a trial basis, was working. (Tr. 234:17-235:14, 296:19-297:4). Furthermore, it is undisputed that the Hospital offered to continue to discuss any input NUHW might have on the success of the schedule. It was NUHW that stopped the process. In light of the facts, the contract provision and the past history, any claim that the Hospital acted inappropriately is completely unsupported in the record.

B. The Duty to Bargain does not Apply When a Change is Necessary to Meet the Core Purposes of the Enterprise.

Even if there had been no waiver of the right to bargain on schedule changes or a past practice not to bargain, the Hospital was not required to bargain with NUHW over this *particular* change. That change was necessary in order for the Hospital to provide coverage within the minimum standard of care – insure patient continuity, and allow for timely and accurate diagnosis. In the opinion of the Medical Director, Dr. Naqvi, the Hospital was not meeting its mission of treating its patients. (Tr. 597:20-598:6, 614:14-24, 620:21-628:5). The cardiologists ordering echo studies complained that the Hospital was not providing the minimal standard of care and were choosing not to refer their patients to the Hospital for those studies. (Tr. 596:25-

²² Perese also worked with Lead Echo Tech Youssef to try to design a four day schedule that would still meet the coverage and patient continuity needs of the department. That effort was unsuccessful. (Tr. 647:15-649:4).

597:19, 605:3-19). There was no evidence to dispute this, and there can be no argument that the Hospital can disregard the standard of care in the industry.

Under Peerless Publications, 283 NLRB 334, 335 (1987), a change that goes to the “core purpose” of the enterprise is exempt from mandatory bargaining. It is true that a divided panel of the NLRB held in Virginia Mason Hospital, 357 NLRB No. 53, *5-6 (2011) that “Peerless was decided under ‘unique circumstances’ and essentially limited to its facts.”²³ But the facts in this case are far closer to Peerless than they are to Virginia Mason.

In Virginia Mason, the employer hospital unilaterally implemented a “flu-prevention policy requiring nonimmunized registered nurses to wear a facemask or take antiviral medication.” The ALJ had ruled that the hospital could rely on Peerless, since “infection control policies and the standard of care patients receive ... are at the ‘core of the entrepreneurial control’ of the [employer].” Although the flu prevention program was clearly appropriate and would result in better care for the patients, there was no evidence that failure to provide this safety consideration reduced the Hospital to a “below standard” level of care. Even if the sharply divided Board panel were right that flu prevention must be bargained over, that would not change the result of this case. NUHW has no power to compel the Hospital to practice at a level that is below the standard of care. The concerns that necessitated the change in the echo tech schedule boil down to the Hospital’s fundamental ability to care for its patients at an acceptable level. That is not just related to the core purpose of the Hospital; it is the core purpose of the Hospital. A union may not force the Hospital to practice at a level that could amount to malpractice. This comes within the narrow parameters of Peerless. NUHW is neither a doctor nor a medical director. It cannot dictate a below standard level of care, and the Hospital had no duty to bargain over that.

²³ The majority was composed of Chairman Liebman and Member Pearce. Member Hayes strongly dissented. Chairman Liebman is no longer a member of the NLRB.

Case No. 39693
– Extra Shift Bonus

CASE NO. 39693– EXTRA SHIFT BONUS

This case consists of two separate allegations: One pertaining to an extra shift bonus and one pertaining to an “on call” schedule.

I. SUMMARY OF ARGUMENT – EXTRA SHIFT BONUS

In the extra shift bonus portion of Case No. 39693, the General Counsel alleges that the Hospital had a “past practice” of paying an extra shift bonus to four employees when they were “on call” in the OR blood gas lab, in addition to the premium pay that was actually applicable to those hours. General Counsel alleged that this practice was unilaterally changed by the Hospital during bargaining. General Counsel’s theory fails both factually and legally.

In order to establish a “past practice” General Counsel must present evidence of a practice that was not “random” or “intermittent” and has been done “with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” Sunoco, Inc., 349 NLRB 240, 244 (2007). This, the General Counsel utterly failed to do. As a factual matter, General Counsel’s witnesses admit that the “practice” alleged in the Complaint never existed and is not what the collective bargaining agreement provides. Beyond that, General Counsel’s witnesses could not agree on what they thought this practice was and when or how it was applied. General Counsel admits that they do not know what the payroll records of the allegedly affected employees actually show. In fact, those records do not support any of the various theories advanced by General Counsel’s witnesses as to what the “practice” may have been.

As a matter of law, the allegation is fatally flawed since an anomalous, unnegotiated secret practice that contradicts the contract and favors a handful of employees over everyone else in their department and the entire bargaining unit is inconsistent with the purposes and principles of the National Labor Relations Act and has never been held to be and cannot be a binding “past practice.”

II. STATEMENT OF FACTS

A. The “Extra Shift Bonus” and “On-Call/Callback” are Completely Different and Mutually Exclusive Concepts Under the Tenet-SEIU Contract.

Articles 13.C.2.a and b of the Tenet-SEIU contract provide for the payment of an “extra shift bonus” or “ESB” to bargaining unit employees working in specified job classifications “when they sign up” and actually work “all hours” in a posted “extra shift or partial shift” schedule. (Tr. 279:23-280:9, 406:12-407:9 and GC-4, at page 52). For respiratory care practitioners, the ESB is \$125. (Id.) An ESB is designed to be an incentive for an employee to volunteer to work additional shifts in addition to the regular schedule. (Tr. 334:18-29, 507:11-17, 773:6-24 and GC-4, at page 52). It is payable only when an employee has voluntarily signed up for a posted, designated, scheduled shift. (Tr. 773-25-774:9 and GC-4 at page 52).

As explained by Chief Human Resources Officer, Matt McElrath (“McElrath”), the ESB, by definition, applies in situations where the need for additional hours was anticipated. (Tr. 779:11-780:13). For an unplanned situation, an employee who is on “standby” or “on-call” status can be called in. (Tr. 775:19-776:17, 780:14-24). Unlike an extra shift, on-call status is assigned by management and the employee does not have the option to agree or decline to be assigned to on-call status or to agree or decline to come in to work when “called back.” (Tr. 339:5-11, 18-20, 354:5-8, 508:4-6, 514:10-13). An ESB does not apply to being called back because callback is, by definition, unscheduled, unplanned and mandatory. (Tr. 779:11-17, 780:14-24).

On-call and call back pays are governed by Article 13.G. (Tr. 408:9-22 and GC-4, at pages 56-57). Article 13.G.1 provides that “an employee who is assigned to stand-by/on-call status” will be paid for those hours at an hourly rate specified in the contract. (Tr. 408:9-22, 776:18-777:1, 777:14-778:4 and GC-4, at Pages 56-57). In the case of respiratory care practitioners, including pulmonary function technologists and the OR blood gas tech, they are paid \$5.75 for every hour they spend on “on-call” status. (Tr. 339:21-340:4, 446:1-6 and GC-48,

at Pages 56-57). Under Article 13.G.2, an employee who is on an assigned on-call status will be paid a premium rate of one and one-half (1-1/2) times his/her base rate of pay if he/she is actually called in to work. (Tr. 340:5-9, 358:24-359:3, 780:14-22 and GC-4, at Page 57).

There are other differences between on-call/callback pay and the ESB under the contract bargained for by Tenet and SEIU. The mandatory on-call schedule provision contains a 2 hour minimum guarantee. The ESB provision does not. (Tr. 418:22-420:1). The ESB provision specifies a procedure for an employee who is scheduled to work an extra shift to be flexed off. (GC-4, at page 52). No such procedure exists for on-call. (GC-4, at page 56-57).

On-call/callback pay and the ESB are mutually exclusive and the Tenet-SEIU contract so recognizes. (Tr. 779:18-780:24). Article 13.C.2.d provides that “an employee may not work an [extra shift bonus] shift and collect any other compensation . . . for the same day worked.” (GC-4, at Page 53). Article 13.G.1 provides that “[h]ours of stand-by/on call will not be considered hours worked for purposes of “any[] premium pay” under the contract and that “no other compensation will be paid” for on-call hours. (G-C4, at Page 56). Article 11.N provides that there will be “no pyramiding” of “premium payments for the same hours worked.” (GC-4, at page 38). In addition to the contractual limitations, it was undisputed that no other employees in the bargaining unit were ever paid both for on-call/callback, and ESB for the same hours. (Tr. 409:20-22, 782:16-19).

B. The Employees Alleged to be Entitled to Special Treatment are Five out of the Over Ninety Respiratory Care Practitioners and Over 600 Bargaining Unit Employees Employed at the Hospital.

The Hospital currently employs approximately 96 respiratory care practitioners. They all work in the Respiratory & Pulmonary Diagnostics Department. Four respiratory care practitioners are designated as “pulmonary function technologists” or “PFTs” and one is called an “OR blood gas lab technologist.” (Tr. 328:25-329:10, 443:1-13, 444:7-18, 462:1-11, 466:21-

467:7, 471:19-20, 526:2-10).²⁴ PFTs perform diagnostic tests to help evaluate a patient's lung function and to monitor long term patients or cystic fibrosis patients. (Tr. 328:17-24). The OR blood gas lab technologist takes blood samples during surgery and analyzes them through machines located inside the operating room. (Tr. 332:11-334:2, 442:11-25, 443:3-13). All respiratory care practitioners can perform a blood gas analysis. (Tr. 373:9-374:21). At the Hospital, however, Basil Nasir (“Nasir”) is specifically designated to perform that task for the OR during his regular hours. (Tr. 441:24-442:2, 532:5-533:2). The PFTs and the OR blood gas technician are supervised by the Director of Pulmonary Services, Susan Farr (“Farr”). (Tr. 333:25-334:10, 443:17-444:1).²⁵

C. Susan Farr Sometimes Erroneously Paid the Employees Under her Supervision an Extra Shift Bonus they had not Earned.

In approximately August, 2010, the Hospital began implementing an update to its Kronos payroll system. (Tr. 770:13-21). McElrath worked with the information systems team that implemented the upgrade to configure the software in accordance with the provisions of all the applicable collective bargaining agreements. (Tr. 771:2-772:12, 817:6-818:4 and GC-4). After a period of training for the managers, the upgrade “went live” in approximately October 2010. (Tr. 820:23-821:20). As a result of the upgrade, Farr was unable to input an ESB when it was not called for under the contract as she occasionally had in the past. (Tr. 509:22-510:13). Shortly thereafter, Herberger reported to McElrath that there was a discrepancy in the way Farr had been paying the employees under her supervision in that she was sometimes paying some form of an ESB for some of their callback time. (Tr. 780:25-781:8, 821:21-822:24). It is undisputed that this was a mistake which involved, at most, four or five employees out of more than 90 in the department in a bargaining unit of more than 600. (Tr. 414:24-416:1 and GC-28).

²⁴ The other respiratory care practitioners are called “respiratory therapists.” (Tr. 471:19-20, 526:2-10).

²⁵ Farr was unable to testify at the hearing due to a health condition which, in her physician’s opinion, would be exacerbated by the stress of having to testify in an adversarial proceeding. (Tr. 894:8-25).

No other employees in the Respiratory & Pulmonary Diagnostics Department or the bargaining unit have ever been paid an ESB for anything other than an extra shift they had voluntarily picked up and prescheduled. (Tr. 409:20-22, 782:16-19). McElrath instructed Herberger to correct the problem going forward but, to the extent any bonuses had been paid inappropriately, not to ask employees to pay back. (Tr. 781:24-782:15, 823:10-19).

On October 1, 2010, PFT Darren May (“May”) received a paycheck that included double time and callback pay for seven hours and no ESB. (Tr. 344:19-346:6 and GC-50). He complained to his union steward, Nasir, and to Mendoza that he had not received an ESB for those hours. (Tr. 280:10-281:11, 284:25-265:7, 449:3-12). Nasir spoke to Farr, who told him her occasional payment of ESBs to employees who had not worked designated extra shifts had been a mistake. (Tr. 449:13-450:13). Thus began a series of complaints from two or three of these PFT’s alleging a variety of different ways an ESB should be paid.

First, Nasir and May met with Farr and the Administrative Director, Respiratory and Pulmonary Diagnostic Services, George Sarkissian (“Sarkissian”), on November 1, 2010. (Tr. 451:23-452:9). In that meeting, Nasir asserted that payment of the ESB is required under the contract for any hours over the “clocked in” hours and it was a violation of the contract not to pay it. (Tr. 452:10-19, 453:13-20). Farr and Sarkissian reiterated that, if May or Nasir had ever received an ESB for on-call or call back hours in addition to the premiums applicable to those hours, that was not what the contract provided and that was a mistake. (Tr. 453:13-17). Nasir then filed a grievance. This time he alleged that “the employer refuses to honor the past practice of paying the extra shift bonus after having worked over 84 hours.” (Tr. 451:3-16 and GC-28).

On December 9, 2010, Herberger met with Mendoza, Nasir and PFT Lisa Rogers to discuss the grievance. Herberger explained that, under the contract and past practice, an ESB is only paid for posted extra shifts and is not supposed to be paid for on-call or callback in addition to the premiums already paid for those hours. Further, to the extent an ESB had ever been paid in those circumstances, it was paid in error. (Tr. 414:11-17, 453:24-454:17, 872:9-874:1).

Nonetheless, the Hospital agreed that, if any employee had been overpaid, there would be no

effort to try to recoup such overpayment. (Tr. 417:7-11). In this meeting, Mendoza insisted that the contract requires an ESB to be paid for all hours worked and on-call (without reference to the 84 hour minimum that Nasir alleged in his grievance). When Herberger asked her to identify what language in the contract requires that, Mendoza was unable to do so. (Tr. 873:13-874:5).

D. General Counsel, NUHW and each of the Witnesses are each Alleging a Different “Past Practice.”

With respect to the ESB, the Consolidated Amended Complaint follows some of the assertions made by Mendoza in the December 9, 2010 meeting. It alleges as follows:

10. (a) Since on or about April 1, 2009, Respondent paid Service Unit pulmonary function technicians supervised by Susan Farr an extra shift bonus for on-call hours in addition to the on-call pay.

(b) In or about October 2010, Respondent changed the established past practice of the way it paid the Extra Shift Bonuses of pulmonary function technicians supervised by Susan Farr, by no longer including on-call hours in the extra shift bonus pay.

11. Since in or about October 2010, Respondent changed the terms and conditions of employment of the pulmonary function technicians supervised by Susan Farr by changing the way it paid their extra shift bonuses.

(Consolidated Amended Complaint ¶¶ 10(a) and (b), 11).

However, May testified that these allegations are incorrect and, in fact, he was never paid an extra shift bonus for on-call hours. (Tr. 356:12-357:8, 358:3-7).

Confronted with this fundamental flaw in its case, General Counsel attempted to amend the complaint. Rather than presenting a clear allegation of what the Hospital’s alleged “past practice” was supposed to be, however, General Counsel asked the ALJ to amend the complaint to “conform the pleadings with the proof in this case” and failed to specify what General Counsel was alleging the “past practice” to be. (Tr. 495:2-17). The ALJ correctly denied this request. (Tr. 495:18-496:14).

NUHW’s witnesses each presented a different version of what the alleged past practice was. Sometimes one witness changed his or her story in mid testimony to try to state a different

“past practice.” Mendoza first testified that, “what was in the contract” is that all employees are “entitled” to an ESB in addition to any overtime or premium pay every time they work more than their regularly-scheduled 72 hours in a pay period. (Tr. 282:18-25, 407:10-408:3). There is no provision in the contract that states such a thing. She then changed her testimony to state that the ESB the PFTs received was not pursuant to the contract but rather “a result of past practice.” (Tr. 408:4-8, 410:1-2, 412:25-413:5). This “past practice,” according to her, was for those employees to be paid both a premium of time and a half for callback hours and an ESB “on a prorated basis” when called back to work from on-call status “if they worked past 84 hours.” (Tr. 283:21-284:9, 285:8-10, 409:1-19, 412:18-24).

May testified that the four PFTs were paid on-call pay while they were on call, time and a half for call back hours actually worked and, in addition, an ESB for the same callback hours once they had completed 84 hours worked in a pay period. (Tr. 340:10-20). According to him, they would receive the full \$125 for a full 12 hour shift and then a prorated portion of the ESB for any additional hours that did not add up to a full 12 hour shift. (Tr. 334:18-335:15, 340:15-20).

Admitting it did not understand the payroll records in evidence in this case, the General Counsel relied instead on May’s check stubs for pay periods ending April 24, 2010, May 22, 2010, and July 3, 2010. (Tr. 341:18-342:18 and Ex. GC49)²⁶. In reviewing these check stubs on cross examination, May asserted that despite the fact that some hours are recorded as “call back” (GC-50, Line 1 “call back 7.00” hours) and some are recorded as “overtime” or “double time” (GC-49, p.1, line 3, “double time 14.50” hours, line 5, “overtime 28.00” hours; GC-49, page 2, line 2, “double time 12” hours, and line 4, “overtime 8” hours; page 3 line 2 “double time 3.50” hours and line 4 “overtime 28” hours; GC-50 line 2), they are all call back hours. (Tr. 359:22-361:23). He also testified that a “full” ESB was \$125.00, and he received that for working 12 hours, although it was “coded” as 10 hours of ESB. A full ESB came from 12 hours of work.

²⁶ An ESB bonus is indicated on paychecks and payroll records either as “Differential (2)” or “Dif B.” (Tr. 342:19343:2, 467:15-17, 814:11-19 and GC-49, at page 1).

Three full ESBs, coded at “30 hours,” actually represents 36 hours of work and would be \$375.00. (Tr. 362:13-18). He testified that he got an ESB for all hours worked after 72 (Tr. 362:19-23) and later corrected that to all hours worked over 84. (Tr. 362:24-363:4).

Nasir testified that the ESB is paid on a prorated basis for *any* hours worked over the regular 72 hours in a pay period. (Tr. 445:13-25, 464:11-12, 465:9-21). He then modified that position and testified that employees in the “pulmonary area” were paid the ESB on “most of the checks” after they had worked 84 hours. (Tr. 465:22-466:7-20, 448:7-11).

E. The Records in Evidence do not Support Any of NUHW’s Versions of the Purported Past Practice.

1. Darren May’s Check Stubs

Despite bringing a complaint based on a purported past practice regarding the way certain employees were paid. General Counsel relied on only three of May’s check stubs out of the dozens he received to try to justify this alleged “past practice.” However, no matter how May tried to explain the ESB “past practice,” his pay stub was not consistent with his assertions. For the pay period ending April 24 he worked 122 hours, and got 3 full ESBs, equal to payment for 3 shifts, 36 hours. (Tr. 363:2-12 and GC-49 at page 1). He also got a “partial” ESB of \$122.32, which is 98% of a \$125.00 ESB. However, he worked 38 hours over 84 (Tr. 363:2-12), and 50 hours over 72. Under one of his formulations, he should have received 3 1/6 ESBs (36 hours + 2 hours); under the other, he should have received 4 1/6 ESBs (48 hours + 2 hours). He did not. Under no formulation should he have received 3.98 ESBs – which is what he got. On page 2 of the GC-49, May is shown to have worked 96 hours (76 regular, 8 overtime, and 12 double time). He got 2 full ESBs. On this check then, he got an ESB for time worked over 72 hours, not over 84 hours – something he clearly did not get on page 1. Then on page 3 of GC-49, May worked 111.5 hours (80 regular, 28 overtime; 3.5 double time). This is 39.5 hours over 72, (which would be 3 1/3 ESBs) or 27.5 hours over 84 (which would be 2 1/3 ESBs). It was neither. He got paid 3 ESBs. May acknowledged that the math shown on his pay stubs does not match his

testimony of how he claims he was paid. (Tr. 361:24 -363:12, 369:11-371:1 and GC-49 at page 1).

GC-49 was the totality of General Counsel's documentary evidence concerning the "past practice" of paying an ESB to these four techs. It contradicts all of General Counsel's theories as to what this alleged past practice might have been and May denied that General Counsel's allegations in the Complaint were true. Thus, General Counsel failed to meet the required burden of proof, and failed to establish any consistent practice as to even this one employee, let alone as to other employees.

2. Payroll Registers

The Hospital, in contrast, can clearly establish that there was no consistent past practice – there were at best random, isolated, mistakes by one supervisor. McElrath explained that when employees clock in using their ID badges, they enter the specific code for their time, such as callback time, so the Kronos payroll system knows how to record the hours and at what rate they are to be paid. (Tr. 778:5-24). Based on this input, Kronos can generate a report which reflects what hours the employee worked and how much he was paid in each pay category, (including callback) the rate of pay at which different hours were paid, and the total hours and total gross amounts paid in each category. (Tr. 778:25-779:10). The parties stipulated to the introduction of these reports, known as "payroll registers" for each of the employees at issue. (R-38 to R-42). The payroll registers use certain abbreviations to identify what an employee is being paid for. STANDBY refers to hours the employee was in stand-by/on-call status. CALLBACK refers to the hours worked when an employee who was on standby status was called in to work. DIFF B refers to the Extra Shift Bonus. (Tr. 801:9-802:12, 802:20-807:12 and R-40 at USC 2690, USC 2704, and R-64).

a) There is no Inconsistency Between the Payroll Registers and the Check Stubs.

General Counsel, while admitting an inability to understand the payroll registers, sought to attack the payroll registers as inaccurate. They are not. General Counsel simply did not take

the time to review them. Specifically, General Counsel attempted to establish that GC-49, and R-39, at USC 2510 were inconsistent, even though they relate to the same pay period. There is no inconsistency. GC-49 is a University- generated document, (see title “University Payroll Services”) and R39, as testified to by McElrath, is a Hospital generated document (Kronos pay system). Sometimes the coding is a little different (e.g., Differential 2 is an ESB on the pay stub and “DifB” is an ESB on the payroll register) but the earnings numbers match exactly.

Preliminarily, the payroll registers list both earnings and deductions, and do a net total at the end. Deductions have a minus sign next to them on the register; earnings do not.

Thus, looking at the “earnings,” both GC 49 and R-39, at USC 2510 show \$3,258.40 in regular time paid, both show \$1,710.66 in overtime paid, both show \$1,181.17 in double time paid, both show \$122.32 and \$375.00 paid as “differential” (“Differential 2.” in GC-49 or “Diff B.” in R-39), both show \$176.81 as stand-by pay. There is one additional increase to pay. On GC-49 it is called “other earnings,” and on R-39 it is called “FLSA,” but both documents show it as \$156.84. On GC-49 all of these earnings are added together, for a gross amount subtotal of \$6,981.20, from which the series of deductions are then made. On R-39 the earnings are not totaled without taking some of the deductions first. Medical, dental, 401K, and disability payments are all deducted before the first total is given. However, as noted, all of the earnings figures are exactly the same, and both sets of earnings, obviously, add up to the \$6,981.20. Whether the total earnings is run first, and then the deductions are taken, or whether the deductions are taken before the totals are given is irrelevant. The point is that both documents show exactly the same earnings.

The same is true for the year to date. Adding up all of the Kronos YTD “positive” or “earnings” figures, and removing the deductions, yields exactly the same gross totals in the two documents, based on exactly the same earnings. Thus, the Kronos payroll register (R-39, USC 2510 and 2511) shows positive numbers, or “earnings,” YTD as:

	<u>Amount</u>
REGULAR	\$19,140.33

	<u>Amount</u>
OVERTIME	\$5,383.05
DOUBLE	\$1,360.58
STANDBY	\$564.94
CALLBACK	\$122.19
EDUCATE	\$321.26
ORIENT	\$3,584.24
HOLIDAY	\$790.80
ORN 1.5	\$488.76
W RECESS	\$790.80
MISMEAL	\$32.95
PTO	\$711.39
XILLNESS	\$1,186.20
HOL DIFF	\$790.80
WKD DIFF	\$360.00
DIFF B	\$1,025.39
FLSA	<u>\$280.09</u>
Total	\$36,933.77

This YTD total, before deductions, is exactly the same as the “gross” YTD total shown on CG-49. As McElrath explained, the totals are affected by the deductions and adjustments. No one is contending that improper deductions were taken. The fact that Kronos compiles the earnings, deductions and adjustments in a different order or under a different code than University Payroll Services, does not make them wrong.

b) The Payroll Registers Show no Consistent Practice with Respect to ESBs.

There are numerous instances in the payroll registers where May and Nasir were not paid ESBs consistently with any version of the purported past practice to which they testified. The picture does not become any clearer if one studies the payroll registers for the other employees Farr supervised. In fact, there appears to be no rhyme or reason to when any of them were paid an ESB or how much.

(1) Darren May

May testified that “all of the extra shift bonus pay” he received “was for working callback time” and that he was consistently paid an ESB for any hours worked over 84 in a pay period. (Tr. 361:7-11, 362:19-363:1 and Ex. GC-49). Further, that he was paid a full ESB of \$125 for every full shift of 12 hours over 84 hours and a prorated portion of that amount at the rate of \$10.42 for any partial shift hours over 84. (Tr. 334:18-335:15).

As noted above, the pay stubs May introduced did not support such a theory: Neither do the payroll registers. For instance:

1. On March 19, 2010, May was paid for 40 regular hours, 8 overtime hours, and 40 hours of orientation, for a total of 88 hours worked. By his theory, he was entitled to four hours of ESB money. He was not paid any. (R-39, at USC 2505).

2. On his May 14, 2010 paycheck, May had 52 regular hours, 7.75 overtime, 1 hour for education, and 23.75 hours of orientation, for a total of 84.50 hours worked. By his theory, he should have been paid a prorated portion of the ESB for the half hour over 84. He was not. (R-39, at USC 2512).

3. On May 28, 2010, May was paid for 96 hours worked but received two full ESBs. He had no callback hours. (R-39, at USC 2514). Based on his theory, he would only have been entitled to one full ESB because he only worked one full 12 hour shift above 84 hours in that pay period.

4. On the July 23, 2010 paycheck, May had a total of 83.75 regular and double time hours. By his logic, he should not have been paid an ESB. But he received \$122.32 (R-39, at USC 2522).

(2) **Basil Nasir**

Nasir's payroll register similarly fails to show a consistent practice or support either of *his* theories as to how Farr paid the ESB. Nasir first testified that the ESB bonus is supposed to be paid for any hours worked over the regular 72 hours. (Tr. 445:13-25). On numerous occasions, however, he worked more than 72 hours in a pay period but was not paid an ESB. (See, e.g., R-41, at USC 2596 (82 hours), USC 2608 (75.25 hours), USC 2612 (81.50 hours), USC 2614 (74 hours), USC 2620 (76.75 hours), USC 2622 (76 hours), USC 2626 (78.50), USC 2638 (80.75 hours), and USC 2640 (80 hours).

On cross-examination, Nasir changed his theory and testified that he was paid an ESB on "most of the checks" after 84 hours worked. (Tr. 465:22-466:7). Even assuming that getting something "most of the time" could constitute evidence of a past practice, which it cannot, that theory is not supported by the evidence either. For instance, on September 3, 2010, Nasir was paid for 86.50 hours worked (63.75 regular, 12.0 double, 10.75 callback). He was not paid an ESB. (R-41, at USC 2641). At the same time, he was paid ESB money on two pay periods where he had more than 72 hours but less than 84 hours worked. (R-41, at USC 2625 (77.25 hours, \$54.65 ESB), USC 2626 (78.50 hours, \$67.67 ESB). On his June 26, 2009 paycheck, Nasir was paid for a total of 87 hours worked, including 17.25 hours of callback. He was also paid one full ESB of \$125. (R-41, at USC 2589). If the ESB is paid for hours worked over 72, Nasir was *underpaid* by 3 hours. If the ESB is paid for hours over 84, he was *overpaid* by nine hours.

(3) **Roxana Medrano**

On several occasions, Roxana Medrano was either paid too much or too little in ESB money depending on whether it was supposed to be paid based on 72 or 84 hours worked. For

instance, on her May 29, 2009 paycheck, Medrano was paid for 98 hours worked. She was paid two full ESBs (R-40, at USC 2690). If the ESB applied after 72 hours, she should have been paid two full ESBs plus two prorated hours. If the ESB applied after 84 hours, she should have been paid one full ESB plus two additional hours of ESB money. In other words, she was either underpaid by two hours or overpaid by ten hours. A similar situation arises for her paychecks for June 12, 2009 (R-40, at USC 2693) (92.5 hours worked, one full ESB paid); and August 21, 2009 (R-40, at USC 2701) (90.75 hours worked, one full ESB paid).

On March 5, 2010, Medrano was paid for 87.50 hours worked. Under either theory, she should have received some ESB money. She did not. (R-40, USC 2726). Yet, on several occasions, Medrano was paid an ESB when she worked *less* than 84 hours. (See, e.g., R-40, at USC 2737 (78.75 hours worked, ESB of \$70.27 paid) and USC 2750 (83 hours worked, ESB of \$114.51 paid)).

(4) Lisa Rogers

Lisa Rogers was rarely paid an ESB. She was paid an ESB only once in 2009 (R-42, at USC 2810). She was last paid one in July 2010, when she had 77.75 hours worked. (R-42, at USC 2846). Yet, on several occasions, she worked more than 72 hours in a pay period but was not paid an ESB. (See, e.g., R-42, at USC 2807 (79.50 hours worked), USC 2815 (81.75 hours worked) and USC 2851 (78 hours worked)).

(5) Ruben Duran

The same lack of a coherent pattern is evident from Ruben Duran's payroll register. Between April 2009 and September 2010, Duran was paid ESB money on only five occasions²⁷. He was paid partial portions of ESBs on four paychecks. (R-38, at USC 2914, USC 2928, USC 2942). On the March 19, 2010 paycheck he had 94.50 hours worked and was paid two full ESBs and an additional \$75.47 partial ESB. (R-38, at USC 2933). Under either theory of the alleged past practice, that amount is excessive.

²⁷ In all of 2009, Duran made only \$111.91 in ESB money. (R-38, at USC 2924).

On the following paychecks, Duran had more than 72 hours worked but no ESB was paid: May 1, 2009 (R-38, at USC 2895) (77.25 hours worked); June 26, 2009 (R-38, at USC 2902) (79.75 hours worked); February 19, 2010 (R-38, at USC 2930) (81 hours worked); June 25, 2010 (R-38, at USC 2943) (77.50 hours worked). So he clearly was not paid an ESB every time he worked more than 72 hours.

For the May 29, 2009 paycheck, Duran had 87.50 hours worked, but received no ESB. (R-38, at USC 2898). So he clearly was not paid an ESB every time he worked more than 84 hours.

III. ARGUMENT

A. The General Counsel Failed To Prove the Existence of a Past Practice Based on the way a Handful of Employees were Sometimes Paid.

It is undisputed that this claim involves a payment of wages issue and that wages are mandatory subjects of bargaining. As such, all parties concede that the wages needed to be paid in accordance with the previously bargained agreement until NUHW and the Hospital entered into a new collective bargaining agreement or the bargaining reached an impasse. NLRB v. Katz, 369 U.S. 736, 743-48 (1962). See also NLRB v. Haberman Construction Company, 641 F.2d 351, 357 (5th Cir.1981). It is also undisputed that no witnesses for General Counsel could identify any provision of the contract that provided for the payment of both on-call or call-back pay and an extra shift bonus for the same hours. Indeed, the contract provisions for the two types of payments are separate and the qualifying requirements for the two payments are different. All parties admit that the four employees who received the double pay were the only ones in the bargaining unit who were given such and that it was paid by mistake. General Counsel's theory, however, is that the admitted mistake by Farr creates a "past practice" to pay four employees more than any of the other employees in the same department or the hundreds of other members of the bargaining unit are paid under the same circumstances.

The party asserting the existence of a past practice bears the burden of proof on the issue. Philadelphia Coca-Cola Bottling Co., 340 NLRB 349, 353 (2003). A past practice becomes a

term and condition of employment which the employer may not unilaterally change when it is not “random” or “intermittent” and has been done “with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” Sunoco, Inc., 349 NLRB 240, 244 (2007).

Here, it is anybody’s guess what this purported past practice is supposed to be. Based strictly on the allegations of the complaint, this charge fails because the witnesses admitted there never was a practice of paying anyone an ESB for on-call hours. That the General Counsel could not figure out a way to amend the complaint is very telling. The evidence offered was confusing and contradictory, belying the idea that there was a consistent, regular practice the employees could rely upon. The witnesses testified that, pursuant to the contract the ESB applies to all hours worked, or perhaps it does not. Perhaps Farr had a practice of paying an ESB for hours worked over 72. Perhaps it was 84. The ESB was paid on some of the PFTs paychecks but not all.

The check stubs and the payroll registers reflect no pattern or consistency on the payment of ESBs. May admitted that the ESBs reflected in the pay stubs he introduced into evidence do not conform with his understanding of how Farr paid the ESB. The payroll records of May, Nasir and the others show the ESB being paid in an inconsistent fashion not conforming to any of the versions of the “past practice” testified to at the hearing.

Further, the Hospital is not aware of any case where a supervisor’s random mistake that affects only some employees, only some of the time and frequently on a different basis, was found to be a “past practice” binding on the employer. See Sunoco, Inc., 349 NLRB 240, 244 (2007) (established past practice of affording bargaining unit employees an opportunity to make jet fuel deliveries prior to subcontracting such work). See also Daily News of Los Angeles v. NLRB, 73 F.3d 406, 412 (D.C. Cir. 1996) (wage increases for all unit employees had been routinely granted in the past according to fixed criteria at a regular time); Sykel Enterprises, 324 NLRB 1123 (1997) (employer failed to pay a Christmas bonus to all of its employees as it had done the previous four years); Blue Circle Cement Company, 319 NLRB 661 (1995) (employer discontinued consistent practice of permitting the return of rotating shift employees to their

rotation at the conclusion of a temporary absence); Lamonts Apparel, Inc., 317 NLRB 286, 287 (1995) (employer discontinued giving bargaining unit employees their annual wage increase). In each of these cases a succinctly expressed practice engaged in on behalf of all employees, over a period of time, was found to be a past practice. No case where a single supervisor arbitrarily paid a few employees extra money based primarily on a whim has been found to be a past practice.

Moreover, as discussed in Case Number 39799 (pp. 17 supra) the rule the General Counsel is advocating would create a huge exception to the rule that an employer cannot deal directly with employees represented by a union with respect to their pay and the terms and conditions of employment. See NLRB v. McClatchy Newspapers, Inc., 964 F.2d 1153, 1159 (D.C. Cir. 1992). In this case the situation is far more extreme. Here, one supervisor conferred random wage increases on a few employees without a contractual basis or a consistent plan. This is the essence of individual bargaining and is precisely the kind of situation the Act was designed to prevent. See Vaca v. Sipes, 386 U.S. 171, 182 (1967) (“The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.”).

In short, there was no, and could have been no “past practice” to randomly pay some employees on some occasions some extra money for the time worked. In stopping the unearned, unnegotiated, individualized payments to a few employees, the Hospital merely implemented the terms of the collective bargaining agreement as it is written and has been applied for every other employee. The allegation that the Hospital “implemented” a “unilateral change” in the terms of conditions of employment when it began to properly pay these five employees is, therefore, not supported by the evidence or the applicable law.

Case No. 39693
– “On Call” Schedule

CASE NO. 39693-“ON CALL” SCHEDULE.

I. SUMMARY OF ARGUMENT –“ON CALL” SCHEDULE.

When the Hospital informed the union that it had discovered a discrepancy in the way some employees were sometimes paid extra shift bonuses and that it would not happen again, NUHW demanded that the Hospital no longer require those employees to be on call and insisted that the Hospital go to a “voluntary” system for covering any gaps in patient coverage. Instead of disciplining employees for their illegally threatened partial strike, the Hospital instituted the only voluntary process that exists in the contract for employees to volunteer for extra work, i.e., posting extra shifts. The Hospital even gave 30 days notice, as permitted by the contract. NUHW filed a charge anyway and General Counsel continues to pursue it.

II. STATEMENT OF FACTS

A. The Hospital Complied with NUHW’s Demand that it Replace the Mandatory On-Call Schedule for the OR Blood Gas Lab with a Voluntary System.

The PFTs and the OR blood gas tech are scheduled Monday through Friday, with 12 hour shifts. (Tr. 460:19-461:17, 463:4-16). To cover any need in the OR blood gas lab late at night and on weekends, Farr had originally simply assigned four of the PFTs to a mandatory on-call schedule. (Tr. 284:10-24, 330:23-331:1, 446:1-16, 447:21-448:6, 461:18-25, 468:20-22, 472:9-17, 473:10-13 and GC-53). She did not attempt to determine scheduling needs in advance and did not post voluntary extra shifts. (Tr. 446:1-6, 447:21-24, 469:3-17, 513:22-514:13). The OR blood gas mandatory on-call schedule was posted two weeks before the start of the month and covered the whole month. Each employee was assigned to be on-call one evening each week and one weekend every four weeks. (Tr. 335:19-337:5 and GC-48). Consistent with the contract, this on-call schedule was assigned by management and was mandatory. (Tr. 339:5-11, 18-20).

In November 2010, May complained to union steward, Nasir and to Mendoza, that there had been an announcement that the on-call schedule would be changed. (Tr. 280:10-281:17). The purpose of the proposed change was to eliminate instances where an employee who had already worked 12 hours was assigned to be on-call that same night. Despite its obvious logic and the clear health and safety concerns addressed by this change, NUHW objected to this proposed change and the Hospital agreed not to implement it. (Tr. 475:19-25, 510:19-513:18 and GC-28 and GC-55).

The OR blood gas lab mandatory on-call schedule then became an issue during the discussions between the Hospital and NUHW regarding the erroneously paid ESBs. At the grievance meeting on December 9, 2010, NUHW demanded that, if no ESBs were going to be paid for on-call or call back, they “wanted the on call schedule to be voluntary instead of mandatory.” (Tr. 288:23-289:1, 416:6-11, 453:24-455:2).

NUHW reiterated that position at a meeting on January 6, 2011, which was attended by May, Nasir, Mendoza, Farr and Herberger. (Tr. 290:6-25). As May explains it, NUHW reiterated that “if they were going to not pay us the extra shift bonus that the on-call schedule should be voluntar[y].” (Tr. 347:11-348:1, 348:24-349:16, 363:17-20). Mendoza admits that there is no provision in the contract regarding a voluntary on-call schedule. (Tr. 416:12-14). There is, however, a provision for voluntary extra shifts (Tr. 416:15-17). Indeed, Mendoza understood that and in the January 6 meeting requested the voluntary extra shift system be implemented. According to her testimony, she made the following demand:

If management wanted to continue to not pay the PFTs their extra shift bonus, that we wanted the on-call schedule to be voluntary instead of mandatory, and the people should be able to sign up for it if they wanted the shift. And if they signed up for it, then they would get the extra shift bonus, if they worked the extra shift.

(Tr. 290:6-25).

Accordingly, Herberger informed Mendoza, Nasir and May that, since the PFT’s were no longer willing to work mandatory on-call if they would not get paid an ESB for those hours, the Hospital would agree to implement a voluntary extra shift system for them instead, under which

they would be paid the ESB. (Tr. 874:6-14). The Hospital never agreed to create a “voluntary on call” schedule for these four employees and NUHW has never proposed to create such a system in the course of bargaining for a new contract. This would have been a unique deal just for these few employees. (Tr. 420:2-14).

Herberger confirmed these discussions in a letter dated January 12, 2011. (Tr. 293:6-22 and GC-31). In response, Mendoza wrote Herberger on January 24, 2011, once again demanding that “if the extra shift bonus was not being paid for hours worked” then there should not be a “mandatory on-call schedule” for the blood gas lab. (Tr. 294:8-20 and GC-32). All of the General Counsel’s witnesses admitted that they refused to work mandatory on-call if they could not get some extra-contractual pay for it. NUHW never offered any other position than that there should be a voluntary procedure. (Tr. 421:14-24). NUHW never agreed that the employees could participate in mandatory on-call if they did not get paid an extra shift bonus. (Tr. 416:18-417:3, 421:21-422:8).²⁸

The Hospital went to the voluntary system provided in the contract. Beginning February 2011, the employees in the pulmonary function lab have been given the opportunity to sign up voluntarily for extra shifts. (Tr. 363:13-364:13, 423:12-14, 467:18-469:17). They can also sign up for extra shifts in respiratory therapy. (Tr. 375:2-12, 469:18-470:4). When they work an extra shift, they are paid an ESB. (Tr. 413:22-414:10).

Currently, the Hospital is paying extra shift bonus pay for extra shifts that are worked, and callback pay for time when an employee is called back from on-call. (Tr. 782:20-783:4). Nasir alleges that he has lost wages as a result of no longer being paid an extra shift bonus for call back hours worked. (Tr. 458:21-459:13). But Nasir admitted he has never signed up for an

²⁸ Given the attitude that all the NUHW witnesses expressed, Farr’s payment of ESB money may have been nothing more than giving in to employees when they demanded extra shift money or they would not come into work. The random nature of the payments would then be explained by whether the employee cooperated with her and agreed to come in when called or whether he refused to come that day unless she provided him some extra money.

extra shift. (Tr. 470:6-8, 471:13-16).²⁹ Of course, he will not get an ESB if he never volunteers to work. May, on the other hand, has voluntarily signed up for extra shifts and received the appropriate ESBs (Tr. 364:2-5, 10-13). May too claims that he has suffered a loss of income. (Tr. 351:7-22, 373:4-8). Other than May's speculation that he could have made more money, General Counsel has introduced no evidence that the extra shift bonus system has been less remunerative to May than being on-call. In fact, the payroll register shows he is wrong. Through December 2010, May received \$2,168.45 in 2010 year to date total ESBs. (R-39 at USC 2542). By July 2, 2011, he had already received \$2,474.01 in 2011 year to date total ESBs. (R-39 at USC 2570). Thus, for employees who volunteer for the voluntary system, the ESBs are excellent.

III. ARGUMENT

In accordance with Article 11.F.7 the Hospital gave notice of a change in the schedule of the Pulmonary Function Technicians and the OR blood gas tech in January 2011 and the change went into effect in February 2011. As discussed above, the Hospital had the right under the contract and the applicable law to implement schedule changes even if NUHW objected.

In this case, however, NUHW's objections are particularly ill-advised and frivolous. NUHW's threat of a partial strike was illegal and the Hospital need not have ever discussed such an inappropriate threat. NUHW's demand that "if the extra shift bonus was not being paid for hours worked" then there should no longer be a "mandatory on-call schedule" for the blood gas lab was nothing other than a refusal to work on-call or call back, even if assigned, unless the Hospital continued to bribe them with ESB money to which they were not entitled. The Hospital would have been within its rights to terminate the employees for this refusal to perform assigned work. A partial strike, in which employees refuse to perform certain tasks while continuing to accept other work, is not protected activity. Vencare Ancillary Servs. Inc. v. NLRB, 352 F.3d

²⁹ Nasir claims that he does not sign up for extra shifts because he is not "guaranteed" he will get the shift. But he admits that being called back from on call status was never guaranteed either. (Tr. 470:21-471:14, 471:24-472:17, 474:11-24).

318, 324 (6th Cir. 2003) (Healthcare workers' actions of refusing to see patients while performing other duties including back paperwork, following notification of an impending wage decrease, constituted an unprotected "partial strike," and thus discharge of workers was not unlawful). To be protected, a work stoppage must be complete, i.e., the employees must withhold all their services from their employer. "They cannot pick and choose the work they will do or when they will do it. Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment." Audubon Health Care Center, 268 NLRB 135, 137 (1983) (finding that nurses engaged in a partial strike when they refused to work in an open section, which was part of their job duties, while continuing to perform their other job functions).

Rather than take disciplinary action, however, the Hospital met with NUHW and its members numerous times to try to reach an accommodation. The Hospital thus agreed to and implemented the only system under the contract for employees to volunteer for additional hours and obtain ESBs, i.e., the posting of extra shifts.

General Counsel apparently contends that NUHW had a legal right to threaten a partial strike, and then had a legal right to insist on the Hospital creating and agreeing to some side deal to benefit only PFTs in terms unique to the PFTs. The Hospital is completely mystified as to how General Counsel gets to this position. Even if the Hospital had a duty to bargain with NUHW over its illegal strike, it had no obligation to agree to NUHW's demands. The duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). As the Board explained in Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984):

Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . . Both the employer and the union have a duty to negotiate with a sincere purpose to find a basis of agreement, but the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position."

Id. Accord NLRB v. Reed & Prince Mfg. Co., 205 F.3d 131, 134 (1st Cir. 1953).

NUHW had no right to refuse to work regularly established, posted schedules. However, rather than get into a series of disciplinary disputes over this unlawful refusal to work, the Hospital attempted to work with NUHW and respond to its concerns. Instead of acknowledging the benefits of using the contractually provided voluntary extra shift system that it demanded, NUHW filed a charge. Instead of telling NUHW it ought to be grateful that the employer considered its position, General Counsel brought a complaint. The illogic of General Counsel's position is illustrated by the question "What would you have the Hospital do?" Go back to the original mandatory on-call schedule which ALL of NUHW's witnesses, including Mendoza, acknowledged they did not want? As a matter of law, the Hospital had the right to change the schedule and eliminate mandatory on-call under Article 11.F.7. As a matter of fact the Hospital negotiated with NUHW to try to reach a compromise, and utilized a voluntary system provided for in the contract that allowed for the paying of ESBs. As a matter of policy it is wrong to charge the Hospital with an unfair labor practice for responding, without discipline or complaint, to NUHW's completely inappropriate refusal to work assigned hours.

Remedy

THE GENERAL COUNSEL HAS SET FORTH NO EVIDENCE THAT WOULD JUSTIFY THE ISSUANCE OF A BROAD BARGAINING ORDER.

In addition to the traditional remedies of backpay and reinstatement of alleged previous practices, the General Counsel has moved for an order requiring the Hospital “to bargain in good faith with NUHW, in request, for the period required by *Mar-Jac Poultry*,” i.e., an additional 12 months. A broad bargaining order is an “extreme remedy.” Gardner Mechanical Services, Inc. v. NLRB, 115 F.3d at 642-43 (9th Cir. 1997). It may be imposed only when it is “the only satisfactory remedy.” NLRB v. Taylor Mach. Products, Inc., 136 F.3d 507, 519 (6th Cir. 1998). Such an order is not warranted in this case because there is absolutely no evidence that the Hospital has “failed or refused to recognize the Union or to meet and bargain with the Union in good faith” or that any of the Hospital’s alleged acts have “tainted negotiations” between the Hospital and NUHW. Visiting Nurse Services of Western Mass, 325 NLRB 1125, 1132 (1998). See also Cortland Transit, 324 NLRB 372 (1997) (Bargaining order denied when there was no evidence that the employer “had failed or refused to recognize the Union or to meet and bargain with the Union in good faith following its certification and no indication how [the alleged unfair labor practice] affected the parties' negotiations.”) There is no evidence that the Hospital is not bargaining with NUHW in good faith. To the contrary, the evidence is that the parties have made substantial progress towards a contract. The Hospital and NUHW have met for contract negotiations more than a dozen times and, according to Mendoza, are close to an agreement. (Tr. 274:24-275:11, 278:24-279:13, 865:23-866:2). A bargaining order is, therefore, completely inappropriate.

Bargaining orders have been used in cases where the cumulative effect of serious unfair labor practices is such that it undermines the union’s majority support. See e.g., Quazite, Division of Morrison Molded Fiberglass Company v. NLRB, 87 F.3d 493, 496 (DC Cir 1996). There is no evidence that is the case here. There is no evidence that any unfair labor practices have occurred and there is no evidence that anyone has called NUHW’s right to represent the employees into question.

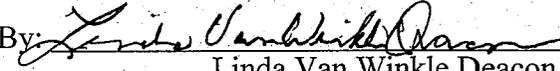
Conclusion

CONCLUSION

Based on the foregoing, as well as the evidence and argument submitted by the parties at the hearing, the Hospital is entitled to judgment as a matter of law on each of the allegations raised in the Consolidated Amended Complaint and said complaint must be dismissed.

DATED: January 25, 2012

BATE, PETERSON, DEACON, ZINN & YOUNG LLP

By: 
Linda Van Winkle Deacon

Attorneys for Respondent
USC UNIVERSITY HOSPITAL

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My electronic mail address is: jra@bpdzylaw.com. My business address is 888 S. Figueroa Street, 15th Floor, Los Angeles, California 90017.

On January 25, 2012, I caused to be served the foregoing document described as **POST-HEARING BRIEF OF RESPONDENT USC UNIVERSITY HOSPITAL** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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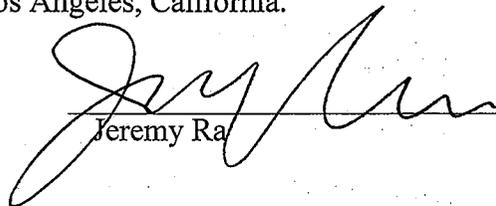
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I declare under penalty of perjury under the laws of the state of California that the above is true and correct.

Executed on January 25, 2012, at Los Angeles, California.



Jeremy Ra