

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

**PROFESSIONAL MEDICAL
TRANSPORT, INC.**

and

**Cases 28-CA-23399
28-CA-60435
28-CA-61218
28-CA-62824**

**INDEPENDENT CERTIFIED EMERGENCY
PROFESSIONALS OF ARIZONA, LOCAL #1**

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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TABLE OF CONTENTS

I. PROCEDURAL HISTORY2

II. QUESTIONS INVOLVED3

III. BACKGROUND4

 A. Respondent’s Operations4

 B. History of the Parties’ Bargaining Relationship4

 1. Recognition of the Union4

 2. Decision of ALJ William G. Kocol5

 3. Board Settlement Agreement5

IV. DISCUSSION AND ANALYSIS5

 A. Respondent’s Section 8(a) (1) Violation by Informing
 Employees they Could Not Take Concerted Complaints
 to the Human Resources Department5

 1. The ALJ’s Findings6

 2. The Record Evidence6

 3. Legal Analysis8

 B. Respondent’s Section 8(a) (1) Violation by Threatening
 Employees with Surveillance and Termination9

 1. The ALJ’s Findings9

 2. The Record Evidence10

 3. Legal Analysis11

 C. Respondent’s Various Statements in an August 16 Discipline
 Violated Section 8(a)(1) of the Act.12

 1. The ALJ’s Findings12

 2. The Record Facts13

 3. Legal Analysis13

 D. Respondent Violated Section 8(a)(1) of the Act in Statements
 Limiting Employee’s Right to Union Representation15

 1. The ALJ’s Findings15

 2. The Record Evidence16

 3. Legal Analysis16

E.	Respondent’s Violations in Its Discipline of Union President Barkley and Union Vice President Travis Yates.....	17
1.	The ALJ’s Findings.....	17
2.	The Record Facts.....	18
3.	Legal Analysis.....	31
F.	Information Requests.....	39
1.	The ALJ’s Findings.....	39
2.	The Record Evidence.....	39
3.	Legal Analysis.....	43
G.	Unilateral Changes.....	46
1.	Unilateral Cessation of Unit 603 Service.....	46
2.	Abrogation of the Settlement Agreement.....	50
H.	Credibility Determinations of the ALJ.....	53
1.	The ALJ’s Findings.....	53
2.	Legal Analysis.....	54
III.	CONCLUSION.....	55

TABLE OF CONTENTS

<i>“Automatic” Sprinkler Corp.</i> , 319 NLRB 401 (1995).....	48
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967).....	43
<i>ADS Elec. Co.</i> , 339 NLRB 1020 (2003).....	33
<i>Affiliated Foods, Inc.</i> , 328 NLRB 1107 (1999).....	32
<i>American Freightways Co.</i> , 124 NLRB 146 (1959).....	08
<i>American Gardens Mgmt. Co.</i> , 388 NLRB 644 (2002)	34
<i>American Tissue Corp.</i> , 336 NLRB 435 (2001).....	17
<i>Atlas Metal Parts, Co. v. NLRB</i> , 660 F. 2d 304 (7th Cir. 1981)	43
<i>Beverly Cal. Corp. v. NLRB</i> , 227 F.3d 817 (7th Cir. 200)	44
<i>Blockbuster Pavilion</i> , 331 NLRB 1274 (2000).....	12
<i>Bloomington-Normal Seating Co.</i> , 339 NLRB 191 (2003).....	12
<i>Brazos Electric Power Cooperative, Inc.</i> , 241 NLRB 1016 (1979).....	43
<i>Camaco Lorain Manufacturing Plant.</i> , 356 NLRB No. 143 (April 29, 2011).....	11
<i>Caterpillar Inc.</i> , 322 NLRB 674 (1996).....	34
<i>Champion International Corporation</i> , 339 NLRB 672 (2003).....	48
<i>Daniel I. Burk Enterprises</i> , 313 NLRB 1263 (1994).....	49
<i>Detroit Newspaper Agency</i> , 317 NLRB 1071 (1995)	45
<i>Diester Concentrator Company</i> , 253 NLRB 358 (1980).....	53
<i>Dish Network Service Corp.</i> , 339 NLRB 1126 (2003).....	17
<i>Dubuque Packing</i> , 303 NLRB 386 (1991).....	48
<i>Fairleigh Dickinson University</i> , 264 NLRB 725 (1982)	08
<i>First National Maintenance Corp. v. NLRB</i> , 452 U.S. 666 (1981).....	48
<i>Flexsteel Industries</i> , 316 NLRB 745 (1995)	12
<i>Flying Foods Group, Inc</i> , 345 NLRB 101 (2005).....	14
<i>Freedman Die Cutters, Inc.</i> , 340 NLRB 422 (2003)	49
<i>Gannett Co. Inc.</i> , 333 NLRB 355 (2001)	48
<i>Golden Day Schools v. NLRB</i> , 644 F.2d 834 (9th Cir. 1981).....	32
<i>Good Life Beverage Co.</i> , 312 NLRB 1060 (1993).....	45
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1999).....	14
<i>Hall v. NLRB</i> , 941 F.2d 684, 688 (8th Cir. 1991).....	32

<i>Hanes Hosiery, Inc.</i> , 219 NLRB 338 (1975).....	08
Heartshare Human Svcs. of New York, 339 NLRB 842 (2003)	11
<i>NLRB v. Illinois Tool Works</i> , 153 F.2d 811 (7th Cir. 1946).....	08
<i>JAMCO</i> , 294 NLRB 896, 905 (1989).....	32
<i>Jewish Home for the Elderly of Fairfield County</i> , 343 NLRB 1069 (2004)	11
<i>J.S. Troup Elec.</i> , 344 NLRB 1009 (2005).....	33
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962)	48
<i>Limestone Apparel Corp.</i> , 255 NLRB 722 (1981).....	33
<i>Los Angeles Soap Co.</i> , 300 NLRB 289 (1990).....	48
<i>NLRB v. McCullough Envtl. Servs.</i> , 5 F.3d 923 (5th Cir. 1993)	33
<i>Mid-Mountain Foods, Inc.</i> , 332 NLRB 251 (2000).....	32
<i>Miller Electric Pump & Plumbing</i> , 334 NLRB 824 (2001).....	08
<i>Montgomery Ward</i> , 316 NLRB 1248 (1995).....	33
<i>Naomi Knitting Plant</i> , 328 NLRB 1279 (1999).....	32
<i>National Car Rental Systems</i> , 252 NLRB 150 (1980)	48
<i>The Ohio Calcium Company</i> , 34 NLRB 917 (1941).....	53
<i>Ohio Power Co.</i> , 216 NLRB 987 (1975).....	43
<i>Operating Engineers Local Union No. 3</i> , 324 NLRB 1183 (1997)	33
<i>Overnight Transportation Corp.</i> , 296 NLRB 669 (1989).....	08
<i>Painters and Allied Trades District Council No. 51</i> , 321 NLRB 158 (1996).....	54
<i>Penntech Papers v. NLRB</i> , 706 F. 2d 18 (1st Cir. 1983).....	48
<i>Peter Vitalie Co., Inc.</i> , 310 NLRB 866 (1993).....	33
<i>NLRB v. Professional Medical Transport, Inc.</i> , No. 11-71785 (9th Cir. 2011).....	05
<i>NLRB v. Rain-Ware, Inc.</i> , 732 F.2d 1349 (7th Cir. 1984).....	32
<i>Reno Hilton Resorts v. NLRB</i> , 196 F.3d 1275 (D.C. Cir. 1999).....	32
<i>Richardson Bros. South</i> , 312 NLRB 534 (1993).....	32
<i>Roadway Express, Inc.</i> , 327 NLRB 25 (1998).....	32
<i>R.T. Jones Lumber Co.</i> , 303 NLRB 841 (1991).....	53
<i>NLRB v. Scrivener</i> , 405 U.S. 117 (1972).....	33
<i>Shattuck Denn Mining Corp. v. NLRB</i> , 362 F.2d 466 (9th Cir. 1966).....	33
<i>Southwire Co.</i> , 282 NLRB 916 (1987).....	08

<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950)	54
<i>St. Anthony Hospital Systems</i> , 319 NLRB 46 (1995)	48
<i>Transmarine Navigation Corp.</i> , 170 NLRB 389 (1968)	48
<i>NLRB v. Vemco, Inc.</i> , 989 F.2d 1468 (6th Cir. 1993)	32
<i>W.W. Grainger, Inc., v. NLRB</i> , 582 F.2d 1118 (7th Cir. 1978)	32
<i>Walter M. Yoder & Sons v. NLRB</i> , 754 F. 2d 531 (4th Cir. 1985)	43
<i>NLRB v. Weingarten, Inc.</i> , 420 US 251 (1975)	16
<i>Willamette Tug & Barge Co.</i> , 300 NLRB 282 (1990)	48
<i>Wright Line</i> , 251 NLRB 1083, 1089 (1980)	32, 33, 36

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ACTING GENERAL COUNSEL’S ANSWERING BRIEF

By its exceptions, Professional Medical Transport, Inc. (Respondent)¹ seeks to have the Board ignore the record evidence which establishes that Respondent engaged in numerous unfair labor practices including the unprecedented discipline of the two top officers of the Independent Certified Emergency Professionals of Arizona, Local #1 (the Union) in violation of Section 8(a) (3) and (4) of the Act. Moreover, Respondent would have the Board ignore the well-reasoned conclusions and credibility determinations of Administrative Law Judge Lana Parke (the ALJ). Respondent, in its 72 exceptions, disagrees with virtually each and every piece of record evidence which the ALJ relied upon as a basis to establish Respondent’s illegal conduct.

The ALJ found that Respondent committed numerous and serious unfair labor practices, in violation of Section 8(a) (1), (3), (4), and (5) of the Act. These include: (a) the unlawful discipline of the Union President and Vice President; (b) the failure and refusal to

¹ Professional Medical Transport, Inc. is referred to as Respondent. The Independent Certified Emergency Professionals of Arizona, Local No. 1 is referred to as Union. References to the ALJD show the applicable page number. “Tr. ___” refers to pages of the transcript from the hearing held October 11 through October 14, 2011. “GCX ___” refers to exhibits introduced by the Acting General Counsel at the hearing. “RX___” refers to exhibits introduced by Respondent at the hearing. “UX___” refers to exhibits introduced by the Union at the hearing.

provide relevant information to the Union; (c) unilateral changes to the wages, hours and working conditions of bargaining unit employees; (d) the abrogation of a provision in a previous settlement agreement; (e) numerous instances of threats of discipline; (f) impeding employees' rights to Union representation; and (g) promulgated overly-broad rules prohibiting employees from bringing forth concerted complaints. Respondent's exceptions are without merit and should be denied. Except as otherwise set forth in the Acting General Counsel's Cross-Exceptions, the Board should adopt the ALJ's findings of fact, conclusions of law, and recommended order as they relate to Respondent's Exceptions.

I. PROCEDURAL HISTORY

A hearing in this matter was conducted before ALJ Lana Parke on October 11 through October 14, 2011,² in Phoenix, Arizona, based upon allegations contained in the Second Consolidated Complaint dated September 13, 2011 (the Complaint). (GCX 1(ac)) The ALJ issued her decision (ALJD) on December 20, 2011, properly finding that Respondent engaged in numerous violations of Section 8(1), (3) and (4) of the Act by issuing written discipline, demoting, suspending, and ultimately transferring the Union President and Vice President. The ALJ further found that Respondent engaged in violations of Section 8(a)(1) and (5) of the Act by shutting down an ambulance unit, abrogating provisions agreed to in a settlement agreement, and failing and refusing to provide relevant and necessary information to the Union. Finally, the ALJ found that Respondent engaged in violations of Section 8(a) (1) of the Act by threatening employees with discharge, discipline, unspecified reprisal, and increased surveillance, for engaging in Union and concerted activities, informing employees they could not bring concerted complaints to the Human Resources department, and telling employees they did not have the right to have a Union representative at disciplinary meetings.

² All dates are in 2011 unless otherwise noted.

On January 17, 2012, Respondent filed with the Board, 72 exceptions to the ALJD and a supporting brief. In its exceptions, Respondent generally excepts to all of the findings of the ALJ enumerated above, along with her credibility determinations.

II. QUESTIONS INVOLVED

Respondent's exceptions to the ALJD are both extensive and difficult to discern. Quite literally, Respondent has excepted to virtually every aspect of the decision where the ALJ found a violation, including the associated findings of fact, conclusions of law, and remedies. Moreover, Respondent's brief in support of its exceptions is rambling and incoherent. In an attempt to give order to Respondent's exceptions, the Acting General Counsel (General Counsel) will address what appears to be the general categories of exceptions, that the ALJ erred by: (1) finding that Respondent told employees that they could not take concerted complaints to the Human Resources department; (2) concluding Respondent threatened employees with discharge and surveillance for engaging in Union and other concerted activities; (3) concluding that the written discipline given to Union President Joshua Barkley (Barkley) contained numerous statements in violation of Section 8(a)(1) of the Act; (4) concluding that Respondent's statements to employees that they were not entitled to Union representation in disciplinary meetings was a violation of Section 8(a)(1) of the Act; (5) concluding that Respondent violated Section 8(a)(3) and (4) of the Act when it issued discipline to Barkley and Union Vice President Travis Yates; (6) concluding that Respondent failed to provide relevant and necessary information to the Union; (7) concluding that Respondent made unilateral changes by shutting down an ambulance unit staffed by bargaining unit employees; (8) concluding that Respondent abrogated a provision in the

settlement agreement signed by all parties in violation of Section 8(a)(5) of the Act; and (9) certain of the ALJ's credibility determinations.

As demonstrated below, Respondent's exceptions are without merit and should be rejected. The ALJ's findings of fact and conclusions of law regarding the meritorious unfair labor practices are firmly grounded in Board law and, therefore, should be adopted.

III. BACKGROUND

A. Respondent's Operations

Respondent is a private emergency medical transportation company that provides both emergency and general ambulance transportation throughout the Phoenix metropolitan area pursuant to various contracts with municipalities and private businesses. (GCX 37)

Respondent has two types of operations; 911 Operations and General Transport.

Respondent's 911 Operations, which is managed by Chief Executive Officer for 911 Operations Pat Cantelme (Cantelme), provides medical transportation and care in emergency situations. (Tr. 37, 101) General Transport Operations, managed by General Transport Manager Wayne Clonts (Clonts), transports patients in non-emergency situations to hospitals, assisted-living centers, and nursing homes.

B. History of the Parties' Bargaining Relationship

2. Recognition of the Union

On July 7, 2006, pursuant to a recognition agreement, Respondent recognized the Union as the exclusive collective-bargaining representative of the following unit (the Unit):

All full-time paramedics, EMT's, IEMT's, and registered nurses, but excluding administrative staff individuals, support services, personnel not directly operating in the field as an EMS provider, guards, office clerical and supervisors as defined under the Act. (GCX 35)

The Union's president, from its inception, has been Joshua Barkley (Barkley), who works for Respondent as a full-time paramedic. (Tr. 401, 403)

2. Decision of ALJ William G. Kocol

On November 9, 2009, Administrative Law Judge William G. Kocol issued his decision in *Professional Medical Transport, Inc.*, JD(SF)-38-09, which was enforced by the United States District Court for the Ninth Circuit. (GCX 37, 79; 80) See *NLRB v. Professional Medical Transport, Inc.*, No. 11-71785 (9th Cir. 2011) In that decision, Respondent was taken to task for abrogating its bargaining obligation by refusing to provide information to the Union, making unilateral changes to Unit employee working conditions, and illegally withdrawing recognition from the Union. (GCX 37, at p. 9, 13, 15). As part of the remedy, Respondent was ordered to recognize and bargain with the Union in good faith. (GCX 37 at p. 15)

3. Board Settlement Agreement

Based on another set of unfair labor practice charges alleging Respondent's continued violations of the Act, on December 1, 2010, ALJ Kocol approved a Settlement Agreement wherein Respondent agreed to certain terms, which included "...allow[ing] the Union President or his designee to attend these (bargaining, grievance, scheduling, operations and safety) meetings and receive their normal wages, if those meetings are scheduled during an assigned shift of the Union President or his designee". (GCX 34, Notice to Employees, page 3)

IV. DISCUSSION AND ANALYSIS

A. Respondent's Section 8(a) (1) Violation by Informing Employees they Could Not Take Concerted Complaints to the Human Resources Department

1. The ALJ's Findings

The Complaint alleges, and the ALJ found, that in December 2010, Respondent, through 911 Regional Manager Beverly Lemoine (Lemoine), informed employees that they were prohibited from taking concerted complaints to the Human Resources Department in violation of Section 8(a)(1) of the Act. (ALJD at 14) Respondent argues that, because employees eventually did take their complaints to the Human Resources department and that Lemoine had no authority to bar employees from the Human Resources department, the ALJ's findings are "baseless." Respondent also attacks the ALJ's credibility determination, asserting that the ALJ should have believed Lemoine's denial over employees' testimony as well as Lemoine's own performance improvement plan where she was specifically admonished to facilitate employee's access to the Human Resources department. Respondent purposefully fails to mention this evidence in its exceptions. Respondent's argument has no merit and should be rejected.

2. The Record Evidence

Paramedic Christopher Mills (Mills) was assigned to Station 607 in Scottsdale, Arizona from on or about June 2, 2010, until he resigned from his employment with Respondent on August 6. (Tr. 533-537) Mills' partner at Station 607 was employee Heidi Spickler. (Tr. 543) In December 2010, Mills and Spickler became aware of conduct occurring in Station 607 concerning another employee, Dave Medley, and they were concerned that Medley was engaging in what potentially could be inappropriate conduct with a paramedic student, Christina Bosso-Williams. (Tr. 542-43) Mills and Spickler were concerned about the inappropriate conduct for several reasons. First, Bosso-Williams was a paramedic student under the preceptor program where students from paramedic schools work

with Respondent's paramedics for their clinical hours. (Tr. 545) Second, Mills and Spickler did not want to get in trouble themselves because they knew about Medley's conduct with a student at the station. (Tr. 544) Finally, it was inappropriate for a student to be spending the night in the station with an employee when neither of them were scheduled to be on duty. (Tr. 544) Mills brought these concerns to Orlando Alcorido, the Manager who ran the preceptor program. (Tr. 544) Alcorido told Mills he should just talk to Medley about the situation. (Tr. 545) Mills told Alcorido he was not going to talk to Medley about the situation because Medley was confrontational, that Alcorido was the manager of the preceptor program, and Mills was giving him the information so Alcorido could handle it if he wanted. (Tr. 545)

The next morning Mills arrived at his station. Medley and Bosso-Williams were present. (Tr. 546) The Field Training Officer on the shift, John Gary, arrived and asked Mills why Bosso-Williams was at the station wearing pajamas and why female clothing was in the washing machine. (Tr. 546) Mills merely told Gary that it was a common occurrence. (Tr. 546) However, a few days later, Scottsdale Regional 911 Manager Bev Lemoine called Mills on his cell phone and asked him the same questions about Medley and Bosso-Williams. (Tr. 547) Mills answered her that Bosso-Williams had been in pajamas at Station 607 and there were female clothing in the washing machine. (Tr. 547)

The next day, Spickler informed Mills that she had received a threatening text message from Medley, stating that Medley was going to come in and handle Mills because he was a "snitch." (Tr. 548) Spickler and Mills discussed what they should do about the threat as both were concerned about a confrontation at Station 607 with Medley. (Tr. 548) After they completed a 911 call, Mills called Lemoine about the situation. (Tr. 549) Mills told Lemoine to get control of Medley, that he was not going to tolerate threats, that Spickler did

not want to be involved in any confrontation, and that Mills wanted to file a hostile work environment complaint with Human Resources. (Tr. 549-550) Lemoine admits that Mills was concerned about the safety of employees and the paramedic trainee program. (Tr. 247) Lemoine told Mills that he needed to calm down and that she would take care of the situation. (Tr. 550) Mills argued that telling him to calm down was not making him feel secure, that Lemoine was downplaying what had happened and that he wanted to file a hostile work environment complaint with Human Resources. (Tr. 550) At that point, Lemoine told Mills he could not file a hostile work environment complaint because there was not a hostile work environment, that Mills had not been assaulted, that he could not go to Human Resources, and that Mills needed to follow the chain of command. (Tr. 550-551)

3. Legal Analysis

As found by the ALJ, Respondent's "no-harm-no-foul" argument that the allegation should be dismissed because Mills eventually did contact human resources, is without merit. (ALJD at 14) In evaluating the lawfulness of a communication, the Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). "It is well settled that the test of interference, restraint, and coercion under Section 8(a) (1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."³

³ *American Tissue Corp.*, 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). See also *Overnight Transportation Corp.*, 296 NLRB 669, 685-687 (1989), enforced, 938 F.2d 815 (7th Cir. 1991); *Southwire Co.*, 282 NLRB 916 (1987) (quoting *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975)); *Fairleigh Dickinson University*, 264 NLRB 725 (1982), enforced mem., 732 F.2d 146 (3d Cir. 1984); *American Freightways Co.*, 124 NLRB 146 (1959).

Additionally, Respondent excepts to the ALJ's findings that Lemoine made the statement in question. (ALJD at 6) Respondent fails to point out in its exceptions that Lemoine admitted that, because of her conversation with Mills, and by telling him he could not take a hostile work environment complaint to Human Resources, she received a performance improvement plan that states "Facilitate referrals to HR when requested." (Tr. 246; GCX 8) Lemoine's testimony that she never told Mills he could not to go to the HR department is simply not consistent with the performance improvement plan that she admits was given, in part, for her conversation with Mills. (Tr. 641)

In sum, the record shows and the ALJ properly found that Respondent, through Lemoine's statements, promulgated an overly-broad and discriminatory rule prohibiting employees from taking concerted complaints to the Human Resources Department. Respondent's statements violate Section 8(a) (1) of the Act, and Respondent's exceptions are without merit and should be disregarded.

B. Respondent's Section 8(a) (1) Violation by Threatening Employees with Surveillance and Termination

1. The ALJ's Findings

The ALJ properly found that Respondent's statements, through 911 Regional Manager Barbie Marr (Marr), that an employee was being watched and was subject to termination after that employee expressed concern that he was being targeted due to, in part, to his union activities, was an unlawful threat of termination and surveillance in violation of Section 8(a)(1) of the Act. (ALJD at 14) Respondent argues that there was no connection between Marr's statements and any union activity. Further, Respondent seems to take the ALJ to task for not mentioning that Marr was not available to testify due to illness, somehow suggesting that because Marr was ill and did not testify, the ALJ should excuse Respondent from having

to defend this allegation. Respondent's arguments are without merit as the evidence clearly showed a nexus between employee's fears of being targeted for his union activities and Marr's threats, corroborated by two witnesses.

2. The Record Evidence

On March 21, Paramedic Gregory Empey (Empey) was directed to attend a meeting with General Transport Manager Wayne Clonts (Clonts) and Marr, to discuss a delayed "move-up" time.⁴ (Tr. 578) Empey and his partner, Phillip Maskell, both attended the meeting with Yates as their union representative. (Tr. 578) During Empey's meeting, Empey made the statement that he believed he was being discriminated against because of his age, the fact his pay rate was at the high end, and because of his union affiliation. (Tr. 582; 597) In this meeting Empey was issued a Memo to File (GCX 58), after which Marr turned to Empey and said "Greg, I want you to know as to the concerns you brought up earlier in the meeting, you are being watched, and you are subject to termination in the future." (Tr. 584; 598) Because Marr did not testify at the hearing, employee testimony as to what occurred at this meeting was unrebutted.

Both Empey and Yates consistently testified that Marr made the statement as alleged above. Respondent's only witness to this exchange was Clonts. When Clonts was initially asked about the meeting with Empey by the General Counsel, he stated that he had no specific memory of the meeting and remembered no details. (Tr. 281) He could not remember who was present, he could not recall anything that was said, and he could not remember whether Yates asked for a move-up policy. (Tr. 281-282) Yet, when questioned by Respondent,

⁴ A move-up is an action taken by a 911 ambulance that is moving to another geographical location in the city when the 911 ambulance assigned to the move-up location is not available either due to a call or other reason. (Tr. 105) This allows a 911 ambulance to be in a geographical location available for 911 call at all times. (Tr. 105-106)

Clonts testified that Marr made no threats at the meeting, despite having no memory of the meeting two days earlier when examined by the General Counsel. (Tr. 281; 637) Clonts' failed memory and inconsistent account is the testimony that Respondent, in its exceptions, reports as being ignored by the ALJ.

3. Legal Analysis

The ALJ properly found that Marr's statement to Empey ("Regarding your concerns you stated earlier, you are being watched and you are subject to termination") not only creates an impression among employees that their Union and other concerted conduct is under surveillance, but amounts to a threat of termination for those activities. Empey had just informed Supervisors Clonts and Marr that he felt he was being targeted because, among other things, of his union affiliation. Marr's statement confirms his fears.

Creating the impression of surveillance violates Section 8(a) (1) as it tends to restrain employees in their union activities. An employer creates an unlawful impression of surveillance if the employee "would reasonably assume from the statement in question that their union activities had been placed under surveillance." *Heartshare Human Services of New York*, 339 NLRB 842, 844 (2003); *Camaco Lorain Manufacturing Plant.*, 356 NLRB No. 143 (April 29, 2011). Any employee, after stating that he believes he is being targeted due to his union affiliation, would be concerned that his union activities were under surveillance after a supervisor confirmed his belief by telling him he was being watched. Marr's statements created the impression of surveillance clearly and unequivocally.

It is well-settled that threats of job loss, as well as other denial of benefits or adverse employment actions, violate Section 8(a)(1).⁵ Here, the evidence is clear that Marr, after

⁵ See, e.g., *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1091-96 (2004) (employer violated the Act where it threatened job loss and plant closure and threatened employees with arrest if they

telling Empey that he was being watched due to his union affiliation, follows it with “and you will be subject to termination.” Marr does not state that some misconduct on the part of Empey will cause his termination, but directly relates Empey’s potential termination to his statement and her confirmation that Empey is being watched due to his union affiliation. This is a direct threat of termination and violates Section 8(a)(1) of the Act. The fact that the ALJ does not mention that Marr did not testify due to illness⁶ is nothing more than Respondent grasping at straws in trying to show some unknown bias on the part of the ALJ in her decision to sustain this violation on the credible and specific evidence of two current employees and the contradictory testimony and lack of any specifics in the testimony of Clonts.

Bloomington-Normal Seating Co., 339 NLRB 191, 193 (2003) (employees’ testimony which is against the interest of their employer is inherently credible as they subject themselves to possible recrimination, the perils of which would be even greater if such testimony was false) citing *Flexsteel Industries*, 316 NLRB 745 (1995). Respondent’s exceptions are without merit and should be disregarded.

C. Respondent’s Various Statements in an August 16 Discipline Violated Section 8(a)(1) of the Act.

1. The ALJ’s Findings

The ALJ found that the August 16 written demotion, suspension, and transfer, issued to Barkley contained statements that constituted threats of reprisal, in various ways, for filing charges with the NLRB. (ALJD at 15) Respondent argues that it was denied due process because there are no allegations in the Complaint that allege these statements as violations of

supported the union); *Blockbuster Pavilion*, 331 NLRB 1274 (2000) (employer violated the Act where it threatened discharge and denial of work opportunities for union activity and threatened to burn the facility before it allowed a union to represent employees).

⁶ Respondent made no offer of proof or provided any specific evidence of Marr’s illness with the exception of Clonts saying Marr was ill. The simple fact is that Marr did not testify. Regardless of the reason for her absence, the ALJ had only the generalized and inconsistent testimony of Clonts to compare with the specific and credible testimony of Empey and Yates. (ALJD at 7, fn. 14)

the Act, and that Respondent has the freedom of speech to state its opinion about Barkley filing unfair labor practice charges that were not found to have merit as well as accusing the Board, in Barkley's discipline, of giving unjustified credence to Barkley's charges. Respondent's assertions are completely false and without merit and should be dismissed.

2. The Record Facts

After being on Administrative Leave since July 7, Barkley was called into Director of Compliance Jim Roeder's (Roeder) office on August 16, and was handed a four-page document titled "Disciplinary Suspension, a document signed by Roeder and Director of Operations Ted Beam (Beam)(GCX 69) Page four of Barkley's suspension states:

PMT is well aware of Mr. Barkley's propensity for filing unsubstantiated Unfair Labor Practice (ULP) complaints with no basis in fact, and of the NLRB's tendency to give unjustified credence to those complaints.

Regarding this language, Roeder testified that it was his opinion the NLRB has a tendency to give unjustified credence to Barkley's complaints of unfair labor practices, and that opinion was used in the discipline of Barkley. (Tr. 345)

The Complaint alleges, in paragraph 6(c)(1) through (4) that on or about August 16, 2011, Roeder and Ted Beam, threatened employees with suspension, demotion, removal from their assigned shift, and unspecified reprisals, for filing charges under the Act. (GCX 1(ac))

3. Legal Analysis

Respondent's due process arguments are completely without merit. As indicated by paragraph 6(c)(1) through (4) of the Complaint, Respondent's statements made in the August 16 document given to Barkley were alleged as unlawful threats, and Respondent had sufficient notice of these allegations. Respondent's absurd argument that the allegations in

the Complaint did not use the word “unsubstantiated” before the word “charges” is hardly worth mentioning, except to show the utter lack of merit of Respondent’s arguments.

Further, Respondent’s arguments that Roeder and Beam are just stating their opinion, and they are free to do so, is totally without merit. First, Respondent makes a point of arguing that some of Barkley’s charges against Respondent have not been found to have merit. Of course, Respondent fails to point out the extensive record of substantiated unfair labor practices it has been found to have committed. Moreover, whether any of Barkley’s charges have been found to have merit does not matter—employees’ cannot be discriminated against, threatened or in any way retaliated against because they have filed charges with the NLRB. The law does not say only substantiated or meritorious charges are protected. Any filing of charges or assistance to the NLRB is protected conduct by employees. Second, while Respondent is free to have an opinion about Barkley’s charges, and the NLRB’s handling of those charges, but Respondent is not free to state that opinion to employees in a disciplinary action, suggesting that the discipline is being given, in part, because that employees exercised his Section 7 right to file charges with the Board. Respondent’s entire slate of case law that it presents in its exceptions concern an employer’s statements about labor issues and unionization in general during union organizing campaigns or collective-bargaining negotiations. See *Flying Foods Group, Inc, d/b/a Fling Foods and Hotel Employees Restaurant Employees International Union, Local 355, AFL-CIO*, 345 NLRB 101, 105 (2005) (Employer did not violate the Act when it showed the video “Little Card, Big Trouble” to groups of employees to show its opinion of the consequences of signing a union authorization card.) *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1999) (Union organizing campaign where the Board held that employer’s can express its views about labor issues and

unionization, provided the employer does so in non-coercive terms.) Respondent utterly fails to present any case where the facts are similar to the facts in this case—taking an employee to task for filing charges with the NLRB.

The document issued to Barkley (GCX 69) is not an employer’s campaign document, or updates on negotiations. It is a Disciplinary Suspension issued to Barkley, wherein Respondent specifically refers to Barkley’s protected conduct—filing charges with the Board. Roeder and Beam both signed and presented GCX 69 to Barkley, tying Barkley’s suspension, demotion, and transfer to his filing of unfair labor practice charges. The ALJ properly found that, what an employee would believe after reading GCX 69, is that he would be subject to further discipline and reprisal if he continued filing unfair labor practice charges with the NLRB. This statement, written on a disciplinary suspension, demotion and transfer, warns employees that if they continue to engage in Section 7 activities, particularly by availing themselves of the Board’s process, they will suffer retaliation for filing charges under the Act. Respondent’s arguments are completely and utterly without merit and should be dismissed.

D. Respondent Violated Section 8(a)(1) of the Act in Statements Limiting Employee’s Right to Union Representation

1. The ALJ’s Findings

The ALJ found that when Clonts informed employee Craig Clifford that he was not entitled to union representation when a verbal warning was the contemplated discipline, Clonts violated Section 8(a)(1) of the Act. (ALJD at 14) Respondent argues that, because Clifford was eventually given union representation, and Respondent has given employees union representation in the past, there is no violation in the statement. Respondent’s argument is without merit, not supported by legal precedent, and should be disregarded for the reasons set forth below.

2. The Record Evidence

In the early part of August, Emergency Medical Technician Craig Clifford (Clifford) was facing disciplinary actions for alleged difficulties with co-workers. (Tr. 635) Clifford was called into Clonts' office to address these concerns. (Tr. 569) Clifford asked Clonts if he could stop the meeting, because if the meeting involved an investigation or discipline, he wanted to have union representation. (Tr. 569) Clonts told Clifford to stop, put his hand up in a "stop" gesture, and said there would be a follow-up meeting for disciplinary action and sent Clifford home. (Tr. 570) Later that week, on or about August 19, Clonts called Clifford on his personal cell phone to tell him that Respondent had reached a conclusion on his discipline. (Tr. 571) Clonts told Clifford that he did not need a union representative at the upcoming meeting because when Respondent is giving only a verbal discipline, employees are not required to have a union representative present. (Tr. 571-572) Clifford went to the meeting and did have union representation despite Clonts' statements. (Tr. 573) Clonts' testimony was only a general denial, claiming that he did not tell Clifford he was not entitled to union representation. (Tr. 635) Clonts never denied telling Clifford that he was only entitled to union representation if the discipline was higher than a verbal discipline.

3. Legal Analysis

On August 19, Clonts announced to Clifford, when Clifford asked for union representation, that employees are only entitled to a union representative if the discipline is going to be higher than a verbal warning. This statement not only misstates the law, but constitutes a threat under Section 8(a)(1) of the Act. In *NLRB v. Weingarten, Inc.*, 420 US 251 (1975), the Supreme Court ruled that an employee's insistence upon union representation at an employer's investigatory interview, which the employee reasonable believes might

result in disciplinary action, is protected concerted activity and that the right to union representation is “inherent in Section 7’s guarantee of the right of employees to act in concert for mutual aid and protection.” Id at 256-57. Although Clonts did not follow through with his threat, and subsequently allowed Clifford to have a union representative present for the meeting, Clonts initial statement was a threat and constitutes a violation of Section 8(a)(1) of the Act. See *Dish Network Service Corp.*, 339 NLRB 1126, 1126-37 (2003) (employer statements and policy casting doubt on right of steward to be present in investigatory meetings communicate to employees futility of trying to deal with respondent through their designated representative.) Respondent’s continued “no-harm-no-foul” argument to the Section 8(a)(1) violations found by the ALJ is not supported by the law. As stated earlier, the test for determining whether a statement made to employees violates Section 8(a)(1) is not whether the statement reasonably tends to interfere with employees free exercise of Section 7 rights, not whether Respondent is actually successful in interfering with that right. *American Tissue Corp.*, supra. Respondent’s defense in its exceptions that the statements made by its managers and supervisors are not violations because employees continued to advocate for their Section 7 rights after being threatened is complete and utter nonsense and a desperate attempt at defending its illegal conduct.

E. Respondent’s Violations in Its Discipline of Union President Barkley and Union Vice President Travis Yates

1. The ALJ’s Findings

The ALJ properly found that Respondent’s June 28 written warnings issued to Barkley and Yates, and its August 16 written warning given to Yates and the suspension, demotion, and transfer issued to Barkley, violated Section 8(a)(3) and (4) of the Act. (ALJD at 15-16) The ALJ further found that Respondent violated Section 8(a)(3) and (4) of the Act by placing

Barkley on administrative leave for five and a half weeks. (ALJD at 16) Respondent argues that the ALJ ignored Respondent's side of the story, that the ALJ should have believed its witnesses, and suggests that the ALJ used a "results-oriented approach" in her decision. Respondent's exceptions to the ALJ's findings are completely meritless.

2. The Record Facts

The record evidence provides ample support for the ALJ's findings. Barkley has been the President of the Union since its inception in 2006. (Tr. 404) Barkley filed the charges which resulted in the ALJ Kocol decision, the 2010 settlement agreement, and also filed the charges in the instant matter. (Tr. 404; GCX 1(a), (c), (k), (m), (q), (u), and (z)). Barkley's union activities are numerous and cannot be seriously challenged by Respondent. Barkley has been at each and every negotiating session with Respondent, has made most, if not all, of the information requests for the Union, and has represented employees in disciplinary matters over the time span of several years. (Tr. 404) During this period Barkley has also been employed by Respondent as a full-time paramedic, working 56 hours a week. (Tr. 400)

Yates has been an officer with the Union since its inception in 2006. (Tr. 590) Yates has served as a Union trustee, Business Manager, and Vice President. (Tr. 590-592) In these various positions, Yates has represented employees at disciplinary meetings for approximately three years. (Tr. 591) As of March 2011, Yates took on the roll of receiving all notifications of any discipline of an employee at Respondent as well as representing most employees at disciplinary meetings. (Tr. 593) Yates has provided affidavits to the NLRB in previous cases, and has been subpoenaed to testify in the previous Board hearings. (Tr. 592-593)

a. Discriminatory Verbal Written Warnings of Barkley and Yates

On June 28, Barkley and Yates were called to Station One to meet with Beam and Lemoine. (Tr. 446) At this meeting, Barkley and Yates were advised that they had two “out-of-compliance” calls, one on June 1, and another on June 9.⁷ (Tr. 446-447; 605; GCX 53, 55) On June 1, Unit 604 (Barkley and Yates’ vehicle) was allegedly 13 seconds late to a scene, and on June 9 it was allegedly 4 seconds late to another location. (GCX 52, 54) Despite never having received any discipline in the past, both Barkley and Yates were issued verbal written warnings. (Tr. 233; GCX 51, 56) The disciplines themselves contain inaccurate information, stating that Barkley and Yates had an extended “10-8” time on a move-up assignment, and Lemoine testified that this information on the written disciplines was incorrect.⁸ (Tr. 242; GCX 51, 56)

i. Problems With Equipment

The Union has complained for over a year that much of the equipment Respondent uses to calculate response times is inaccurate. (Tr. 109; 159-161; GCX 23, 26, 27, 40) Barkley and Yates complained, upon receiving the verbal written warnings, that the equipment did not work. (Tr. 453-453; 606) At that point, Beam said he had 100 % faith in the technology. (Tr. 454; 605) However, this statement contradicts Beam’s testimony where he admitted that Barkley had complained about the inaccuracy of the data regarding 10-8 times, and Beam was able to confirm that Barkley’s assertions were correct. (Tr. 393) Respondent’s argument that none of Barkley and Yate’s complaints was ever confirmed is contradicted by its own supervisor’s testimony. (Tr. 393) Barkley and Yates also performed their own experiment with the time discrepancies and informed Lemoine that there was a ten

⁷ “Out-of-compliance” means that a call did not meet the City of Scottsdale requirement that a crew be on the scene within 8 minutes and 59 seconds of receiving the dispatch from the Phoenix Regional Dispatch center. (Tr. 144-146; GCX 36)

⁸ “10-8” refers to a vehicle being en-route to a location.

second delay in between the Phoenix Dispatch and the actual time a unit receives the call.

(Tr. 468; GCX 77)

On May 5, 2010, 911 Manager Pat Cantelme told the Union that the GPS system was being revamped.⁹ (GCX 23) Despite numerous complaints by the Union about the accuracy of Respondent's equipment, including the GPS system,¹⁰ the mobile computer terminal (MCT),¹¹ the traffic light strobes, the fax machines, the printers,¹² and the "tough books,"¹³ Respondent feigned no knowledge of equipment problems when it disciplined Barkley and Yates.¹⁴ (GCX 69) In fact, Respondent accused Barkley of being insubordinate for failing to provide emails to Respondent in defense of his discipline. (Tr. 354; GCX 69) Roeder initially testified that Barkley never notified him about equipment not working correctly. However, once he was shown GCX 63, a letter written by Roeder admitting that Barkley has questioned the validity of the GPS system, he changed his testimony. (Tr. 332; GCX 63)

ii. Respondent's Progressive Discipline Procedure

Respondent uses a progressive disciplinary system, which starts with a memo to file, a verbal written warning, a written warning, a suspension, and ultimately a termination. (Tr. 28) This evidence was presented by Respondent's own Human Resources Manager Joy Carpenter (Carpenter). Carpenter further testified that she instructs managers to follow the progressive disciplinary plan. (Tr. 29) Cantelme also testified that, if a certain crew is having

⁹ Cantelme testified that there were two GPS systems—"In Special" and "In Motion." (Tr. 109-110) Cantelme then testified to an Automatic Vehicle Locator, which is different than the one used by Respondent. (Tr. 110, 112) Cantelme also incredibly testified that the GPS system has been in place for 35 years and he is never aware of anytime it was not working. (Tr. 114) GPS has obviously not been in existence for 35 years nor has it remained static that entire time.

¹⁰ Wilson admitted that the GPS system is never calibrated for accuracy. (Tr. 86)

¹¹ MCT is a computer terminal located in the front of Respondent's ambulances that communicate with the Phoenix Regional Dispatch Center for 911 calls. (Tr. 84) Lemoine testified that MCT's would occasionally shut down by themselves. (Tr. 254)

¹² Respondent conducts no regular maintenance on printers. (Tr. 385)

¹³ Tough books are laptop computers used by the employees to prepare patient care reports. (Tr. 83) There is no regular maintenance schedule for tough books. (Tr. 384)

¹⁴ Lemoine testified that she has received intermittent complaints about radios not working. (Tr. 158)

a particular problem with response times, Respondent's practice is to sit down with the crew and discuss the problem prior to issuing any discipline. (Tr. 119) Cantelme went on to testify that no one would be disciplined for being out of compliance once, but that Respondent only disciplines people because of a pattern of being out of compliance. (Tr. 147) According to Cantelme, the first discipline a crew would receive for having a pattern of non-compliance would be a memo to file, and only after the crew had a discussion with its Regional Manager. (Tr. 148) Lemoine testified that, in the five years Barkley and Yates were assigned to Unit 604, they had never been disciplined or written up for out-of-compliance calls in the past. (Tr. 245) Respondent has provided only two times where Barkley and Yates were "out-of-compliance"—the two times used for their first discipline in five years of employment.¹⁵

However, in the case of Barkley and Yates, Respondent did not follow its own progressive discipline plan, but went straight to a verbal written warning. Respondent did so despite the fact that Barkley and Yates had spotless performance records for the prior five years. (Tr. 233; 245; 606)

Neither Yates nor Barkley had ever been counseled by their immediate supervisor, Lemoine, concerning "out-of-compliance" calls. (Tr. 150, 606) Lemoine initially testified that she had never sat down with Barkley and Yates to discuss delayed response times prior to issuing this discipline; her initial testimony was confirmed by Barkley. (Tr. 455) However, when she was questioned by Respondent's counsel, Lemoine changed her testimony, suddenly claiming that she had spoken to both Barkley and Yates. (Tr. 245; 265) Lemoine

¹⁵ Cantelme testified that "out-of-compliance" means being out of compliance with the City of Scottsdale requirement that 911 units be "on scene" in 8 minutes and 59 seconds, 90% of the time. "Out-of-compliance" does not refer to "10-8" times, or being in route within one minute. (Tr. 144-146; GCX 36) GCX 29 is one month's report of "en-route" times as recorded by the Phoenix dispatch system. It does not show "out-of-compliance" times. (GCX 29) As testified by Lemoine, GCX 29 is not used for discipline and those calls are not verified by GPS. (Tr. 257)

did not, however, provide any dates, times, locations, and/or documentation to support the general and overreaching statements in her changed testimony.¹⁶ (Tr. 265, 268-269) While Lemoine also testified that she may have talked to them “periodically” throughout her time as a manager in 2008, this testimony was insufficient to establish any prior discussions with Barkley and Yates about “10-8” times.¹⁷ (Tr. 265) In fact, Lemoine testified that she talked to all of her crews generally about 10-8 times, which are different than “out-of-compliance” calls, the reason Respondent allegedly disciplined Barkley and Yates. (Tr. 268) Lemoine was not even consistent with why Barkley and Yates received these warnings, as the facts show two “out-of-compliance calls,” yet Lemoine and Respondent referred to them as “10-8” times, two different subjects. (Tr. 266)

iii. Departure from Normal Operating Procedure

Lemoine’s behavior with regard to Barkley and Yates is curious, as it departed from Respondent’s regular procedure. Despite receiving a computer generated advisement on June 1 and June 9 to provide an exception report as to why Unit 604 was a few seconds late in responding to a call, Lemoine never followed up on the message.¹⁸ (Tr. 177; 234; GCX 53, 55) Lemoine testified that she will contact a unit if they have not filled out an exception report either by e-mail or by calling the crew. (Tr. 177, 242) Lemoine has contacted Barkley and Yates about three times over the past year about completing exception reports, but these contacts were never due to a performance or discipline issue. (Tr. 451)

¹⁶ Roeder testified that when a manager talks to an employee about a performance issue, that manager should prepare a “memo to file” to document the discussion. (Tr. 311) No memos-to-file were ever prepared regarding performance issues with Barkley or Yates.

¹⁷ “10-8” times is the time between when a unit receives a dispatch and the unit is en-route to the scene. The term “10-8” is a leftover radio call number, meaning en-route. (Tr. 470)

¹⁸ An exception report is a report to be completed by a crew whenever it is over the allotted time on a call for that city’s contractual requirements. For the city of Scottsdale, the allotted time is 8 minutes and 59 seconds, 90% of the time. (Tr. 176)

Cantelme, Lemoine's supervisor, testified that if a crew does not submit an exception report once or twice, Respondent would not do anything, but if a crew regularly did not do so, Respondent would meet with them and, if necessary, take disciplinary action. (Tr. 138) There is no evidence that Barkley and Yates refused to submit exception reports in the past when asked or reminded to do so by Respondent; this met Cantelme's standard. (Tr. 138) Despite this, nobody informed Barkley and Yates that they were missing an exception report until they were given their discipline on June 28, 2011. (GCX 51, 56) Additionally, Barkley testified that he may receive a hundred messages on his Blackberry per shift. (Tr. 448) Given the amount of messages employees receive each day, Respondent should have followed its established practice of asking Barkley and Yates about the two exception reports. She did not, despite knowing about the exceptions soon after their occurrences, and speaking or meeting with Barkley on multiple occasions.¹⁹ (Tr. 245) If the exception reports are important, and Barkley and Yates have never failed in the past to fill them out, it is puzzling that Lemoine never raised the issue before issuing discipline.

iv. Comparative Discipline

Respondent failed to provide any comparative discipline regarding "out-of-compliance" occurrences. Clonts' statements that he has issued discipline on delayed response times 40-50 times over the past several years is nothing more than self-serving statement, unsupported by any documentary evidence, and not worth of belief. (Tr. 635) No records were produced to support Clonts' statement, despite Respondent's access to its own disciplinary files. Respondent chose instead to rely on an overly-broad and generalized statement from Clonts that discipline has been issued. (Tr. 635) Respondent did not provide

¹⁹ Lemoine knew about the June 1 incident the next day, and learned about the June 9 incident a week later. (GCX 52, 54). Lemoine called Barkley on June 22, requesting attestation forms and was at Station 604 on June 23, look for other forms from Barkley. (Tr. 243-245)

any evidence to show what level of discipline was given, whether employees were mere seconds late or minutes late to a call, whether Respondent has started with the third level of discipline, as it did with Barkley and Yates, or followed its own progressive discipline plan.

b. Barkley's Discriminatory Administrative Leave

On or about July 7, Barkley and Yates were called to Station One to meet with Beam and Roeder. (Tr. 326, 327) At this meeting, they were informed that patient care reports (PCRs) were found in the desk drawer at Station 604 and that these PCRs were theirs. (Tr. 327; 333) Regarding the PCRs, the only documents Respondent has shown Barkley and Yates are two PCRs, with one of the PCRs having three copies. (Tr. 478; 608-609) When asked how the PCRs ended up in the desk drawer, neither Barkley nor Yates was able to answer because they had never seen those PCRs in the desk drawer. (Tr. 484; 609) At the July 7 meeting, Roeder accused Barkley of forging a PCR. Barkley replied that Respondent should get an official to perform an investigation if it was accusing him of a crime. (Tr. 479; 609) Roeder laughed at Barkley's suggestion. (Tr. 479) Barkley was immediately placed on paid administrative leave. (Tr. 327; 484; 609)

Yates was also placed on administrative leave but when Barkley, in his capacity as Union representative, objected, Roeder relented and reversed his decision, allowing Yates to return to work. (Tr. 336-337; 484-486; 610-611) Barkley, who just five minutes earlier had been placed on administrative leave, then asked to return to work as well. (Tr. 486; 611) However, Roeder said he would not change his mind, because Barkley had not asked to return to work during his meeting five minutes earlier. (Tr. 337; 486; 611) Barkley was on administrative leave from July 7 through August 16, an unprecedented amount of time. (Tr. 337-338)

c. Discriminatory Discipline issued to Yates and Barkley

On August 16, Barkley and Yates were summoned back to Station One to meet with Roeder and Beam. (Tr. 338) Barkley was handed a four-page document titled “Disciplinary Suspension, which listed numerous documents that Lemoine allegedly found in the desk drawer on June 23. (GCX 67, 69) This contradicts Lemoine’s written document stating she found the same PCRs on July 7. (GCX 48) Additionally, neither Barkley or Yates was ever afforded an opportunity to review all of the documents listed on their discipline, only the few PCRs shown to them on June 30. (Tr. 514-515) The Disciplinary Suspension also contains Respondent’s contention that a Phoenix Fire Department PCR is different from Respondent’s PCR for the same call. (GCX 69) However, upon review of a redacted document, the record evidence indicates that the PCR Respondent relied upon contains notations that were added by someone other than Barkley. (Tr. 487-488; GCX 48) For example, Barkley testified that the blood pressure notation should be in the section where blood pressure is asked for, not in the narrative. (Tr. 487) Moreover, the document uses a term that Barkley does not use—“PTA”. (Tr. 488) Respondent did not address either of those concerns in its case-in-chief nor did they dispute Barkley’s testimony.

Page four of Barkley’s suspension states:

PMT is well aware of Mr. Barkley’s propensity for filing unsubstantiated Unfair Labor Practice (ULP) complaints with no basis in fact, and of the NLRB’s tendency to give unjustified credence to those complaints.

i. Unprecedented Discipline

Barkley was suspended from his Field Training Officer position, a position he had held for almost five years, resulting in a loss of pay, suspended one 24-hour shift, and transferred to one of three stations. (GCX 69) Despite the language in the discipline that

states “Consistent with actions taken for similar violations,” Roeder testified that Respondent has never demoted a Field Training Officer in the past. (Tr. 343) Additionally, Respondent was unable to provide any evidence that an employee had ever been suspended for 24-hours, or that any employee was made to transfer to a new shift and station as part of a discipline. The only evidence Respondent provided of other employees who were alleged to have committed violations of Health Insurance Portability and Accountability Act (HIPPA) were two previous incidents. The first was the termination of employee Jay Nelson who took a phone number of a patient off of a PCR and continuously called the patient for social contact, occurring on August 4, 2008. (Tr. 294; GCX 61) The second was an employee, Johnny Kaplan, who despite having PCRs in a desk at his station, was found to have taken PCRs out of the station and to his home on a regular basis. (Tr. 296; GCX 60) Kaplan received a written warning on June 29, 2010, and only for taking the PCRs home, not for having PCRs in the desk at his station. (Tr. 296; GCX 60) Although Roeder testified that Yates is the only employee who ever received only a written warning for a HIPPA violation, GCX 60 clearly indicates that Roeder was wrong when he made that statement. (Tr. 358; GCX 60) Outside of the two examples above, there is no evidence that Respondent has disciplined other employee for alleged HIPPA violations. (Tr. 295) Respondent’s discipline of Barkley was unprecedented.

Yates received a written warning for the same reason as Barkley. (GCX 67) Again, the information on the written warning that, documents were found on June 23, contradicts Lemoine’s own memorandum which states that the documents were found on July 7. (GCX 48) Yates was also told he would be required to take remedial training in the handling of PCRs. (Tr. 623; GCX 67) Despite Respondent’s assertions that having PCRs in a desk

drawer is a serious violation, two months later Respondent had yet to provide Yates the remedial training it ordered. (Tr. 623) No other employee has ever received even a written warning for having PCR's in a station desk drawer; Kaplan only received a written warning for taking PCR's home, not for leaving them in a desk drawer in his station. (Tr. 296; GCX 60)

ii. Respondent's Inconsistencies and Inaccuracies

(a). Attestations

Lemoine states that she called Barkley on June 22, and asked him to prepare some attestations that he had allegedly neglected to complete.²⁰ (Tr. 178; 505-506) Lemoine faxed them to Barkley, who filled them out, faxed them back to Lemoine, and placed the hard copies in an envelope that was taken by the courier to Station One, where Lemoine's office is located. (Tr., 178; 505-506) Lemoine testified that she did not receive the complete documents and asked Barkley to complete them again. (Tr. 183; 508) Barkley told Lemoine that he had previously sent them, but could complete them again if she re-faxed the documents to him. (Tr. 508; GCX 46) Barkley testified that Lemoine never resent the attestations to him to complete. (Tr. 508)

(b). Trip to Station 604 by Lemoine on June 23

Barkley's alleged failure to return the attestations supposedly prompted a visit to Station 604 by Lemoine on June 23. (Tr. 187, 220) Curiously, Lemoine hand-delivered attestations and paperwork to employee John Gary to complete that day, but the day before, merely faxed them to Barkley. (Tr. 230-231) Upon arriving at the station, Lemoine states that she innocently looked through the desk and discovered some PCR's and memorandum that Barkley was allegedly told to hand out to other employees over a year earlier. (Tr. 195)

²⁰ Attestations are a portion of a PCR where the paramedic must fill out because the patient is unable to sign or refuses to sign. (Tr. 167) Respondent has been using attestation forms for at least seven years. (Tr. 167)

Lemoine took a picture of the signature page where employees were to sign after receiving the memorandum, but conveniently covered up the area where the signatures would be located, making it impossible for anyone to see whether signatures were actually on the page, proving that Barkley passed out the memorandum. (Tr. 222-225; GCX 49) Lemoine also conveniently left the documents in the desk, so Respondent could not provide a copy during the hearing. (Tr. 198) Lemoine could not remember what the memorandum was about, only that it was “pretty old”. (Tr. 224) Despite having these documents, Barkley and Yates were not asked about the documents on June 28, when they were called in to receive verbal written warnings for “out-of-compliance” calls. Respondent waited until June 30, and then only showed Barkley and Yates three copies of one PCR and the Phoenix Fire Department PCR. None of the other documents were ever shown to Yates and Barkley.

Moreover, the attestations that were so important that Lemoine had to do a search of Station 604, were not presented to Barkley to sign on June 30, July 7, or August 16, when Barkley was present at Station One to receive discipline. (Tr. 202-204) Lemoine did not obtain Barkley’s signatures until sometime in mid to late August. (Tr. 205)

(c). Trip to Station 604 on July 7

Lemoine arrived at Station 604 on July 7, and was told by employee Justin Lisonbee that there were PCRs on the desk. (Tr. 206) Lemoine testified that it was the same desk she searched on June 28, but denied that there were any PCRs on top of the desk at the time. (Tr. 206) Employee Michael Krysik, an employee who turned over information to Respondent in the past that was used in a civil lawsuit filed by Respondent against the Union and Barkley (Tr. 497), told Lemoine that more PCRs were in the Field Training Officer’s closet. (Tr. 207) Lemoine went to the desk, picked up the PCRs and turned them into Station

One. (Tr. 207) She also prepared a memorandum of what she allegedly had found.

(GCX 48) This is after Barkley was at the Station on July 1, and searched the desk as well as the closet and found no PCRs.²¹ (Tr. 492)

(d). Trip to Station 604 on July 8, 2011

What Respondent does next is beyond the pale. Respondent dispatched four senior management officials who descended upon Station 604, video taping the entire event.²² (Tr. 385; 614) Those four managers searched the Field Training Officer's closet, requiring employees Yates and Chris Mills to watch. (Tr. 388-389; 559) Although other paperwork was discovered in the closet, Beam chose to pull out only one PCR indicating that Barkley and Yates were the responding paramedics. (Tr. 390; 617) Yates testified that he looked at the PCR and saw his and Barkley's name on the document.²³ (Tr. 617) Beam testified that the PCR had Chris Mills' name on it. (Tr. 391) If Respondent is to be believed, that the PCR had Mills' name on it, Mills was present during the discovery; Respondent never showed the document to Mills, nor did it take any action against him. (Tr. 391; 534; 560)

(e). HIPPA Issue

Respondent spends several pages of its exceptions explaining HIPPA. However, Respondent has no explanation as to how Barkley and Yates violated HIPPA. Even if the PCRs were found in the desk drawer in Station 604, Roeder had difficulty explaining how having PCRs in a closed desk drawer, inside a paramedic station that has no patients and/or customers, is a violation of HIPPA, outside of the fact that the desk was unlocked. (Tr. 671)

²¹ Barkley testified that he had been searching the station, including the desk, on a regular basis since January, until he no longer worked at Station 604. (Tr. 492) The last time Barkley searched on July 1, no PCRs were found in the desk. (Tr. 493; 495-496) Yates also testified that he had looked in the desk in June and July, and had never seen any PCRs. (Tr. 612-613)

²² Beam, Carpenter, Roeder and Ralph Vassallo. (Tr. 614) were present

²³ Yates testified that later that day, that he informed FTO John Gary about the search of the closet. Gary accompanied by Yates, went to the same closet that was searched, grabbed a stack of PCRs and took them out of the closet. (Tr. 618)

Roeder testified that, if a PCR was on a counter, uncovered, it is a HIPPA violation, but if it was on the counter and covered, it was not. (Tr. 682) However, Respondent could not explain how a PCR turned face-down on a counter in the paramedic station is not a HIPPA violation, while a PCR inside a closed desk drawer is considered a HIPPA violation. (Tr. 683)

Respondent's self-serving statements that its employees don't violate HIPPA doesn't stand true to the facts if, as they allege, PCRs in a paramedic desk is a violation of HIPPA. The fact that Respondent allowed Station 607 to have its PCRs placed in an outside unlocked mailbox for over a year is evidence that Respondent's asserted defense is pretext. Roeder testified that, placing PCRs in an unlocked mailbox outside of Station 607 would be a HIPPA violation. (Tr. 326) Mills testified that Lemoine was the manager who directed the mailbox, in which PCR's were placed, to be installed outside of Station 607 on June 2, 2010. (Tr. 537; 539) Mills credibly testified that he raised concerns to both Lemoine and Roeder about the mailbox. (Tr. 539-541) Respondent took no action for seven months after Mills raised these concerns with Roeder, yet removed the mailbox and placed it inside Station 607 immediately after placing Barkley on administrative leave. (Tr. 538; 541) Lemoine also testified that she had previously observed PCRs placed on visors inside the ambulances. (Tr. 230) Employees Greg Empey, and Mills testified that PCRs are left on counters, printers, and fax machines in the stations on a daily basis. (Tr. 561, 585-586) Given that Lemoine routinely does station checks at these stations, it is likely that she has observed these PCRs in the various locations. The ALJ was correct when she found that Respondent failed to present evidence that it viewed the alleged HIPPA violations as significant given its cavalier attitudes about PCR security in the past and after its discipline of Barkley and Yates. (ALJD at 16)

Respondent also fails to mention in its Exceptions, after making grandiose statements about the importance of HIPPA, that its own HIPPA training materials do not inform employees where PCR's can be placed in the station and certainly do not prohibit placing PCR's in a closed desk drawer. (GCX 15) Additionally, the HIPPA test that is administered to employees, taken by both Barkley and Yates, does not contain any prohibitions or questions as to whether PCR's can be placed in a closed desk in the paramedic station. (Tr. 59; GCX 16, 17) Respondent's training materials state that PCR's must be kept secure, with no explanation as to what "secure" means in practical terms. (GCX 15) Despite Respondent's training materials concerning keeping PCR's secure, Respondent routinely uses couriers to pick up PCR's from stations throughout the metropolitan Phoenix area, despite those individuals being neither healthcare providers nor PMT employees. (Tr. 58) It was not until July 7, after Barkley had been placed on administrative leave, that Lemoine posted signs in the paramedic stations about PCR's, advising employees what to do with them. (Tr. 227; GCX 50) Even then, the sign that Lemoine posted, merely states that PCR's must not be lying around and must be appropriately secured. (GCX 50) Again, Respondent gives absolutely no explanation as to what "appropriately secured" means. Lemoine testified, however, that the PCR's must be in the "office" or somewhere where they are not easily accessible for everybody. Don't leave a "chart lying around." (Tr. 228) Lemoine further testified that the desk in question, with respect to the discipline given to Barkley and Yates, is in the office in Station 604, affirming that even GCX 50 would not prohibit PCR's from being in that desk. (Tr. 229)

3. Legal Analysis

Under *Wright Line*, General Counsel has the initial burden of persuasion and must present evidence “sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision.” *Wright Line*, 251 NLRB 1083, 1089 (1980). In meeting the initial burden of persuasion, General Counsel must establish four elements: (1) the alleged discriminate engaged in protected activity; (2) the employer had knowledge of that protected activity; (3) animus on the part of the employer; and (4) an adverse employment action because of the employee’s protected activity. *Roadway Express, Inc.*, 327 NLRB 25, 26 (1998). The *Wright Line* “burden of proof imposed upon the General Counsel may be sustained with evidence short of direct evidence of motivation. For example, inferential evidence arising from a variety of circumstances such as animus, timing and pretext.” *Id.*

A discriminatory motive or animus may be established by: (1) the timing of the employer’s adverse action in relationship to the employee’s protected activity²⁴ the presence of other unfair labor practices;²⁵ (2) statements and actions showing the employer’s general and specific animus;²⁶ (3) the disparate treatment of the discriminatees;²⁷ (4) departure from past practice;²⁸ (5) failing to adequately investigate whether the discriminatee engaged in the alleged misconduct;²⁹ and (6) evidence demonstrating that an employer’s proffered explanation for the adverse action is a pretext.³⁰ The Board will infer an unlawful motive or

²⁴ See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999); *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (“timing alone may suggest anti-union animus as a motivating factor in an employer’s action”).

²⁵ See *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 251 N.2, 260 (2000), enforced mem., 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534, 534 (1993).

²⁶ See *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473-74 (6th Cir. 1993) (statements, even if lawful, serve as background evidence of animus); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999).

²⁷ See *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

²⁸ See *JAMCO*, 294 NLRB 896, 905 (1989), aff’d mem., 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991).

²⁹ See *W.W. Grainger, Inc., v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978).

³⁰ See, e.g., *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB at 26.

animus where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive."³¹

Once the General Counsel makes the required, initial showing, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089. If the employer presents such evidence, then General Counsel must rebut the defense by demonstrating that the employer would not have taken the action in the absence of the employee's protected activities. *Operating Engineers Local Union No. 3*, 324 NLRB 1183, 1188 (1997). Not only must the employer put forth a legitimate reason for its action, but must persuade by a preponderance of the evidence that it would have taken the same actions even in the absence of the employee's protected activity. *Peter Vitalie Co., Inc.*, 310 NLRB 866, 871 (1993).

Finally, "where an administrative law judge has evaluated the employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.*, 705 F. 2d 799 (6th Cir. 1982).

It is well-settled that Section 8(a)(4) of the Act makes it unlawful to discharge or otherwise to discriminate against an employee because he has filed charges or given testimony under the Act, as well as furnishing information to a Board agent investigating an unfair labor practice charge. *NLRB v. Scrivener*, 405 U.S. 117 (1972). The *Wright Line* analysis is applied by the Board and the courts in determining whether an employee has violated Section 8(a)(4). *NLRB v. McCullough Envtl. Servs.*, 5 F.3d 923 (5th Cir. 1993);

³¹ *J.S. Troup Elec.*, 344 NLRB 1009 (2005) citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995)); *ADS Elec. Co.*, 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

American Gardens Mgmt. Co., 388 NLRB 644 (2002); *Caterpillar Inc.*, 322 NLRB 674 (1996). The only difference is that the General Counsel must establish that the discriminatees either filed charges under the Act, or provided testimony or information under the Act. The analysis as to whether the conduct of Respondent was pretextual remains the same.

In the case at hand, it is very apparent that Respondent is well-aware of the numerous union activities of both Barkley and Yates. Barkley has been the Union President since 2006, and Yates has been a Union officer since that time, most recently, the Vice President. Barkley attends all negotiations and has been the main contact for the Union since 2006. Yates attends the majority of the discipline meetings with Respondent and employees.

Further, Barkley has filed all of the charges against Respondent, including the charges that are now under an enforcement order with the Ninth Circuit and those charges that were settled under the December 1, 2010 settlement agreement. Yates has provided affidavits and been subpoenaed in prior cases.

Respondent's animus towards the Union is amply demonstrated. Roeder and Beam made it very clear that they held an adverse opinion and animus towards Barkley's right to file unfair labor practice charges with the Board and the Board's determinations on the merits of those charges by putting their animus directly in Barkley's suspension. (GCX 69)

a. The Unlawful Verbal Written Warnings given to Barkley and Yates

On June 28, when Barkley and Yates were given verbal written warnings for two calls that were "out-of-compliance," neither Barkley or Yates had received any discipline in their entire five-year employment with Respondent. Given Lemoine's contradictory testimony, it is clear that Barkley and Yates had not even been talked to as a crew about prior "out-of-compliance" times. In its Exceptions, Respondent trots out GCX 29, to show that Barkley and

Yates' had a large number of "10-8" times that were over one minute in December 2010 to support their argument that Barkley and Yates were an on-going problem with timeliness. However, what occurred in December 2010 is immaterial and not-relevant to the discipline of June 28. Barkley and Yates were disciplined for being 14 and 4 seconds over the 8 minute and 59 second compliance standard set by the City of Scottsdale, not "10-8" times. GCX 29 does not show "out-of-compliance" calls, only "10-8" times.

It is understandable as to how Respondent could be confused since the written warnings themselves are incorrect. Respondent prepared those documents, stating that the discipline was for a delayed "move-up," when the actual issue was being "out-of-compliance." Moreover, the absence of any record evidence establishing a consistent application of standards, undermines Respondent's claims. Despite Respondent claiming that it had 40-50 write-ups for "out-of-compliance" disciplines, Respondent failed to present even one of them to support this assertion. Instead, Respondent choose to rely on the overreaching and exaggerated testimony of Clonts, whose memory on specifics throughout his testimony was so lax that his entire testimony was questionable. Respondent's disbelief that the ALJ would not rely on Clonts testimony regarding comparative discipline without even one corroborating document is disingenuous.

Finally, Respondent utterly failed to follow its' own progressive discipline plan. Cantelme testified that employees would be spoken to prior to any discipline being given after a pattern of "out-of-compliance" calls were seen. Cantelme was very specific, stating that no employees would be disciplined after only one or two out of compliance calls. Further, both Cantelme and Carpenter testified that, after being talked to, employees would receive a memo to file prior to any discipline. Respondent completely strayed from this policy in the case of

Barkley and Yates. Respondent never discussed any pattern of out of compliance calls with them and never gave them a memo to file prior to issuing discipline.

Applying *Wright Line*, the record evidence establishes that Respondent violated Section 8(a)(1), (3), and (4) when it issued verbal written warnings to Barkley and Yates on June 28. It is undisputable that Barkley and Yates engaged in union activity as well as filing charges and providing testimony to the Board, that Respondent had knowledge of this activity, and that Barkley and Yates suffered adverse employment actions when they were issued verbal written warnings on June 28. Further, there is a causal link between that adverse action and Barkley and Yates protected activity established by evidence of Respondent's animus toward Barkley and Yates, the timing of the discipline (the day after Respondent became aware that Barkley's charges were before the Ninth Circuit for enforcement), the lack of previous discipline or a pattern of "out-of-compliance" calls, the departure from Respondent's progressive discipline plan, the failure of Lemoine to ask for exception reports for weeks, the mere seconds (4 and 14 seconds) Barkley and Yates were out of compliance, and the utter lack of any evidence of comparative discipline at Respondent. These warnings were a direct attack on the Union's President and Vice President, were totally unfounded, demonstrated Respondent's deep hostility to the Union and its persistence in filing charges against Respondent, and were calculated to build a discipline file for the ultimate removal of the Union's top officers.

b. The Unlawful Patient Care Reports Discipline

Respondent's entire behavior and conduct regarding the patient care reports allegedly found in the desk at Station 604 is unprecedented and bizarre. Respondent's conduct starts with Barkley's apparent sudden incompetence with regard to filling out attestation reports. It continues with Lemoine's appearance at Station 604 to conduct a questionable search which

includes her taking a picture of a memorandum, but conveniently covering the signature page and then leaving the documents at Station 604. This is followed by Lemoine's questionable discovery on July 7 of more PCRs that were not there on June 23. What makes this even more bizarre is that Barkley and Yates searched the desk on July 1, after being told PCRs were found in the desk. Respondent's Exceptions make fun of Barkley's testimony, alleging that he is paranoid without reason. Respondent's behavior over the past three years indicates Barkley had every reason to be suspicious and any reasonable employee in his shoes would ensure that his working space was kept free of anything Respondent could remotely use against him.

The charade continues with Roeder's refusal to allow Barkley to go back to work instead of being placed on administrative leave, incredibly because Barkley had not asked for it five minutes earlier. Respondent's exceptions argue that Barkley was placed on administrative leave and Yates was not because Barkley was the Field Training Officer and paramedic on the crew and had more responsibility for the PCRs. Unfortunately for Respondent, that is not the reason given to Barkley at the time he asked to return to work; this excuse was dreamed up after the Complaint issued against Respondent.

More intrigue arose with the July 8 search, when Beam disregarded employee Gary's and allegedly Mills' PCRs in the closet after making such a big production of the search. Ever more bizarre is the PCR report containing notations never used by Barkley. The ruse is further revealed by the contrast in Respondent's cavalier attitude about PCRs being placed in an outside mailbox at Station 607 for over a year and PCRs being found on printers, faxes, and counters, contrasted its exaggerated response to PCRs being found in a closed desk drawer. Finally, Respondent was unable to show any employee who was ever demoted,

suspended or transferred, let alone all of this done in one fell swoop. Respondents only comparable was Kaplan, an employee who was not disciplined for leaving PCR's in a desk in his station but for taking those PCR's home. Here, no one removed the PCR's from Station 604 except Lemoine, and those PCR's were over a year to a year and a half old. Throw into this mix Barkley's well-justified paranoia that Respondent was out to get him, given the civil lawsuit and other ongoing actions against him. This paranoia was justified given GCX 69, the discipline of Barkley, when Roeder made it clear that Barkley's filing of unfair labor practice charges and the NLRB's finding merit to those charges, were important factors in the decision to discipline Barkley and, by association, Yates. Finally, there was Barkley's own routine searches of his workplace since January 2011. If Barkley had discovered PCR's during these searches, Barkley would not have left PCR's to be discovered, but would have destroyed them.

Given all of this fictionalized drama, what becomes obvious is that Respondent went out of its way to find something with which to nail Barkley and Yates. The reason is clear—Barkley and Yates' extensive and successful Union and Board activity.

Respondent argues in its exceptions that the ALJ must believe that union officers are insulated from discipline for behavior that would have resulted in discipline even if the officer was not a union proponent. There is no indication whatsoever that the ALJ has that belief. The ALJ's well-reasoned decision points to exactly why she found violations in the disciplines issued to Yates and Barkley, reasons that have long been cited during the finding of discriminatory discipline such as a lack of comparative discipline, a departure from an established progressive, discipline plan, the timing of the discipline, the unreasonable and bizarre behavior of Respondent's managers and, finally, Respondent's own written discipline containing illegal threats in violation of Section 8(a)(1) of the Act. (ALJD at 15-16) The ALJ

properly found that Respondent violated Section 8(a)(1), (3), and (4) of the Act when it issued a written warning to Yates and a suspension, demotion and transfer to Barkley on August 16 as well as placing Barkley on administrative leave for five and a half weeks and Respondent's Exceptions in this regard are without merit.

F. Information Requests

1. The ALJ's Findings

The Complaint alleges, and the ALJ found, that on two separate occasions, January 10 and June 29, Respondent failed to provide, upon the Union's request, information that was relevant and necessary for the Union's representational duties as the collective-bargaining representative of the Unit employees. (ALJD at 17-18) Respondent argues that, because the Union's request consisted of numerous, incomprehensible requests, it was not required to provide the information because it felt those items were not relevant to the Union's representative duties and overly burdensome. Respondent's argument has no merit and should be rejected.

2. The Record Evidence

a. January 10 Information Request

On January 10, Beam sent an email to Barkley informing him that there would be three items on the agenda for an upcoming Labor-Management meeting. (GCX 2, 71) Those three items were the evaluation and benchmarking of the crews 10-8 performance, evaluating a possible solution and tracking for extended hospital times, and station leases nearing their end of the term or at the end of their term. (GCX 2, 71) Upon receiving this agenda, on January 10, Barkley emailed Carpenter requesting certain information that was relevant to the upcoming collective-bargaining negotiations and labor-management meetings. (Tr. 34, 421;

GCX 4) Earlier that day, Barkley had sent an email to Carpenter requesting other items related to a grievance the Union was contemplating filing regarding an investigation at Station 607. (Tr. 33; GCX 3) The items requested in the two emails that were not provided are the following:

- (1) the total number of discipline proceedings for September 2010 through January 2011, for all unit members;
- (2) the number of 10-8 times exceptions from all stations to include Tempe Fire Department/PMT rides, Chandler Fire Department/PMT rides and Scottsdale 615;
- (3) the number of discipline proceedings for similar incidents for Fire/PMT rides;
- (4) the number of move-ups missed by Fire PMT rides and action taken by the Respondent to rectify that situation;
- (5) the number of total discipline proceedings for the same months mentioned above for all Fire/PMT rides; (GCX 4) and
- (6) the complete investigation and all documents relating to complaints at Station 607, including documents that show FTO and manager involvement, regarding unit employees Chris Mills, Dwayne Looney and David Medley. (GCX 3)

In addition to the agenda item list from Beam on January 10, Barkley had numerous conversations with Beam prior to this request as to issues Respondent saw regarding “10-8” times. (Tr. 370, 372, 413-414) As the issues of “10-8” times were front and center for the upcoming negotiations, requests 1 through 5 in the January 10 information request sought information directly related to upcoming negotiations. (Tr. 422) Barkley testified that the Union needed the information to show the trend of 10-8 time problems, and because units in Tempe and Chandler had better equipment, he needed to show that better equipment made for better 10-8 times. Additionally, the Union wanted to see whether there had been an increase

in discipline for 10-8 times among Unit employees. (Tr. 423-425) After Carpenter denied the request, Barkley informed Beam that he had requested information directly relating to Beam's agenda and that his request for information was denied. (GCX 2) Beam did not respond to Barkley's email. Instead, Carpenter informed Barkley that the information is not relevant to any grievance. (GCX 6) Barkley also sent an email to Wilson, asking for some help regarding the Union's information requests. (GCX 25) Wilson provided no assistance. Despite a clear showing of relevancy to Beam and Wilson, Respondent has never provided the information requested in Items 1-5. (Tr. 426)

Additionally, Request 6 of the January 10 information request asks for information on the incidents occurring at Station 607 involving three bargaining-unit employees who were facing discipline. As early as December 28, 2010, Respondent knew that the Union had been contacted about the situation at Station 607 and was concerned about the safety of bargaining unit employees. (Tr. 41; GCX 7, 9, 20) Christopher Mills testified that, after he was threatened by employee Dave Medley, he asked Barkley to represent him during the investigation and during any investigatory meetings. (Tr. 554) Barkley also testified that he had received requests for representation during the investigatory interviews from Mills and Doyle Looney, another Unit employee. (Tr. 417-418, 425) Mills eventually received discipline for the incident and asked the Union to grieve the discipline. (Tr. 45, 420) Carpenter was also aware that all of the employees involved in the investigation, David Medley, Doyle Looney, Chris Mills, Joe Plough and Justin Lisonbee, were all Unit employees. (Tr. 44) Despite this knowledge, Carpenter informed Barkley that there were serious questions regarding the relevancy of Barkley's request for information regarding Station 607 investigation. (GCX 5) Carpenter cited some vague reference to not being

required to hand over witness statements under federal law, despite the fact that Respondent is not a government agency bound by the Freedom of Information Act provisions. Additionally, Carpenter alleges that there were privacy and confidentiality objections to the request, but had no authority for those statements. (GCX 5) Despite the fact the information request was directly related to the investigations and discipline of bargaining unit employees, Respondent's knowledge that the Union was involved in representing these employees, and had raised concerns about a hostile work environment as well as considering filing a grievance over the Mills' write-up, Respondent failed to provide the relevant and necessary information. (Tr. 420, 426; GCX 5)

b. June 29 Information Request

On June 29, Barkley sent an email to Carpenter, requesting the following information:

- (1) List of all people disciplined for 10-8 times under two minutes in the last six months, to include their paperwork;
- (2) Compliance reports that Supervisor Ted Beam indicated were completed, broken down by unit, since December of 2010;
- (3) The policy used in discipline indicates that it is a policy mandated by the city contracts. Request the language in the city contracts that mandates 100% out of chute time compliance. (GCX 10)

Of the three items listed, the ALJ found that Respondent was obligated to provide the Union Item 3, and agreed with Respondent that it could request an agreement for the Union to reimburse Respondent for administrative costs associated with Item 1 and 2 prior to providing the information.³² (ALJD at 17-18) Barkley and Yates had just received verbal written warnings the day before. (Tr. 456; GCX 51, 56) Both received discipline for having two 911 calls "out of compliance" with language that apparently existed in city contracts.

³² Under separate cover, CGC has filed cross-exceptions to the finding of the ALJ regarding reimbursement costs.

(GCX 51, 56) Further, Barkley's and Yates' times were over only by seconds in both incidents. (GCX 52 - 55) Therefore, the Union asked for Item 3 to determine what policy by which Respondent had just disciplined Barkley and Yates, and whether Respondent followed the policy. (Tr. 461) This information was never provided. (Tr. 473-474; GCX 13)

3. Legal Analysis

Respondent has a duty to provide information that is needed and requested by the Union for the proper performance of the Union's duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). Where the information sought relates to "core" terms and conditions of employment within the bargaining unit, no specific showing of relevance is required. *Atlas Metal Parts, Co. v. NLRB*, 660 F. 2d 304, 309-310 (7th Cir. 1981). When the requested information extends to matters outside the realm of the unit, "relevance is required to be somewhat more precise". *Ohio Power Co.*, 216 NLRB 987, 991 (1975). "[A] reasonable belief" as to the usefulness of the information sought has been held to be sufficient. *Walter M. Yoder & Sons v. NLRB*, 754 F. 2d 531, 535 (4th Cir. 1985). The "relevance" of the request is governed by "a liberal discovery-type standard". *Acme Industrial Co.*, supra at 437, i.e. "the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Id.* If the circumstances surrounding the information request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out, the employer is obligated to divulge the requested information. *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018 (1979), *enfd.* 615 F. 2d 1100 (5th Cir. 1980). The sufficiency of the request should not be determined solely from the

request itself, but should be judged in light of the entire pattern of facts available to the employer. *Ohio Power Co.*, 216 NLRB 987, 990 fn. 9 (1975).

a. The Unlawful Response to the January 10 Information Requests

When Beam and Barkley discussed the issues involving “10-8” times in December 2010 and January 2011, there was an air of mutual respect and cooperation by both parties. However, after Beam set out his agenda for the first meeting to discuss “10-8” times and Barkley requested information on January 10, directly related to Beam’s agenda, Respondent rejected Barkley’s request.

As pointed out by the ALJ, the information requested is presumptively relevant and Respondent’s belief that the information had no apparent relevance is immaterial. (ALJD at 17) Requests for presumptively relevant information does not need to be further clarified. Further, Respondent’s assertions that the requests are incoherent is absurd. Asking for the total number of discipline proceedings for unit members, the number of 10-8 time exception reports (a term used in the discipline of Barkley and Yates), number of move-ups, and total number of discipline for Fire/PMT rides is coherent and understandable. Respondent is well-aware that many of its rides in certain cities have both Respondent employees and part-time firefighters. See ALJ Kocol’s decision, JD(SF)-38-09; (GCX 37 at pgs. 11-13) Respondent also states, for the first time in its exceptions, that it does not keep records on these units. However, Respondent’s statement is unsupported by any record evidence. Moreover, Respondent does not explain why they do not keep such records, since Respondent considers part-time firefighters to be Respondent’s employees.

Respondent may argue that the Union is not entitled to information concerning non-bargaining unit employees such as those working on the Fire/PMT rides. In *Beverly Cal.*

Corp. v. NLRB, 227 F.3d 817, 844 (7th Cir. 200) cert. denied 533 U.S. 950 (2001), the Court held that the employer unlawfully failed to furnish the union with attendance and disciplinary records of employees outside the unit, where the union, which was concerned that the unit employees were being treated differently than non unit employees, had valid reason to request such records. In this case, the Union had reason not only to believe that personnel outside the unit were being treated differently, but also needed the information to show that in the cities of Chandler and Tempe, employees who had better equipment had better response times than those in the City of Scottsdale. Again, all of this information was relevant to Respondent's own, outlined agenda for bargaining yet it tied the hands of the Union on any productive negotiations due to its refusal to provide any of the information.

Further, the Union's request for information regarding the investigation of the Station 607 hostile work environment is directly related to bargaining unit employees who were being investigated for possible discipline and is presumptively relevant. Moreover, the Union is entitled to information regarding potential disciplinary actions to make a determination whether to file a grievance or, if a grievance is filed, to appropriately present the grievance. Respondent's pronouncement that there is no grievance pending and that the information is private and confidential is not supported by established law. Blanket claims of confidentiality will not be upheld. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995). Even assuming that a request does encompass confidential information, Respondent had an obligation to discuss its confidentiality concerns with the Union so as to try to develop mutually agreeable protective conditions for disclosure of that information. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 (1993). Merely pronouncing that the information is confidential is not sufficient.

Moreover, Respondent has presented no evidence as to why an investigation involving bargaining unit members' threatening conduct in the workplace is confidential.

b. Unlawful Denial of the June 29 Information Requests

There is no reason why Respondent was unable to provide the Union the compliance contractual language under which the unit employees are obligated to follow, as requested in Item 3 on June 29. Respondent argues in its exceptions that it did provide the information. Respondent provided the Union with its own policy and failed to provide the contracts that contain the language—the information the Union requested. However, the record clearly shows, and the ALJ properly found, that Respondent failed to provide the requested information and was obligated to do so. (ALJD at 18) Respondent's exceptions in this regard should be dismissed.

H. Unilateral Changes

1. Unilateral Cessation of Unit 603 Service

a. The ALJ's Findings

The ALJ found that Respondent instituted a unilateral change without notice and without affording the Union an opportunity to bargain when it instituted a cessation of Unit 603's services in violation of Section 8(a)(5). (ALJD at 18) Respondent argues that the shut down had no material effect on the surrounding units' workload and was, therefore, not a change Respondent was obligated to notify and bargain over with the Union. Respondent's arguments have no merit and should be dismissed.

b. The Record Facts

Sometime in late September or early October 2010, Barkley and Yates arrived at work at Station 604, only to learn that Unit 603, a 40-hour a week 911 ambulance that worked out

of their station, had been shut down. (Tr. 604) Barkley and Yates both testified that, with the shut down of Unit 603, their workload doubled. (Tr. 407; 604) Although Respondent presented a chart showing 911 calls during the time frame, the chart is meaningless as it does not indicate any of the move-up calls that the units respond to throughout their shifts. (Tr. 675 – 677; 680-681; RX 3) Barkley testified that units in Scottsdale may have as many as 8-10 move-ups in one shift. (Tr. 449) Additionally, Respondent admits that the units are busier in the winter. (Tr. 91; 396-397)

Unit 603 was assigned to Station 604 during “peak time hours”—8:00 a.m. to 6:00 or 7:00 p.m. (Tr. 121) Cantelme first testified that Unit 603 had not been operational in years. (Tr. 121-122) After being asked several times to clarify, Cantelme then said it had been operational on occasion, but only when there were compliance issues. (Tr. 122)

No notification of the shut down of Unit 603 was provided to the Union. (Tr. 123, 407) GCX 24, 70, 72, and 73 indicate that Respondent routinely notified the Union when Units were to be shut down, stations closed, or moved. This was not the case until after the November 9, 2009 decision from ALJ Kocol where Respondent was found to have violated Section 8(a)(1) and (5) by not notifying the Union when it shut down two stations. (GCX 37) However, after that decision, the record evidence is clear that the Union received direct notifications. Yet, as Unit 603 directly affected the Union President and Vice President, Respondent failed in its duty to notify the Union and bargain with the Union about the shut down and the effects of that shut down with the Union.

c. Legal Analysis

When a union represents a unit of employees, the employer must first notify and give the union an opportunity to request bargaining before the employer effects changes in

mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962); *St. Anthony Hospital Systems*, 319 NLRB 46 (1995). Notice must be given with sufficient time to allow a union to request bargaining. “*Automatic*” *Sprinkler Corp.*, 319 NLRB 401 (1995). The employer has a duty to notify the union that the store will be closing and to bargain over the effects of that store closing. *National Car Rental Systems*, 252 NLRB 150, enfd. 672 F. 2d 1192 (3rd Cir. 1982); *Gannett Co. Inc.*, 333 NLRB 355 (2001). In the latter cases, it is made clear that the closing of the store may not be a mandatory subject of bargaining in all cases, but the law requires an employer to provide an opportunity to the union to bargain over the effects of the closing of the store. *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). Inherent in that obligation is an opportunity for the union to bargain in a meaningful manner and at a meaningful time. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). Presenting the union with a fait accompli is not timely notice. *Penntech Papers v. NLRB*, 706 F. 2d 18, 26 (1st Cir. 1983); *Los Angeles Soap Co.*, 300 NLRB 289 (1990). The employer must give the union timely notice of the closure and a significant opportunity to meaningfully bargain over the effects of the closure. *Champion International Corporation*, 339 NLRB 672 (2003); *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990); *Los Angeles Soap Co.*, 300 NLRB 289, n. 7, 295 (1990).

The decision to close a facility and relocate operations can be considered a mandatory subject of bargaining and something an employer must give notice and an opportunity to bargain over in certain circumstances. *Dubuque Packing*, 303 NLRB 386 (1991), holds that if the relocation of unit work is unaccompanied by a basic change in the nature of the employer’s operation, it becomes a mandatory subject of bargaining. *Id.* at 396. Once that has been established, the burden falls on Respondent to show the reasons for its decision to

shut down Unit 603. As Respondent failed to give any notice of the closure of its Unit 603, it is impossible for the Union to have any meaningful preclosure bargaining. *Freedman Die Cutters, Inc.*, 340 NLRB 422 (2003). As stated in *Daniel I. Burk Enterprises*, 313 NLRB 1263 (1994):

Compliance with the preimplementation notice requirement has been excused only in the cases of emergency, such as the sudden refusal of the employer's bank to continue extending credit; the unanticipated denial of an employer's loan request; a bankruptcy trustee's closure of a business and termination of employees on learning serious mismanagement....existed." *Id.* at 424

Respondent readily admits that it failed to notify and bargain with the Union about the shut down of Unit 603. Respondent certainly knew what it was going to do before it shut down Unit 603. Respondent had established a pattern of notifying the Union when it closed, relocated, or shut down a unit, as evidenced by the emails it sent to the Union. However, Unit 603 directly affected the working conditions of the top two Union officials, Barkley and Yates. Shutting down Unit 603 right before the busy season in the City of Scottsdale would, and did, have a detrimental affect on Unit 604.

Respondent argues in its exceptions that there was "undisputed documentary evidence" that showed Respondent's closure of Unit 603 had no material effect on the surrounding units. (RX 3) However, as readily pointed out and admitted to by Respondent's own witnesses, RX 3 does not show "move-up" calls, calls that can be as many as ten calls on a shift. Therefore, Respondent's "undisputed" evidence is incomplete and fails to show the extent the shut down of Unit 603 had on the unit members, let alone the bargaining unit members that worked on Unit 603. Respondent complains that the ALJ only spent two sentences outlining the facts of this allegation and, therefore, did not give the allegation sufficient attention. Respondent's complaint is specious. There is no set amount of verbiage

that an ALJ is required to put in her decision when making a finding. The ALJ placed the relevant facts into the decision and rendered her ruling. (ALJD at 18) The ALJ's finding is clear - Respondent violated Section 8(a) (1) and (5) in its failure to notify the Union of the shut down of Unit 603 and provide the Union with an opportunity to engage in effects bargaining.

2. Abrogation of the Settlement Agreement

a. The ALJ's Findings

The ALJ properly found that, by refusing to allow the Union President to designate another individual to attend collective-bargaining negotiations during work time without loss of pay, Respondent abrogated its agreement under the settlement agreement signed on December 1, 2010. (ALJD at 19) Respondent argues that it did not abrogate the terms of the settlement agreement because Barkley was the only one allowed to make decisions at collective-bargaining sessions, and that the only avenue for the General Counsel to protest Respondent's actions is for the settlement agreement to be set aside. Respondent's arguments are without merit and should be disregarded.

b. The Record Facts

On December 1, 2010, Respondent and the Union entered into a Board settlement agreement. (GCX 34) In that settlement agreement, the Notice to Employees contains a provision that requires Respondent to allow the Union President or his designee the ability to attend bargaining sessions while he is on duty and be paid for that time. The exact provision is as follows:

WE WILL provide the Union President or his designee 60 hours of official time per year at a rate of \$20.00 per hour, prorated for 2010, to participate in bargaining and grievance meetings, including scheduling, operations and safety meetings. In addition, WE WILL allow the Union President or his

designee to attend these meetings and receive their normal wages, if those meetings are scheduled during an assigned shift of the Union President or his designee. (GCX 34)

On or about March 17, Respondent refused to follow this provision and changed the terms by stating that only the Union President would be allowed to attend bargaining sessions during work time, despite the Union requesting that time for other members of his bargaining team. (GCX 31, 32) Union President Barkley scheduled bargaining sessions during his days off so he could designate someone else on the team to come to the bargaining sessions while on duty and not lose pay. (Tr. 435) On this particular day, Barkley had informed Respondent that Tony Lopez and Dwayne Owens were also members of the bargaining team and were on duty the day of the scheduled negotiation sessions. (GCX 31) Lopez and Owens were full-time employees who worked 24-hour shifts in Scottsdale. (Tr. 93, 95) Respondent was obligated by the terms of the settlement agreement to allow at least one of those bargaining team members to attend the bargaining sessions while on duty and be paid for the time. (GCX 34) However, Respondent informed Barkley that Owens and Lopez would be required to either take personal time off or arrange shift trades to attend bargaining sessions. (GCX 32) This edict changed the terms of the settlement agreement and required the Union to decrease its bargaining team for negotiations. (GCX 33)

Respondent argues that Barkley was the only person allowed to make decisions for the Union so, therefore, they felt no obligation to abide by the settlement agreement. (Tr. 663-665) The record evidence establishes, however, that both parties have individuals they must consult with when making agreements during negotiations. Lopez confers with Barkley; Wilson confers with his bargaining team. (Tr. 666 - 667; RX 1 – 2)

c. Legal Analysis

On December 1, 2010, the parties entered into a Board Settlement Agreement that, among other things, established a way for an employee-run union to attend meetings where the presence of a Union officer would be required and beneficial. This procedure allowed the Union President or his designee to attend these meetings while on duty, being paid their normal wages. The clear and unmistakable reading of the provision is that this is separate from the 60 banked hours provided annually for employees to be paid while at bargaining. The Union President scheduled bargaining sessions for his days off so that he could designate at least one of his negotiating team members as his designee, to be able to attend the bargaining session and get paid while there.

Respondent, however, made the decision, on its own, that since Barkley had to be consulted prior to decisions and agreements being entered into at bargaining, it would only allow Barkley to be paid for being at the bargaining sessions while he was on duty. By doing so, Respondent is attempting to control the Union's negotiating team through its unilateral change to the settlement agreement. Negotiating team members wanting to consult with other team members is nothing new in bargaining. In fact, Wilson informed the Union that he could make decisions after consulting with his team and his lawyer. Respondent's behavior in tying the hands of the Union as to who can attend bargaining sessions and changing the terms of the Settlement Agreement clearly indicates that Respondent has no intention of bargaining in good faith with the Union and is striving to control the Union at every turn.

Additionally, Respondent's argument that the only avenue for a breach of a provision in a settlement agreement is to set the entire agreement aside and proceed to a compliance hearing is not supported by Board law. The setting aside of a settlement agreement is one avenue that can be pursued by the Regional Director. The Board has long held, however, that

the decision to set aside a settlement agreement cannot be one determined by a mechanical application of rigid *a priori* rules but one determined by the exercise of sound judgment based upon all the circumstances of each case. *The Ohio Calcium Company*, 34 NLRB 917 (1941). *Diester Concentrator Company*, 253 NLRB 358 (1980). As found by the ALJ and affirmed by the Board in *Diester*, the employer had engaged in substantial compliance with the settlement agreement and found that it was unnecessary to rescind the settlement agreement in order to effectuate the policies of the Act. *Id.* A settlement agreement can be set aside if its provisions are breached or if post settlement unfair labor practices are committed. *R.T. Jones Lumber Co.*, 303 NLRB 841, 843 (1991). The decision to determine whether to pursue the setting aside of a settlement agreement is made by the Regional Director just as the decision to issue a Complaint on unfair labor practice charges is a decision for the Regional Director. There is no requirement or obligation to pursue this avenue, as suggested by Respondent, but a decision made through sound judgment and consideration of all the facts and circumstances of the case.

H. Credibility Determinations of the ALJ

1. The ALJ's Findings

The ALJ made certain credibility findings throughout her decision, some that have been discussed above. To summarize, the ALJ generally credited the testimony of current and former employees that testified but found many of the statements made by Respondent's witnesses with substantial justification, to be not credible.

Respondent argues that because these employees are also Union officers or Union supporters, their testimony was colored by their pro-union bias. Respondent further argues

that the ALJ discredited Respondent's witnesses without proper justification. Respondent's arguments have no merit and the ALJ's credibility determinations should stand.

2. Legal Analysis

Respondent wants nothing more than to convince the Board to ignore the ALJ's careful, well-supported determinations, ignore the credible testimony, and instead credit its own witnesses' version of events. The Board should firmly decline because Respondent has not provided any concrete examples where the ALJ's credibility findings were glaringly erroneous. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951) (Board will not overrule an administrative law judge's credibility resolutions absent clear preponderance of the evidence dictates that the resolutions are incorrect); *Painters and Allied Trades District Council No. 51 (Manganaro Corporation, Maryland)*, 321 NLRB 158 (1996). Rather, Respondent points to the fact that the ALJ did not explain why Marr did not testify at the hearing as a reason not to sustain her credibility determination in crediting employee Empey's version of the conversation. (ALJD at 7, fn. 14) In actuality, Empey's version was corroborated by Yates whereas Marr did not testify and Clonts memory of the exchange was minimal, to say the least. (ALJD at 7, fn. 14)

Respondent's arguments that its own employees' testimony should not be credited because they have a "pro-union bias" is equally meritless. Outside of the mere fact that several of the employee witnesses hold officer positions with the Union, Respondent is unable to point to any record evidence, or demeanor of these witnesses, showing that their union affiliation colored their testimony in any way. If the Board is to follow Respondent's logic, then just because Respondent's witnesses are supervisors and managers of Respondent, they have a pro-Respondent bias and none of their testimony should be credited. In fact, the ALJ

credited the witnesses she did due to appropriate observations, and discredited other witnesses for the same appropriate and legitimate reasons.

III. CONCLUSION

Based on the foregoing, and the entire record evidence, the General Counsel respectfully submits that the ALJ properly found that Respondent violated Section 8(a)(1)(3)(4) and (5) of the Act, as set forth in the ALJD, and Respondent's exceptions should be rejected. Except for the General Counsel's limited cross-exceptions which are filed under separate cover, the Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order in all respects. It is further requested that the Board order whatever other additional relief it deems appropriate to remedy Respondent's numerous and serious violations of the Act.

Dated at Phoenix, Arizona, this 31st day of January 2012.

Respectfully submitted,

s/ Sandra L. Lyons

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S ANSWERING BRIEF in PROFESSIONAL MEDICAL TRANSPORT, INC., Cases 28-CA-23399, et. al. was served by E-Gov, E-Filing and by E-mail, on this 31st day of January 2012, on the following:

Via E-Gov, E-Filing

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