JD(ATL)–02–14
Ronceverte, WV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

GREENBRIER VMC, LLC, D/B/A
GREENBRIER VALLEY
MEDICAL CENTER

and **CASE 10–CA–094646**

NATIONAL NURSES ORGANIZING
COMMITTEE, AFL–CIO (NNOC)

Jasper Brown, Esq.,
for the General Counsel.
Kaitlin K. Brundage, Esq.,
for the Respondent.
Micah Berul, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. On November 12 and 13, 2013, this case was heard in Lewisburg, West Virginia. The complaint alleged that the Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center (the Hospital or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by: issuing James Blankinship a performance improvement plan (the PIP) and written warning; and changing his hours of work.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following:

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[1] At the outset of the trial, Counsel for the General Counsel unintentionally violated the Sequestration Order. (ALJ Exh. 1). The witness, Celia Cody, was only providing background evidence, and this error was not prejudicial.

FINDINGS OF FACT[2]

I. JURISDICTION

At all material times, the Hospital has been a limited liability company, with an office and place of business in Ronceverte, West Virginia. Annually, it earns over $250,000 in gross revenues, and purchases goods valued at more than $5,000 from outside of West Virginia. Based upon the foregoing, it admits, and I find, that it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act. I also find that the National Nurses Organizing Committee, AFL–CIO (NNOC) (the Union) is a labor organization under Section 2(5) of the Act.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Union's Election and Certification

On August 20, 2012,[4] Region 10 of the National Labor Relations Board (Region 10) conducted an election in the following appropriate collective bargaining unit at the Hospital (the unit):

> All full-time, regular part-time, and per diem Registered Nurses [RNs], including those who serve as relief charge nurses, employed by the Employer . . . excluding all other employees, including managers, confidential employees, physicians, technical employees, service and maintenance employees, employees of outside . . . agencies . . . , guards and supervisors as defined by the Act.

(GC Exh. 4). The Union won this election handily, and was certified as the unit's exclusive collective bargaining representative. Although the Union has since attempted to bargain with the Hospital, it has refused and this matter is presently pending before the Board.

B. Emergency Department

The Emergency Department (the ER), which is supervised by ER Director Constance Rose, employs about 25 RNs and 5 ancillary staff. RNs serve as charge and staff nurses; they work 12-hour shifts, which begin at 7 a.m., 10 a.m., 11 a.m., 1 p.m., 2 p.m. and 7 p.m. Rose testified that only 4 or 5 RNs are regularly assigned the 7 a.m. shift, which requires greater expertise and independence.

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2 Unless otherwise stated, factual findings arise from admissions, joint exhibits, stipulations and uncontroverted testimony. After the record closed, Counsel for the General Counsel resubmitted GC Exh. 11, p. 4. The page was not, however, missing from the formal record, and his actions were unwarranted.

3 Although the Hospital did not admit labor organization status, the record shows that employees participate in the Union in order to confer with employers concerning grievances, workplace disputes, wages, hours and other employment conditions. Moreover, I take judicial notice that, on August 24, 2012, the Hospital entered into a Consent Election Agreement in Case 10–RC–087613, where it admitted that the Union was a labor organization.

4 All dates herein are in 2012, unless otherwise stated.

C. Blankinship's Tenure

The Hospital, through Rose, hired Blankinship about 6 years ago. He has substantial health care experience; he has been an RN for 16 years and has worked in the ER for 6 years. Prior to becoming an RN, he held Nursing Aide, Telemetry Technician and Emergency Room Technician positions. He averred that, before engaging in open Union activity, he maintained a good relationship with Rose.

1. Annual Performance Evaluations

Blankinship has received strong evaluations. His annual evaluations, which were prepared by Rose, rated his nursing skills, adherence to policy and procedure, and customer service proficiency.

In March 2010,[5] he received a positive appraisal, which classified him as exceeding his position's requirements. See (U. Exh. 5). Rose made several glowing comments on this appraisal, which included, "[e]xcellent bedside nursing," "makes sure each p[atien]t['s] needs are addressed," and "[l]ucky to have you back." (Id.).

In April 2011,[6] Blankinship received another strong appraisal, which again graded him as exceeding his position's requirements. (U. Exh. 4). Rose also added the following praise:

> Jim is an excellent asset . . . . He makes sound decisions and is willing to share his knowledge . . . . He is accountable . . . . He is supportive of his coworkers. His patients and physicians really appreciate his thoroughness with instructions.

(Id.).

In April,[7] he received a more neutral evaluation, which graded him as essentially meeting his job requirements.[8] (R. Exh. 3). Rose also commended, "improvements in his documentation and adherence to policies" and his "great contact with patients." (Id.).

2. October Schedule Change

Before October, Blankinship worked rotating 12-hour work shifts. In October, however, the Hospital began regularly assigning him 12-hour shifts that started at 7 a.m. This change demonstrated great confidence, given that Rose attested that the 7 a.m. shift required increased expertise and independence. The following chart is demonstrative:

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5 This evaluation covered calendar year 2009.

6 This evaluation covered calendar year 2010.

7 This evaluation covered calendar year 2011.

8 Rose stated that his "2.8" score was below average and RNs averaged "3.2." Beyond this blanket conclusion, however, she failed to substantiate her logic. The Hospital also neglected to offer RN appraisals that corroborated this point, even though such documents should have been readily available. Given these lapses, and given that Blankinship received strong prior appraisals that were close to this appraisal, I cannot credit Rose's claim.

4-Week Schedule	7 a.m. Shifts	10 and 11 a.m. Shifts	1 p.m. Shifts	Total Shifts	Percentage of 7 a.m. Shifts
Apr. 22 – May 19	1	8	2	11	9%
May 20 – Jun. 16	0	2	7	9	0%
Jun. 17 – Jul. 14	1	7	4	12	8%
Jul. 15 – Aug. 11	1	10	1	12	8%
Aug. 12 – Sep. 8	2	5	5	12	17%
Sep. 9 – Oct. 6	1	5	3	9	11%
Oct. 7 – Nov. 3	**5**	**1**	**1**	**7**	**71%**
Nov. 4 – Dec. 1	**9**	**1**	**2**	**12**	**75%**
Dec. 2 – Dec. 29	**11**	**1**	**0**	**12**	**92%**

(GC Exh. 12; R. Exh. 2).

Blankinship described the rationale behind his schedule change. He stated that, in September, he applied for a day-shift slot in Outpatient Surgery. He reported that, after interviewing, Assistant Nurse Manager Roberta Mann labeled him a strong candidate, but, opted to temporarily leave the slot unfilled. He added that he later discussed this opportunity with Rose, who commented that he would be a "good fit." He related that, thereafter, Rose started regularly assigning him the 7 a.m. shift. He recounted that they had the following discussion in October about his revised schedule:

> I said . . . the schedule is nice . . . . It was in the lounge, and she said . . . I'm just trying to give you . . . days. That's what you want, and I said thank you . . . .

(Tr. 148). Rose did not deny this exchange. She solely stated that Blankinship was temporarily reassigned because "a day shift person [was] on . . . time off." (Tr. 428).

Because Blankinship testified that Rose changed his schedule as an inducement to stay with the ER, and Rose testified that he was only temporarily replacing an absent colleague, I must make a credibility determination. For several reasons, I credit Blankinship. First, he was a straightforward, candid and honest witness, who was equally helpful on direct and cross-examination. Second, the Hospital's conspicuous failure to elicit testimony from Rose about this important exchange strongly favors Blankinship. Lastly, Rose's contention that Blankinship was temporarily replacing an absent RN is contradicted by the work schedule.[9] See (GC Exh. 12).

3. November Union Activity

Blankinship stated that he volunteered to serve as a Union representative, and assist with bargaining, grievances and disciplinary meetings. He recalled that, on November 29, he visited

[9] The schedule did not identify a single 7 a.m. shift RN taking extensive leave during this 3-month period. It similarly failed to show a 7 a.m. shift RN taking leave during the majority of the 7 a.m. shifts that Blankinship worked. (GC Exh. 12) (from October 7 to November 3, only 1/5 of his 7 a.m. shifts coincided with a 7 a.m. shift RN taking leave; from November 4 to December 1, only 1/3 of his 7 a.m. shifts coincided; and from December 2 to 29, only 6/11 of his 7 a.m. shifts coincided).

Rose's office, and submitted a signed statement, which announced his new role:

> [I will] serve as the Facility Bargaining Council and Nurse Representative of . . . [the Union and] . . . . will be participating in . . . all investigatory meetings for possible discipline of RNs in our unit based on the[ir] Weingarten Rights and also serve as [their] representative . . . in grievance[s] . . . .[10]

(GC Exh. 2). He described Rose's astonished and hostile reaction to this announcement:

> [S]he looked at it, dropped it, and threw her hands up, and said . . . I'm not taking this, I don't have to . . . . take this, my employer says that we do not recognize the Union here, and I'm not taking this and I said, . . . the only reason . . . I have is if another employee wants a witness with a meeting with management, and I would be required to be there. And she said I know you're talking about Weingarten, but we're not going to do that. We don't recognize the Union here. At that point I sa[id] . . . I guess that's that, and I picked it up, and I started walking out the door. She said wait a minute, let me have that, I need the names off of it . . . .

(Tr. 138); see also (GC Exh. 3). Given that Rose did not testify about this exchange, I must fully credit Blankinship's account.[11]

4. December 6 Disciplinary Action

Within a single week of telling Rose that he was a Union representative, Blankinship received the following PIP and written warning:

> **EXPLANATION OF OFFENSE** . . . [1] One actual med error – wrong med . . . [2. another] near miss to wrong person. [3.] Has exhibited questions regarding drugs on intubation . . . . [4. C]alled pacer spikes a chemical reaction . . . [5. released] pt [with] . . . low B/P, did not notify physician . . . .
>
> **CORRECTIVE ACTION RECOMMENDED** Placed on PIP, pharmacy to do med passes, [RN] K. Little to remediate on intubation medication, monitor documentation, move to 11A for additional staff support . . . .

(GC Exh. 5) (spelling and grammar as in original). His PIP further warned that additional infractions might result in elevated discipline and afforded him a 30-day rehabilitation period (i.e. through January 6, 2013) to demonstrate improvement. The PIP also directed him to complete these tasks: (1) take order sheets to patient rooms whenever distributing medication; (2) pass an intubation drug exam; (3) pass a telemetry course; (4) chart in a timely and relevant manner 90 percent of the time; (5) distribute medication with Pharmacy; and (6) receive

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10 This statement was also signed by RN's Lori McNicholas and Kelly Moro.

11 He was, as noted, highly credible. *See* also *Douglas Aircraft Co.*, 308 NLRB 1217 (1992) (failure to elicit testimony from a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge.").

intubation instruction from RN Little. (Id.).

5. Events Cited by the PIP

a. November 14 – Medication Error

Blankinship explained:

> I was at work . . . [and] busy. I looked at the monitor [and] . . . saw . . . an order on the patient. I glanced at it [and] . . . pulled Rocephin [i.e. an antibiotic] . . . . I went into the room. After asking the patient if she was allergic to it, I hung the medication. I went back to the computer to chart that I had filled the order . . . and I realized that I hung the wrong medication. . . . So I went . . . back to the room, removed the medication . . . , and . . . told the provider . . . .
>
> And he said, well, what do we do in these situations? I said . . . we fill out occurrence reports and . . . tell the family. And he said, okay, let's . . . do that. So I . . . . told the family . . . and hung the right antibiotic [i.e. Levaquin] . . . .

(Tr. 157–58). He estimated that a minute passed, before the error was corrected. It is undisputed that he filed an occurrence report and told Rose, and the patient was unharmed.

Rose testified that the error was caused by his failure to bring the physician's order to the patient's bedside. She added that this error, in isolation, would not have warranted the PIP.

b. November 24 – Intubation Comment

Blankinship stated:

> Dr. Johnson . . . was . . . [going to] intubate . . . and called for the medications to be given. You . . . [generally] give a . . . sedative first, paralytic second . . . . I told him I had the . . . Succinylcholine . . . [,]the paralytic [,] . . . and the Versed [,] the sedative. I said which do you want first . . . ? And I knew the answer as soon as I asked . . . . I was thinking out loud . . . . [The doctor] said the Versed [and I proceeded to administer it].

(Tr. 164–65). He stated that he previously assisted numerous intubations and solely blurted out a redundancy. He averred that the doctor was not upset and the patient was unharmed.

Rose stated that RNs receive annual intubation training. She stated that his query demonstrated a knowledge deficit, although she admitted that this was a first-time occurrence.

c. November 25 – Lortab Incident

Blankinship stated:

> The patient was assigned to another nurse. We help each other all the time . . . . [a]nd I was free . . . . There was an order up for a med to be given, so I grabbed the chart. I got the medication, and I went to the room. It was for Lortab. I . . . walked into the room, and I said I've got your . . . Lortab . . . . [The patient] was an adolescent. And the mother [asked] . . . what's she getting Lortab for. At that moment, I opened the chart and realized that it was Room 5 instead of Room 4. I turned around . . . . and gave it to the right patient.

(Tr. 163). Rose stated that this error, coupled with his earlier medication error, raised a "red flag." She conceded, however, that RNs are not disciplined for isolated medication errors.

d. November – Cardiac Monitor Statement

Blankinship testified that:

> [O]ne of the supervisors . . . stepped out of the room and said . . . we need you . . . to help do chest compressions . . . . The man [had] . . . been down quite a while, and everybody was . . . taking turns . . . .
>
> I did chest compressions . . . . looked up at the monitor, and . . . saw . . . p-waves and I thought it was chemical. And then someone said, no, that's the pacer. And I said, oh, okay. . . .
>
> I said that's chemical, which isn't unusual . . . . I didn't know, because I wasn't there when the patient came in, [was] . . . that they were trying to pace him . . . .
>
> And . . . . in a long code when someone has been down for a long time, a lot of times . . . all you get is chemical, because the heart is . . . dead . . . .

(Tr. 166–71). Rose said that this comment amplified her concerns about his clinical knowledge.

e. December 2 – Patient Discharge

Blankinship testified that:

> [A] female patient came in with side pain. During . . . her treatment, she had received Dilaudid, . . . a powerful pain medication, and one of the side effects is that it lowers your blood pressure . . . . Dr. Faulkner had deemed her well enough to be discharged, so I . . . . put the chart in the rack for discharge . . . .
>
> I . . . went over . . . instructions . . . took her vital signs and . . . discharged her. . . .

> [W]hen I walked into the room, she was . . . on her own power, wide awake. She told me she felt better and . . . was ready to go home. . . .

(Tr. 172–73). He indicated that the patient did not report any pain, and was comfortable and ready to leave. He stated that Rose approached him within a day and inquired why he released a patient with an 86 systolic blood pressure. He recalled replying that he was following physician's orders, but, agreed that he should have relayed her last blood pressure reading. Rose contended that he erred by not relaying this reading to her doctor. See also (R. Exh. 10).

6. December Schedule Change

Blankinship stated that, after being placed on the PIP, he was assigned few, if any, 7 a.m. shifts. The following chart is demonstrative:

4-Week Schedule	7 a.m. Shifts	10/11 a.m. Shifts	1 p.m. Shifts	Total Shifts	Percentage of 7 a.m. Shifts
Oct. 7 – Nov. 3	5	1	1	7	71%
Nov. 4 – Dec. 1	9	1	2	12	75%
Dec. 2 – Dec. 29	11	1	0	12	92%
Dec. 30 – Jan. 26, 2013	**0**	**11**	**1**	**12**	**0%**
Jan. 27, 2013 – Feb. 23, 2013	**0**	**8**	**4**	**12**	**0%**
Feb. 24 – Mar. 23, 2013	**0**	**8**	**1**	**9**	**0%**
Mar. 24 – Apr. 20, 2013	**0**	**9**	**0**	**9**	**0%**
Apr. 21 – May 18, 2013	**0**	**12**	**0**	**12**	**0%**
May 19 – Jun. 15, 2013	**0**	**12**	**0**	**12**	**0%**
Jun. 16 – Jul. 13, 2013	**0**	**9**	**3**	**12**	**0%**
Jul. 14 – Aug. 10, 2013	**0**	**8**	**4**	**12**	**0%**
Aug. 11 – Sep. 7, 2013	**1**	**11**	**1**	**13**	**8%**
Sep. 9 – Oct. 5, 2013	**1**	**7**	**0**	**8**	**13%**
Oct. 6 – Nov. 12, 2013	**3**	**7**	**1**	**11**	**27%**

(GC Exh. 12; R. Exh. 2).

7. Blankinship's Remedial Actions

Blankinship testified that he completed the tasks assigned by the PIP. He added that he reported his progress to Rose.

a. Bringing Order Sheets to Patient Rooms When Administering Medication

Blankinship testified that he consistently followed this directive. The Hospital failed to demonstrate continued errors, or show that he otherwise neglected its medication policies.[12]

[12] It also failed to show whether this policy documented, disseminated and universally applied, as opposed to being uniquely crafted for Blankinship and inconsistent in application.

b. Intubation Drug Training and Testing

Blankinship testified that Rose never offered him formal intubation training and testing. He related that, consequently, he sought out RN Little, who provided some informal instruction.

c. Telemetry Course

Blankinship testified that he took the telemetry exam twice. The Hospital did not rebut this testimony.

d. Charting

Blankinship credibly testified that he complied with this directive. He asserted that his charting was consistently relevant and timely.

RN Christy Pack testified that Blankinship's 2012 charting was deficient and made follow-up care difficult. For several reasons, I do not credit her testimony. First, besides generalities, she failed to describe specific instances of poor charting, or specifically identify actual problems encountered by the next shift. She also appeared to be highly motivated to advance the Hospital's cause, which detracted greatly from her credibility. The Hospital similarly neglected to submit any redacted charts that corroborated her claims of deficient charting, even though such evidence was likely readily available.

Rose testified that proper charting is crucial, and, although the computerized charting permits RNs to chart care that occurred several hours before, charting should generally be performed contemporaneously. She added that extensive lapses increased the likelihood of errors. She agreed, on cross-examination, that she has counseled other RNs about charting deficiencies. She alleged, however, that Blankinship's charting remained deficient after the PIP. For several reasons, I do not credit her testimony. She wholly failed to offer specific examples of his deficient charting. She solely spoke in generalities, which is worthy of little evidentiary weight. The Hospital, as noted, failed to offer redacted copies of his deficient charts, which would have presumably been readily available, if its assertions were true. It is also probable that, if Blankinship's charting had remained deficient, the Hospital would have elevated his discipline, as stated by the PIP. Simply put, these evidentiary omissions and inconsistencies undercut Rose's generalized testimony about this highly subjective topic.

e. Pharmacy Medication Passes

Blankinship stated that he completed this step. The Hospital did not rebut this testimony.

8. January 6, 2013 Extension of PIP

Although the PIP stated that his performance would be reviewed on January 6, 2013, Rose stated that she extended the PIP by 90 days because he was absent during this period. Blankinship did not receive written notice of this extension.

9. April 16, 2013 Meeting

On this date, Blankinship met with Rose. He recollected this exchange:

> Rose told me that I was improving on a lot of what was on the PIP but that my charting still needed work, and she was placing me on a 30-day extension. . . .
>
> She listed four or five charts from different patients. . . .
>
> She brought up that . . . [a] patient going to x-ray is not pertinent . . . charting, and I disagreed. It tells where they were, when they went, when they come back. . . .
>
> [We cannot always chart] . . . at the hour we see them . . . . ProMed . . . time stamps when you entered your chart to do . . . charting, but it also . . . allows you to put the time that you actually did what you said . . . .

(Tr. 178–79)

Rose stated that Blankinship's charting remained deficient. She prepared this written summary of his status:

> 90 day review of PIP—Jim was out 2 weeks with gall bladder surgery and one week with [a] back injury. Jim has completed the ALC course on Telemetry, had supervised rounds with pharmacy and had follow up teaching with Kris Little on RSI. Documentation continues to be problematic . . . [and] is not consistently timely and not pertinent. This should be easily corrected. What is needed in the patient record is a statement related every hour on the patient condition as it relates to the chief complaint, not information such as rounding completed or patient in X-Ray. Examples of charts given are: 4324750, 4319773, 4323190, 4323306, 4329288 and 4329277. Particularly on the last 2 records it is noted that the entries are not timely and often entered 2 hours after the time he states the assessment was done. In an effort to continue to improve, I have extended Jim's PIP on the documentation alone for 30 more days at which time we will re-evaluate his progress.

(R. Exh. 11). The Hospital conspicuously failed, however, to offer redacted copies of the allegedly deficient charts, which would have corroborated Rose's claims of ongoing charting issues.

10. Failure to End the PIP

Blankinship testified that, to date, he has never been advised that the PIP has ended. Rose estimated that it ended in May 2013, but, was unclear how she delivered the news:

> I think we **probably** had a conversation. **Specifically, no**, but summarized, yes, you are doing better. I would periodically check in with him, give him feedback, good and bad, as far as what needed to happen.

(Tr. 432–33) (emphasis added). She stated that he has recently been assigned some 7 a.m. shifts.

Because Blankinship testified that he was never told that the PIP ended, and Rose testified otherwise, I must make a credibly resolution. I credit Blankinship, a highly credible witness, with a stellar demeanor. It is also probable that, if Rose had ended the PIP, she would have notified him in writing, as has been previously done. See, e.g., (R. Exh. 4). It is similarly likely that, if Rose had ended the PIP, she would have recalled these details, given the extensive litigation of this matter. Simply put, her surmise is neither convincing nor plausible.

D. Other Discipline of ER RNs

The parties offered evidence of other ER RN disciplines, which is summarized below:

Last Name	Date	Incident	Discipline	PIP
McDowell	Apr. 2010	• Unauthorized distribution of medication	Verbal warning	No
Dowdy	Jun. 2010	• Scowled at patient, family and physician • Took psychiatric patient to ICU, without monitor • Sat at front desk, while ignoring cardiac alarms	Written warning	No
Post	Aug. 2010	• Failed to properly triage patient, who had severe fall • Delivered substandard care • Failed to relay key patient information to doctor • Repeated usage of Internet during work time	Written warning	90-day PIP[13]
Yancy	Nov. 2010	• Personal phone usage, after repeated warnings	2nd written warning	No
Post	Feb. 2011	• Failed to properly triage possible cardiac patient • Failed to attach monitor to cardiac patient • Delivered substandard care • Took break before replacing IV bag for diabetic • Delayed triage of critically ill infant	Written warning	No
Blankinship	Dec. 2011	• Violated restraint policy	Verbal warning	No
Samples	Apr. 2012	• Verbally and physically abused patient • Refused to help coworker care for patient • Made negative comments to coworkers and patient	Verbal and written warning	No

(R. Exhs. 4, 6, 8; U. Exh. 6).

[13] Contrary to Blankinship, he was advised in writing that his PIP ended on Dec. 17, 2010. (R. Exh. 4).

III. ANALYSIS

A. Section 8(a)(3) – Legal Framework[14]

The framework described in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) sets forth the appropriate standard:

> Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.
>
> If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065–66 (2007) (citations omitted).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not relied upon, it fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. However, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

B. Prima Facie Case

The General Counsel has made a prima facie *Wright Line* showing. Union activity and knowledge were adduced, when it established that Blankinship informed Rose that he was a Union representative. Animus was demonstrated by her hostile reaction and the close timing between his announcement and the PIP, warning and schedule change. *See La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003).

C. Affirmative Defense

The Hospital failed to show that it would have issued Blankinship a PIP[15] and written warning,[16] and changed his work shift, absent his Union activity.

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14 These allegations are listed under paras. 7 through 9 of the complaint.

15 The Hospital's claim that the PIP was non-disciplinary is flawed, given that the PIP clearly warns that the ongoing failure to address one's performance issues could result in termination. (GC Exh. 5).

16 The Hospital's assertion that the complaint did not cover the written warning is unreasonable. First, the PIP and warning were simultaneously issued by the same document, flow from the same series of events,

1. PIP and Warning

The Hospital did not show that it would have issued the PIP and warning, absent his Union activity. *First*, several of its proffered reasons were pretextual. His intubation comments were innocuous, inasmuch his sole gaffe involved speaking aloud a question with an obvious answer.[17] His cardiac monitor comments were equally harmless, inasmuch as he only offered an insignificant opinion while aiding his colleagues, without any patient consequence.[18] *Second*, the Hospital's timing is questionable, given that discipline was conspicuously not meted out until a week after Blankinship announced his new Union role, even though most of the underlying events occurred before his announcement. Moreover, if the Hospital genuinely believed that the intubation comments, cardiac monitor opinion, medication error and near-miss medication error warranted discipline, it would have acted in a contemporaneous manner (i.e. before he announced he was a Union representative). In sum, its decision to initially remain silent about these topics, and then seize upon them as disciplinary fodder only after he engaged in Union activity is highly suspicious. *Third*, Rose's hostile reaction to Blankinship's announcement of his Union role demonstrated invidious intent. *Fourth*, the Hospital's unlawful motivation was further demonstrated by its several extensions of the PIP, ongoing failure to end it, and Rose's overall lack of involvement in his rehabilitation. Simply put, if the PIP were genuinely a non-discriminatory tutorial designed to enhance performance, Rose: would not have continuously and arbitrarily increased its duration;[19] would not have failed to tell him that it was over;[20] and would have been more directly involved in his training.[21] *Fifth*, the Hospital's decision to implement a PIP was suspect, given his considerable health care resume and strong past performance.[22] *Sixth*,

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and cannot be logically separated for substantive or remedial purposes. Second, both matters were covered by timely charges. Third, Counsel for the General Counsel announced at the onset of the hearing that he was challenging both the PIP and warning, and both matters were exhaustively litigated by all. Lastly, even if the complaint were somehow construed to not include the warning, an unplead matter can nevertheless support an unfair labor practice finding, where it is closely connected to the complaint's subject matter and has been fully litigated, which is the case herein. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

17 Given that Blankinship, a seasoned RN, has performed many intubations without issue, it is unlikely that he just simply forgot the seemingly straightforward medication order and required re-education on this topic.

18 The Hospital should welcome such exchanges, as opportunities to promote dialogue that might benefit its staff. Its decision to seize upon this exchange and transform it into a disciplinary matter is suspect.

19 The Hospital arbitrarily increased the PIP from an initial 30-day period (GC Exh. 5), to a 120-day period (R. Exh. 11), to a 150-day period (id.). The final 30-day extension was based upon Blankinship's alleged charting deficiencies, even though he credibly stated that he was charting adequately, Rose only testified about him innocuously charting that a patient was sent to x-ray, and the Hospital failed to offer any redacted copies of his other reportedly errant charts. These actions make the PIP seem more harassing than purposeful.

20 Blankinship took the PIP seriously and rigorously completed his assigned tasks. The Hospital's failure to tell him that it was over, deeply undercut its claim that it had a rehabilitative purpose.

21 There is no evidence that Rose met with Blankinship on a regular basis to monitor his progress and training. Her failure, as his direct supervisor, to take a more active role in a PIP that involved important patient care issues rendered this undertaking suspect.

22 He is a seasoned RN, who received glowing appraisals, which lauded his "excellent bedside nursing," proclaimed the ER [l]ucky to have [him] back," and commended him as an "excellent asset." (U. Exhs. 4–5). It is, therefore, very unlikely that he suddenly forgot all that he previously knew and newly transformed into an incompetent, who now required a PIP, in order to regain even a basic level of competency.

Blankinship was disciplined more drastically than other ER RNs, who committed vastly more serious transgressions.[23] In sum, the above-described factors demonstrate that the Hospital would not have disciplined Blankinship, absent his Union activity.[24]

2. Schedule Change

The Hospital similarly did not show that it would have changed his schedule, absent his Union activity. *First*, the same reasons that rendered the PIP and warning unlawful tarnished the schedule change. *Second*, if Blankinship were genuinely unqualified to regularly perform the 7 a.m. shift, as Rose asserted, she would not have regularly assigned him this shift for a 3-month period, as an inducement to remain with the ER. *Third*, Rose's claim that Blankinship was only temporarily assigned the 7 a.m. shift, in order to replace an RN on leave, was not supported by the schedule. *Lastly*, the schedule change closely followed his Union activity.

D. Conclusion[25]

The General Counsel has convincingly shown that Union animus motivated Blankinship's written warning, PIP and schedule change.[26] The Hospital failed to adduce that it

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23 RNs, who unlike Blankinship, potentially endangered patients and exhibited willful disregard for workplace rules, received only verbal and written warnings, without the implementation of a PIP. This precedent renders Blankinship's far more draconian discipline suspect.

24 Although Blankinship admittedly discharged a patient with low blood pressure without advising her physician about her blood pressure drop, this isolated incident did not warrant the PIP and warning. He was operating under orders to discharge the patient, there is no evidence that the patient was harmed by his actions, there is no evidence that the physician subsequently complained, the patient appeared physically ready for discharge, and he credibly explained that a pressure drop was consistent with the medication that she was taking.

25 The Hospital failed to provide certain occurrence reports to the Union and General Counsel, in response to their subpoenas. (Tr. 254-55, 513; GC Exhs. 8, 9; U. Exhs. 2, 3; ALJ Exh. 3). In its defense, the Hospital cited the Patient Safety and Quality Improvement Act of 2005, 42 U.S.C Sec. 299b et seq. These actions led opposing counsel to request sanctions under *Bannon Mills*, 146 NLRB 611 (1964). Their sanctions request is denied, inasmuch as they have fully proven the complaint allegations, absent such potential evidence, and have not been prejudiced.

26 Although Blankinship's discipline was not alleged to violate Section 8(a)(5), it is noteworthy that, in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), the Board held that employers must bargain with their unions *prior to* the implementation of certain discipline, which was not done herein. Such precedent should be used as guidance for future disciplinary matters, until such time as the parties finalize a collective-bargaining agreement.

would have taken these actions, absent his protected activity.[27]

CONCLUSIONS OF LAW

1. The Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Hospital violated Section 8(a)(1) and (3) of the Act by issuing Blankinship a written warning, PIP and schedule change because he engaged in Union or other protected concerted activities.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Hospital has engaged in certain unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Hospital shall expunge from its records any reference to Blankinship's written warning and PIP, give him written notice of such expunction, and inform him that its unlawful conduct will not be used against him as a basis for future discipline. It is also ordered to restore the 7 a.m. schedule that he was assigned between October 7 and December 29, 2012.[28]

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27 Although two additional witnesses testified about his performance, their testimony was afforded little, if any, weight. Thomas Flis, Director, testified that that Blankinship was ill-suited for the 7 a.m. shift. His testimony was not credited because: (1) he offered no clear examples supporting his conclusion; (2) his testimony was contradicted by the Hospital's willingness to regularly assign him the 7 a.m. shift for a 3-month period before his Union activity and his strong prior performance appraisals; (3) he implausibly admitted that he never shared his concerns with Rose; and (4) his demeanor suggested that he was a witness, who strongly favored the Hospital's cause. Felicia Rae Smith, an ER charge nurse, testified that Blankinship was "inconsistent on [the 7 a.m.] . . . shifts, because it's so busy, and he tended to lose focus" and "would go from one thing to another, and not necessarily finish the first thing he started." (Tr. 212). Her testimony was not credited because: (1) if fully credited, her testimony suggested that the Hospital tolerated a borderline malpractice scenario, which was implausible; (2) her testimony was contradicted by her own willingness, as the scheduler, to regularly assign him the 7 a.m. shift for a 3-month period; and (3) she appeared to be deeply biased in favor of the Hospital to the point that she exaggerated that his nursing care reached malpractice proportions.

28 A make whole remedy does not appear warranted, inasmuch as the evidence failed to show that he lost wages as a result of the schedule change. If, however, the evidence presented during the compliance phase demonstrates a loss of income, backpay shall be based on earnings he would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) enf. denied on other grounds sub nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). Under these circumstances, the Hospital shall also file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate him for any adverse tax consequences associated with receiving lump-sum backpay awards covering more than 1 calendar year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

Finally, the Hospital shall distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees at the facility, in addition to the traditional physical posting of paper notices. See *J. Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[29]

ORDER

The Respondent, Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center, Ronceverte, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Placing employees on PIPs, changing their schedules and issuing them warnings or otherwise disciplining them for engaging in Union activities.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

a. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful PIP, warning and schedule change, and within 3 days thereafter notify Blankinship in writing that this has been done and that such discipline will not be used against him in any way.

b. Within 14 days from the date of the Board's Order, restore Blankinship to the work schedule that he was assigned between October 7 and December 29, 2012.

c. Within 14 days after service by the Region, physically post at its Ronceverte, West Virginia facility, and electronically send and post via email, intranet, internet, or other electronic means to its unit employees who were employed at its Ronceverte, West Virginia facility at any time since December 6, 2012, copies of the attached Notice marked "Appendix."[30] Copies of the Notice, on forms provided by the Regional Director for Region 10, after being signed by the Hospital's authorized representative, shall be physically posted by the Hospital and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the

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29 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

30 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Hospital to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Hospital has gone out of business or closed the facility involved in these proceedings, the Hospital shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by it at the facility at any time since December 6, 2012.

d. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 23, 2014

Robert A. Ringler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT issue warnings, performance improvement plans or discipline, change your hours of work, or otherwise discriminate against you because you support the National Nurses Organizing Committee, AFL–CIO (NNOC) (the Union) or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful written warning, performance improvement plan and schedule change issued to James Blankinship.

WE WILL, within 14 days from the date of this Order, restore James Blankinship to the primarily day-shift position in the Emergency Department that he occupied between October and December 2012.

WE WILL, within 3 days thereafter, notify James Blankinship in writing that this has been done and that the written warning, performance improvement plan and schedule change will not be used against him in any way.

GREENBRIER VMC, LLC, D/B/A
GREENBRIER VALLEY MEDICAL CENTER
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

233 Peachtree Street N.E., Harris Tower, Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (205) 933-3013.