UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARE ONE AT MADISON AVENUE, LLC D/B/A
CARE ONE AT MADISON AVENUE,

Petitioner,

Case Nos. 15-1010 & 15-1025

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S STATEMENT
REGARDING THE UNDERLYING DECISION

Pursuant to this Court's January 16, 2015 Order, Care One at Madison Avenue, LLC d/b/a Care One at Madison Avenue ("Petitioner") hereby provides the Decision and Order of the National Labor Relations Board on December 16, 2014, reported as Care One at *Madison Avenue, LLC d/b/a Care One at Madison Avenue and 1199 SEIU, United Healthcare Workers East*, 361 N.L.R.B. No. 159, from which Petitioner's Petition for Review arises. The decision is attached as Exhibit A and is also attached to Petitioner's Petition for Review.

Dated: February 12, 2015

Respectfully submitted,

s/Paul D. Clement

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CERTIFICATE OF SERVICE

I certify that on February 12, 2015, I electronically filed the foregoing Statement Regarding the Underlying Decision with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. I further certify that the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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s/Paul D. Clement
Paul D. Clement

EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Care One at Madison Avenue, LLC d/b/a Care One at Madison Avenue *and* 1199 SEIU, United Healthcare Workers East. Cases 22–CA–085127 and 22–CA–089333

December 16, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On July 31, 2013, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and 1199 SEIU, United Healthcare Workers East (the Union), filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

At issue in this case is whether the Respondent committed multiple unfair labor practices during the Union's campaign to organize and represent a unit of the Respondent's Madison Avenue employees. We agree with the judge, for the reasons she states, that the Respondent violated the Act in several respects. First, we agree that the Respondent violated Section 8(a)(1) of the Act when, prior to the March 23, 2012,[4] representation election, it distributed to its employees a leaflet that threatened them with job loss for engaging in protected concerted activity. Next, we agree that the Respondent violated Section 8(a)(1) and (3) by announcing and implementing a reduction in healthcare premiums and copays, on March 5 and 23, respectively, for all employees except those who were eligible to vote in the election. Third, we agree with the judge that the Respondent violated Section 8(a)(1) during a mandatory meeting of employees held 2 days before the election. In that campaign meeting, where the Respondent repeatedly urged employees to vote against the Union, the Respondent unlawfully presented a video displaying photographs of employees, taken for other purposes and used without their consent, and lacking any disclaimer that the video was not intended to reflect their views. *Allegheny Ludlum Corp*., 333 NLRB 734 (2001), enfd. 301 F.3d 167 (3d Cir. 2002). Finally, as discussed below, we also affirm the judge's finding that the Respondent violated Section 8(a)(1) by posting a postelection memorandum directed at union activity on its employee bulletin board.

I. THE POSTELECTION MEMORANDUM

On about March 26, 3 days after the union election, Respondent Administrator George Arezzo posted a memorandum entitled "Teamwork and Dignity and Respect" accompanied by the Respondent's preexisting Workplace Violence Prevention Policy (the Policy), on the employee bulletin board.

The memorandum states as follows:

> Now that the NLRB Election is behind us, I was hoping that everyone would put their differences behind them and pull together as a united team. Even though we may have had different opinions on the Union, I thought that after the election we would treat each other with dignity and respect and reunite our Madison Ave-

[1] The parties stipulated to the pertinent facts and waived a hearing.

[2] We find no merit in the Respondent's contention that the Acting General Counsel lacked the authority to prosecute this case. The Acting General Counsel was properly appointed under the Federal Vacancies Reform Act, 5 U.S.C. § 3345, and not pursuant to Sec. 3(d) of the Act. See *Muffley v. Massey Energy Co.*, 547 F.Supp.2d 536, 542–543 (S.D. W.Va. 2008), affd. 570 F.3d 534 (4th Cir. 2009) (upholding authorization of Sec. 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act). See *The Ardit Co*., 360 NLRB No. 15, slip op. at 1 (2013).

We likewise find no merit in the Respondent's contention that the judge lacked the authority to decide this case. In *New Process Steel v. NLRB*, 560 U.S. 674 (2010), the Supreme Court expressed doubt about a contention that the lack of a Board quorum voids the previous delegations of authority to nonmembers, such as Regional Directors. Although the Supreme Court did not expressly rule on the question, it noted that its "conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or general counsel." 560 U.S. at 684 fn. 4. Further, since *New Process Steel*, all of the courts of appeals that have considered this issue have upheld the principle that Board delegations of authority to nonmembers remain valid during a loss of quorum by the Board. See *Kreisberg v. Healthbridge Mgt., LLC*, 732 F.3d 131 (2d Cir. 2013); *Frankl v. HTH Corp*., 650 F.3d 1334, 1354 (9th Cir. 2011), cert. denied 132 S. Ct. 1821 (2012); *Osthus v. Whitesell Corp*., 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010).

[3] We shall modify the judge's recommended Order to require the Respondent to compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. See *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall also modify the judge's recommended Order to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified, and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[4] All of the following dates are in 2012.

> nue family. I was hoping we could let go of our past differences and look forward, focusing all of our energy on making our Center the best it can be and providing the very best Quality of Care and Customer Service possible.
>
> Unfortunately, it appears that a few of our team members are unwilling to do this. It also has been reported to me that a few employees are not treating their fellow team members with respect and dignity. I have even heard disturbing reports that some of our team members have been threatened.
>
> While I recognize that employees have a right to make up their own minds regarding the union, and I respect the right employees have to be for or against the union, these rights do not give anyone the right to threaten or intimidate another team member, for any reason. Care One at Madison Avenue has a longstanding policy prohibiting threats, intimidation, and harassment (Workplace Violence Prevention policy is attached).
>
> I want everyone to be on notice that threats, intimidation, and harassment will not be tolerated at Care One at Madison Avenue. We will enforce the Workplace Violence Prevention policy to keep our workplace free from such improper conduct. Anyone engaging in such conduct will be subject to discipline, and, depending on the facts of the situation, such discipline may include suspension or discharge for a first offense.
>
> It is very disappointing that I have to post a memo warning a few people that they will be disciplined if they threaten others. Threats should never occur in a family environment where we care about one another and should be treating each other with dignity and respect.
>
> To the vast majority of our team members, thank you for your support and for being part of the Care One at Madison Avenue team—and family. And, thank you in advance for working with me and our leadership team as we move our Center forward and make it the best center in the Care One family.

The judge found no evidence that the threats mentioned in the memorandum actually occurred, that the Respondent attempted to investigate any alleged threats, or that it disciplined any employees for such incidents.

The Policy accompanying the memorandum states as follows:

> The Center is committed to maintaining a safe, healthy and secure work environment, and preventing violence in the workplace. Acts or threats of violence, including intimidation, harassment and/or coercion, which involve or affect any Center employee, Resident, volunteer, visitor and independent contractor and anyone else on Center premises, will not be tolerated. Violations of this policy may result in disciplinary action, up to and including termination of employment and/or legal action as appropriate.
>
> Examples of workplace violence include, but are not limited to, the following:
>
> - Threats or acts of violence occurring on Center premises, regardless of the relationship between the Center and the parties involved in the incident.
> - Threats or acts of violence occurring off Center premises involving someone who is acting in the capacity of a representative of the Center.
> - Threats or acts of violence occurring off Center premises if the Center determines that the incident may lead to an incident of violence on Center's premises.
>
> An employee's unlawful or unauthorized possession or use of a dangerous or deadly weapon, including but not limited to all firearms, in the workplace is prohibited.
>
> Specific examples of conduct that may be considered threats or acts of violence under this policy include, but are not limited to, the following:
>
> - Threatening physical or aggressive contact toward another person.
> - Threatening a person or his or her family, friends, associates or property with physical harm.
> - The intentional destruction of Center property or another's property.
> - Harassing or threatening phone calls.
> - Surveillance or Stalking
> - Veiled threats of physical harm or like intimidation.
>
> You are expected and encouraged to report any acts or threats of physical violence, including intimidation, harassment and/or coercion which involve or affect the Center, or which occur on Center premises, to your Center Administrator/Supervisor or the Regional Human Resources Department.

The judge found that the memorandum was unlawful because it was promulgated in response to union activity and because employees would reasonably construe it to prohibit such activity.[5]

[5] There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by maintaining the Policy.

II. ANALYSIS

An employer violates the Act by maintaining a work rule that explicitly restricts Section 7 activities. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). "If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. As noted above, there is no pending challenge to the Policy. The issue is whether the Respondent's posting of the memorandum was unlawful. We agree with the judge that it was, both because the memorandum was promulgated in response to the employees' union activity and because employees would reasonably read it to restrict Section 7 activity.

First, by its express terms, Arezzo's memorandum indicates that the Respondent promulgated and posted the memorandum in response to its employees' union activity. It repeatedly referred to the union election 3 days earlier and the "differences" that arose in the workplace during the Union's campaign. Further, Arezzo's statement, "I thought that after the election we would treat each other with dignity and respect," suggests that during the organizing campaign and election the Respondent believed that employees did not treat each other with dignity and respect when they engaged in protected union activity. The repeated references to the election in the memorandum, and the nonspecific plea for "dignity and respect," terms not mentioned in the Respondent's Policy, create an obvious and heretofore unexpressed link between the subject matter of the rule and protected activity.

Our dissenting colleague suggests that the Respondent's need to prevent workplace violence justified issuance of the memorandum. While we share his concerns about potential workplace violence, the Board does not accept an employer's claims of violence at face value when Section 7 rights are implicated. See *Boulder City Hospital*, 355 NLRB 1247, 1249 (2010) (posting of broad memorandum against harassment violated Section 8(a)(1) where memorandum was posted in response to lawful union solicitation that employer never investigated as harassment, and which expanded existing antiharassment policy to target such solicitation). Rather, the Respondent has the burden to demonstrate whether such concerns or reasons apart from the campaign actually motivated it to issue the memorandum when it did.[6] Here, because there is no record evidence that the Respondent attempted to investigate alleged threats, let alone that any threats actually occurred, we agree with the judge that the Respondent lacked a legitimate basis for issuing the memorandum.[7]

Second, as in *Boulder City Hospital*, above, we find that the Respondent's employees would also reasonably construe the memorandum to prohibit Section 7 activity. For the same reasons discussed above, employees would understand the memorandum's references to the recent union election and to their purported failure to treat each other with "dignity and respect" during the campaign as an extension of the Policy to explicitly target protected activity in support of the Union. Indeed, the memorandum served as an authoritative indication to employees that the Respondent would construe the Policy to include protected campaigning activity and that they should do so as well. See *The Roomstore*, 357 NLRB No. 143, slip op. at 1 fn. 3 (2011) (employees would reasonably construe rule prohibiting "[a]ny type of negative energy or attitudes" to include protected activity given employer's repeated warnings not to talk negatively about the employer's pay practices).

Our dissenting colleague argues that *Boulder City Hospital*, above, is distinguishable and does not support

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[6] The Respondent excepts to the judge's legal analysis to the extent that she relied on the absence of evidence of such threats. It argues that the judge erred because "such evidence would not have been probative of anything related to the question of whether [its] posting of the Arezzo memorandum and [the Policy] together violated Section 8(a)(1)." Contrary to the Respondent's argument, such evidence is clearly relevant in determining whether a rule, or as in this case, a memorandum expanding on a rule, was unlawfully promulgated. It is well established that "once it is shown that the rule was promulgated in the context of a union campaign, the burden of explanation lies with the employer." *City Market, Inc.*, 340 NLRB 1260, 1260 (2003). In order to meet this burden, an employer must offer more than mere assertions of misconduct. See id. (requiring a showing of the alleged improper solicitation); *Boulder City Hospital*, supra at 1249 (employer did not investigate employee complaints about harassment related to union solicitation, and therefore "had no reason to believe" that solicitation was not protected); *Harry M. Stevens Services*, 277 NLRB 276, 276 (1985) ("[T]he Respondent failed to rebut the General Counsel's prima facie case and to establish that its no-solicitation/no-distribution rule was promulgated [during the union's organizational campaign] to maintain production and discipline.").

[7] We do not agree with the dissent that we need not reach the question whether the memorandum was promulgated in response to actual threats because, in the dissent's view, it did not expand upon the original Policy, but "merely reiterated the lawful and established [workplace violence] policy." To the contrary, as explained above, the memorandum went substantially beyond the original Policy and created a new rule by specifically referencing union activity that was—in the absence of contrary evidence—protected. See, e.g., *Santa Maria El Mirador*, 340 NLRB 715, 717–718 (2003) (employer unlawfully promulgated rule by "specifically aim[ing]" existing general no-access rule at protected activity).

our decision here. We disagree. Our colleague makes much of the fact that here, unlike in *Boulder City Hospital*, the memorandum was posted alongside the underlying Policy and "repeated language from the Policy" by using the words "threats," "intimidation," and "harassment." We find that this reference to three words in the Policy did nothing to lessen the coerciveness of the memorandum. Instead, any limited invocation of the Policy's general rules against harassment was more than offset by language responding to and specifically targeting union activity.

Nor are we persuaded by our colleague's claims that the memorandum's purported acknowledgement of employees' Section 7 rights negated its earlier unfounded intrusion on those rights. In *Boulder City Hospital*, on similar facts, the Board stated that:

> This would be a different case had the Respondent's memo [merely reminded employees of the existing policy without extending the policy to implicate Section 7 activity] and had it been posted in a context free of unfair labor practices, or if the Respondent's memo had acknowledged what Board law makes clear, namely that its employees had the statutory right to "engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited."

Id. at 1249. Contrary to the dissent, the pertinent facts preclude this case from being the "different case" referred to above. First, the memorandum did not merely remind employees of the existing Policy; it specifically extended it to prohibit union organizational activity. Second—and as chronicled above—it was not posted in a context free of unfair labor practices. Instead, it was posted on the heels of the election and in the wake of several contemporaneous unfair labor practices. Third, while the memorandum nominally acknowledged the employees' right to hold personal views about the Union, it failed to make clear that employees also had the right to engage in concerted activity in furtherance of those views. Indeed, it intimated that employees who engaged in such conduct would be subject to discipline.[8] Our colleague would disregard such pertinent facts, finding it determinative that the Respondent maintains that the memorandum was posted in response to reports of threats. But as explained, we do not accept at face value such self-serving justifications for promulgating the memorandum, and the Respondent did not meet its burden to produce evidence of such threats.

In sum, based on the factual context and our established precedent, we agree with the judge that the Respondent violated Section 8(a)(1) by posting the postelection memorandum, because (1) it thereby promulgated a rule in response to union activity and (2) employees would reasonably construe it to prohibit such activity.

ORDER

The National Labor Relations Board orders that the Respondent, Care One at Madison Avenue, LLC d/b/a Care One at Madison Avenue, Morristown, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with job loss if they select the Union as their bargaining representative, engage in activities on behalf of the Union, or engage in protected concerted activities.

(b) Announcing and implementing a reduction in healthcare premiums and copays that excludes employees eligible to vote in the representation election.

(c) Showing a video or presentation during an election campaign containing employees' images without their consent and without a disclaimer stating that the video or presentation is not intended to reflect the views of the employees appearing in it.

(d) Issuing a memorandum to employees posted soon after a union organizing campaign and election that employees would reasonably construe as modifying the Respondent's Workplace Violence Prevention Policy to prohibit protected union activity.

(e) 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) Implement the January 1, 2012, reduction in healthcare premiums and copays for unit employees who were eligible to vote in the representation election but were specifically excluded from those benefits.

(b) Make whole those unit employees who were eligible to vote in the representation election but were specifically excluded from the reduction in healthcare premiums and copays available to other employees.

(c) Compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration

[8] While "an employer's express notice to employees advising them of their rights under the Act may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule," that notice "should adequately address the broad panoply of rights protected by Section 7." *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 3–4 (2014) (footnote omitted) (relying on narrowness of employer's safe harbor provision as one ground for finding that it did not negate the coerciveness of unlawful work rules). See, e.g., *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) ("The Respondent's May 5 notice, however, dealt exclusively with employee rights to discuss union matters . . . The Respondent thereby ignored the exercise of Section 7 rights relating to concerted activity other than union activity.").

allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Rescind the memorandum to employees entitled "Teamwork and Dignity and Respect," and provide assurances that the Workplace Violence Prevention Policy is not intended to and will not be used to interfere with employee rights under Section 7 of the Act.

(e) Within 14 days after service by the Region, post at its Morristown, New Jersey facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 22 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. December 16, 2014

Mark Gaston Pearce, Chairman

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting in part.

In evaluating the legality of a work rule, "the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). In failing to abide by these canons of work rule construction, the majority gives the Respondent's memorandum to employees, entitled "Teamwork and Dignity and Respect," a manifestly unreasonable reading in light of the memorandum's text and the language of the indisputably lawful Workplace Violence Prevention Policy (the Policy). Based on this misreading, my colleagues apply inapposite precedent to conclude that the memorandum effectively expanded the Policy such that the Respondent has promulgated a new rule in response to union activity that employees would reasonably construe as restricting their Section 7 rights. In fact, the Respondent's memorandum merely reiterated the Policy consistent not only with Board law, but also with Board policy "recogniz[ing] the legitimate need of employers to guard against workplace violence." See *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011). Because the majority's conclusions lack an adequate factual and legal foundation, I respectfully dissent.

Initially, contrary to the majority, there has been no "promulgat[ion] in response to union activity." See *Lutheran Heritage Village*, supra at 647. The threshold question in this case is whether there has been a promulgation of a new rule or policy in the first place. Here, the memorandum neither modified the Policy nor created a new rule or policy. Indeed, the memorandum merely reiterates the lawful and established Policy in response to claimed reports of threats.[1] Thus, the memorandum attaches the Policy (and expressly states that it is doing so),

[9] 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."

[1] The judge found the Policy, standing alone, to be facially lawful. Because the memorandum did not modify the Policy such as to promulgate a new rule or policy, there is no need—for purposes of the second prong of the *Lutheran Heritage Village* analysis—to determine whether the Respondent posted the memorandum "in response to union activity" or to actual threats. The majority nonetheless mischaracterizes my position as contending that unsubstantiated reports of threats justified issuance of the memorandum and are therefore "determinative" of the memorandum's legality. As a factual matter, the memorandum was posted in response to claimed reports of threats. Legally, however, this fact is inconsequential because the Board need not reach the questions of whether the Respondent investigated the reports of threats or whether actual threats were made. Under *City Market, Inc.*, "once it is shown that the rule was promulgated in the context of a union campaign, the burden of explanation lies with the employer." 340 NLRB 1260, 1260 (2003). Thus, an employer bears a "burden of explanation" only after it has been established that a work rule was in fact promulgated. Here, because the Respondent's memorandum merely reiterated the lawful, active Policy and nothing more, there was no promulgation and therefore no burden on the Respondent to explain how any rationale for such purported promulgation was not in response to union activity.

specifically incorporates the Policy by reference (as the judge expressly found), and cites the Policy's prohibition of threats, intimidation, and harassment, terms that the Policy explains. Nor would employees reasonably construe the Respondent's memorandum in conjunction with the reiterated Policy as restraining their Section 7 rights.[2] See id.

The majority's reliance on certain isolated phrases in the memorandum to conclude otherwise is misplaced. In context, the memorandum's references to "respect and dignity" do not broaden or otherwise modify the Policy. Rather, those references, juxtaposed with the conduct prohibited by the Policy, describe conduct that does not violate the Policy, i.e., conduct that does not threaten, intimidate, or harass others, as those terms are explained in the Policy. For instance, the memorandum refers to reports that "a few employees are not treating their fellow team members with respect and dignity," immediately before clarifying that Respondent Administrator George Arezzo had heard "disturbing reports that some of our team members have been threatened." In other words, "a few employees" failed to treat "some of our team members" with "respect and dignity" by threatening them. In the memorandum's penultimate paragraph, Arezzo laments that he had to "post a memo warning a few people that they will be disciplined if they threaten others," concluding in the following sentence that "[t]hreats should never occur" in a "family environment" where employees "should be treating each other with dignity and respect." Further, the memorandum's references to the recent union election are not definitive evidence that its posting modified the Policy so as to promulgate a new rule or policy in response to union activity. Rather, the memorandum specifically expresses the Respondent's "respect [for] the right employees have to be for or against the union" in making clear that whatever one's opinion on the subject, employees' labor rights do not privilege them to engage in threatening or intimidating behavior at work. Accordingly, by relying on the memorandum's references to "dignity and respect" and to the recent union election, my colleagues erroneously "read[] phrases in isolation" to "presume improper interference with employee rights." See *Lutheran Heritage Village*, supra at 646. A "reasonable reading" of the entire memorandum in context makes clear that it did nothing more than lawfully reiterate the Policy.

The Board's decision in *Boulder City Hospital*, 355 NLRB 1247 (2010)—on which the majority relies—is not to the contrary. There, in response to presumably lawful union solicitations during an organizing campaign, the employer posted a memorandum purporting to remind employees of its lawful antiharassment policy. Id. at 1247. The memorandum stated that "harassment or threatening behavior in any degree by or between employees will not be tolerated." Id. In addition, the memorandum cited the employer's anti-harassment policy from the employee handbook and informed employees of their right to contact Human Resources if they feel "harassed or threatened in any way." Id. The employee handbook policy was somewhat narrower, prohibiting "illegal harassment . . . defined as any conduct directed toward another because of that person's sex, race, age, national origin, color, disability, sexual orientation, religion, ancestry, or veteran status, or any other unlawful basis that is inappropriate or offensive as determined by using a 'reasonable person' standard." Id. The Board majority concluded that the memorandum constituted either "an overbroad application of the lawful written handbook policy or . . . the promulgation of a new harassment policy." *Boulder City Hospital*, supra at 1249. In other words, the memorandum modified and broadened the preexisting antiharassment policy to include union activity, i.e., lawful union solicitations. The Board majority reasoned that the employer's memorandum "did not repeat or reproduce the language of the handbook," but "used its own broad, general language to describe the conduct that was prohibited." Id. at 1248. But the majority concluded that *Boulder City Hospital* "would be a different case" had the employer acknowledged employees' rights to engage in lawful union solicitations. Id. at 1249. This is that "different case."

Here, the Respondent's memorandum reiterated, cited, attached, and incorporated by reference the lawful, preexisting Policy without modification. Thus, unlike the situation in *Boulder City Hospital*, the memorandum did no more than remind employees of the Policy. The Respondent's memorandum also repeated language from the Policy—threats, intimidation, and harassment—terms for which the Policy provides examples. Finally, as discussed above, the Respondent's memorandum acknowledged employees' Section 7 rights, stating: "While I recognize that employees have a right to make up their own minds regarding the union, and I respect the right employees have to be for or against the union, these rights do not give anyone the right to *threaten or intimidate* another team member, for any reason." (emphasis added). The memorandum in *Boulder City Hospital* con-

[2] Any arguable similarity between *The Roomstore*, 357 NLRB No. 143 (2011), and the instant case rests on an unreasonable and crabbed reading of the Respondent's memorandum in relation to the Policy.

tained no similar language affirming employees' Section 7 rights.[3]

Dated, Washington, D.C. December 16, 2014

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

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 threaten you with job loss if you select the Union as your bargaining representative, engage in activities on behalf of the Union, or engage in protected concerted activities.

WE WILL NOT announce and implement a reduction in healthcare premiums and copays that excludes employees eligible to vote in the representation election.

WE WILL NOT show a video or presentation during an election campaign containing employees' images without their consent and without a disclaimer stating that the video or presentation is not intended to reflect the views of the employees appearing in it.

WE WILL NOT issue a memorandum to employees posted soon after a union organizing campaign and election that employees would reasonably construe as modifying our Workplace Violence Prevention Policy to prohibit protected union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL implement the January 1, 2012, reduction in healthcare premiums and copays for our unit employees who were eligible to vote in the representation election but were specifically excluded from those benefits.

WE WILL make whole those unit employees who were eligible to vote in the representation election but were specifically excluded from the reduction in healthcare premiums and copays available to our other employees.

WE WILL compensate our employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL rescind our memorandum to employees entitled "Teamwork and Dignity and Respect," and WE WILL provide assurances to you that the Workplace Violence Prevention Policy is not intended to and will not be used to interfere with your exercise of the rights listed above.

CARE ONE AT MADISON AVENUE, LLC D/B/A
CARE ONE AT MADISON AVENUE

The Board's decision can be found at www.nlrb.gov/case/22-CA-085127 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

[3] The majority's reliance on *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 3–4 (2014), and *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005), is misplaced. In *First Transit*, supra, slip op. at 3–4, the Board found that policy language affirming employees' rights to vote for or against a union during an organizing campaign without management interference failed to "clarify the scope of an otherwise ambiguous and unlawful rule" not only because the right to engage in nonunion concerted activity was omitted, but also because the "policy's placement in the [employee] handbook [was] neither prominent nor proximate to the rules it purport[ed] to inform." Here, the memorandum's language affirming employees' rights to support or oppose the Union was included on the same page as the language that the majority finds unlawful. In *Claremont Resort & Spa*, supra at 832, the Board merely applied the repudiation doctrine to conclude that an employer failed to cure the illegality of an earlier work rule with a subsequent notice to employees. By contrast, the Respondent's memorandum contemporaneously presented both the language affirming employees' rights under the Act *and* the language the majority finds unlawful. The Board's repudiation doctrine is not at issue here.

Laura Elrashedy, Esq., for the Acting General Counsel.
Jedd Mendelson, Esq. and *James M. Monica, Esq. (Littler Mendelson, P.C),* for the Respondent.
Katherine H. Hansen, Esq. (Gladstein, Reif & Meginniss, LLP), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. Based upon charges in Cases 22–CA–085127 and 22–CA–089333 filed by 1199 SEIU, United Healthcare Workers East (Union), against Care One at Madison LLC, d/b/a/ Care One at Madison Avenue (the Employer, Respondent, or Madison Avenue), an Order Consolidating Cases, consolidated amended complaint, and notice of hearing (complaint) issued on March 4, 2013. The complaint alleges that the Employer violated Section 8(a)(1) and (3) of the Act by: threatening employees with job loss if they selected the Union as their bargaining representative and engaged in concerted, protected activity; announcing and implementing a reduction in healthcare premiums and copays for all employees except for those eligible to vote in an upcoming representation election; showing an Employer-produced video containing employee images during a mandatory meeting held for employees and by issuing a memorandum reiterating the Employer's workplace prevention policy. Respondent filed an answer denying the material allegation of the complaint and raising several affirmative defenses which will be discussed, as appropriate, below.[1]

On March 29, 2013, pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, counsels for the Acting General Counsel,[2] the Employer, and the Union submitted Joint Motion and Stipulation of Facts (Stipulation) to me wherein the parties agreed to waive a formal hearing and requested that I make appropriate findings of fact and conclusions of law and issue an appropriate order based upon the submitted, stipulated record. This record consists of the formal papers, a stipulation together with supporting exhibits, a statement of issues presented, and the parties' respective statements of position. On April 3, 2012, I granted the parties' motion and approved the stipulation. I also set a date for the filing of briefs.

On the entire record, and after considering the briefs filed by the General Counsel, the Employer, and the Union, I make the following

[1] As a preliminary matter, Respondent argues that any actions taken by this Board, including its agents and delegates, lack authority because the court in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), found the recess appointments of Members Sharon Block and Richard Griffin were unconstitutional and invalid. Thus, the Board lacks a quorum. The Respondent further contends that the Acting General Counsel's appointment was unlawful. Respondent maintains that the Acting General Counsel and Regional Director thereby lack the authority to prosecute the complaint and that I am without authority to proceed with a hearing and decide the matter. I reject these contentions and observe that such arguments have been rejected by the Board for the reasons stated in *2 Sisters Food Group, Inc.*, 359 NLRB No. 158 (2013), *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 (2013), and *Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013).

[2] Hereafter referred to as the General Counsel.

FINDINGS OF FACT

I. JURISDICTION

The Employer, a New Jersey limited liability company, operates a nursing and rehabilitation facility in Morristown, New Jersey. During the preceding 12 months, the Employer has derived gross revenues in excess of $100,000 and has purchased and received at its Morristown facility goods and supplies valued in excess of $5000 directly from suppliers located outside the State of New Jersey. The Employer admits and I find that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) and has been a healthcare institution within the meaning of Section 2(14) of the Act.

It is also admitted, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Care One Management, LLC (Care One Management) provides management services to the Employer, as well as approximately 20 other nursing and rehabilitation centers in New Jersey.

Brian Karstetter was a Regional Director of Operations employed by Care One Management from January 9 to September 25, 2012. The Employer was one of the centers to which Karstetter provided services. The parties have stipulated that between January 9 and March 23, 2012, Karstetter was a supervisor of the Employer within the meaning of Section 2(11) of the Act and an agent of the Employer within the meaning of Section 2(13) of the Act.

It is further stipulated that from January 26, 2012 to present, George Arezzo has been the administrator at Madison Avenue and is a supervisor of the Employer within the meaning of Section 2(11) of the Act and an agent of the Employer within the meaning of Section 2(13) of the Act.

B. The Representation Petition and Campaign

On January 23, 2012,[3] the Union filed a petition for election to represent the following unit of employees at Madison Avenue in Case 22–RC–072946:

> All full-time and regular part-time nonprofessional employees including: all licensed practical nurses, certified nursing aides, dietary aids, housekeepers, laundry aids, recreation aides, restorative aides, rehabilitation techs, central supply clerks, unit secretaries, and receptionist.

A representation election was conducted on March 23. The tally of ballots showed 57 ballots cast for and 58 ballots cast against representation, with 1 challenged ballot. The Union filed objections to the election and a postelection hearing was held on May 18, 21, 23, 24, and 29, in Case 22–RC–072946.[4]

[3] All dates referred to going forward are in 2012, unless otherwise indicated.

[4] The parties have stipulated to the admission of the postelection hearing record in Case 22–RC–072946 except for and excluding "Attachment 2" of Board. Exh. 1(e).

The Board upheld certain of the Union's objections and, on September 13, 2012, issued a Decision and Direction of Second Election. The second election has not been held, due to the pending unfair labor practice charges filed by the Union in the instant case. On March 25, 2013, the Employer filed a motion to vacate the Decision and Direction of Second Election.

C. The Alleged Threat of Job Loss

1. Facts

During the critical period, the Employer distributed numerous leaflets to its employees.[5] Of particular relevance to the instant case is one entitled "Get the Facts! Know the Truth! What the Union Won't Tell You."

The leaflet poses a series of questions to employees with a choice of answers: "Yes" or "No." The "No" choice is highlighted. Employees are asked the following questions (italics and boldface are in the original):

> Do you want to give an outsider over $300–$900 per year—and then given them more money if they think that is not enough?
>
> Do you want to give outsiders the ability to charge you additional fees or assessments whenever they want?
>
> Do you want to give outsiders the power to gamble with your wages and benefits?
>
> Do you want to give outsiders the power to jeopardize your job by putting you out on strike?
>
> Do you want to give outsiders the right to speak for you and make binding decisions for you that could affect your future?
>
> Do you want to give outsiders the right to have you fired if you fail to pay your union dues?
>
> Do you want to give outsiders the right to trade away your wages and benefits in bargaining as they see fit?
>
> Do you want to give outsiders the authority to make you obey their rules and orders?
>
> Do you want to give outsiders the right to put you on trial and punish you for breaking their rules?

The leaflet continues:

> If your answer to any of these questions is NO—then you know what to do when you vote in the election!
>
> Vote NO and keep 1199SEIU out of our lives!
>
> When you Get the Facts You Will Know the Truth! Vote NO!

The General Counsel and the Union contend that one question posed to employees: "Do you want to give outsiders the power to jeopardize your job by putting you out on strike?" constitutes an unlawful threat of job loss.

The Employer has argued, for reasons discussed in further detail below, that the leaflet and the questions posed therein are lawful. The Employer additionally points to the fact that, during the campaign, employees were also shown a PowerPoint presentation during educational meetings. The Employer does not refer to any particular portion of this presentation but argues generally that it contained lawful communications to employees as to what could happen in the event of a strike. A review of the PowerPoint presentation in evidence reveals a number of slides containing the following communications to employees relating to a possibility and effects of a strike:[6]

> <u>1199 SEIU's Options When the Center Rejects the Union's Proposals in Bargaining</u>
>
> If the Center says "No" to 1199 SEIU's proposals, the Union does not have many options—
>
> —It can give up and agree to the Center's proposals;
>
> —It can go back to the bargaining table; or
>
> —It can take employees out on strike—jeopardizing employee jobs, resident care and our Center
>
> <u>Reasons Why A Union Takes Employees Out on Strike</u>
>
> Unions sometimes take employees out on strike to pressure employers in bargaining—to try to force employers to agree to Union's unreasonable bargaining demands
>
> Unions Have the Right to Take Employees Out on Strike
>
> 1199 SEIU would not need any authorization from Center to take employees out on strike—Union can call a strike on its won
>
> This is one area where Union can make a promise and follow through—it can promise employees a strike if negotiations break down
>
> Strikes are always a possibility when a union is around
>
> <u>The SEIU's Strike Record 1002–1012</u>
>
> Over the past ten years, SEIU has had:
>
> —Over 150 Strikes
>
> —Over 65,000 employees out on strike; and
>
> —Over 1,000,000 work days lost

The following three slides of the presentation list the "1199SEIU Strike Record" including the facilities involved and dates and durations of the strikes at those facilities.

The next series of slides shown to employees in this part of the presentation are as follows:

> <u>The Center's Rights During a Strike</u>
>
> Union's right to strike is protected by law, but Center would also have legal rights in event of a strike
>
> Center would have the right:
>
> —Not to pay striking employees who walk out on their jobs and their residents
>
> —Not to pay cost of Care One benefits for striking employees
>
> —**<u>To continue to operate the business</u>**

[5] Mindful that there has been no certification of any particular bargaining unit here, for ease of reference I will refer to those employees eligible to vote in the election in Case 22–RC–072964 as "unit" employees.

[6] It should be noted that there is no contention that any of these communications to employees are unlawful.

United States Supreme Court's Position on Replacement Workers

". . . Nor was it an unfair labor practice [for the Company] to replace the striking employees with others in an effort to carry on the business. . . .

"And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment. . . ."

NLRB v. McKay Radio & Telegraph

Center Can Immediately Hire Permanent Replacement Workers

Law says that a center can immediately hire replacement workers in event of an economic strike

No waiting period

Replacement workers can be hired permanently

Striking workers are then placed in a preferential recall list and are recalled only if vacancies occur

The following four slides purport to summarize "Lost Earnings From a Strike."

There is then a series of five additional slides, as follows:

Hypothetical Strike—What Could Happen if 1199SEIU Took Employees Out on Strike

Following failed negotiations, Union takes 75 employees out on strike

Ten weeks later, Union accepts Center's last offer

While strike is ongoing, Center hires 50 permanent replacement workers

Fifty striking employees then have no jobs to return to at end of strike

Striker's names are placed on preferential recall list and recalled only as openings occur

Disappointment, frustration and even violence can occur

Union's Tactics to Get Employees Out on Strike

How does Union get employees out on Strike?

Union builds up expectations by telling employees it needs leverage at bargaining table to get Center to consider Union's demands

Union calls a strike vote

Once strike vote passes, Union has power to call strike whenever it wants—without going back to employees for further approval

Union Members Suffer Lost Income While Strike is Ongoing

Striking employees do not receive paychecks while they are on strike and strikers must pay full cost of any Care One benefits they elect to continue receiving while on strike

But Union officials keep getting paid out of Union coffers—money paid in by Union members

Replacement Workers Are Always a Possibility in a Strike

No one can predict what might happen in a strike

Whenever there is an economic strike, permanent replacements are always a possibility

No one knows how our residents, their families, or medical community might react if there were a strike

We don't know whether residents might leave or hospitals or doctors might begin sending patients to a competitor's center

We do know that strikes create uncertainty and place all our jobs at risk

Strikes Can Have Devastating Consequences

Strikes can jeopardize jobs of our employees

Strikes can impact quality and consistency of care we provide our residents

Strikes can impact our employees and their families who rely on our jobs

Strikes can damage our reputation and destroy our center

There usually are no winners in a strike!

2. Analysis and conclusions

In *Eagle Comtronics*, 263 NLRB 515 (1982), the Board reviewed the rights of employees under *Laidlaw Corp.*, 171 NLRB 1366 (1969), enfd. 414 F.2d 99 (7th Cir. 1969), as they pertain to reinstatement in the event of a strike:

> Specifically, striking employees retain the right to make unconditional offers of reinstatement, to be reinstated upon such offers if positions are available, and to be placed on a preferential hiring list upon such offers if positions are not available at the time of the offer.

Eagle Comtonics, supra at 515.

The Board reiterated the principle that an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike. Moreover, an employer may address the subject of striker replacement without fully detailing the protections set forth in *Laidlaw*, "so long as it does not threaten that, as result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*." Id at 516. However, if a "statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats" then the employer has coerced employees in the exercise of their Section 7 rights under the Act." Id. Threatening employees that a strike will lead to job loss is unlawful because it incorrectly conveys to employees that their employment will be terminated as a result of a strike, whereas the law is clear that economic strikers retain certain reinstatement rights. See, e.g., *Baddour, Inc.*, 303 NLRB 275 (1991).

The Employer argues that the leaflet in question, including the portion specifically challenged by the General Counsel is a lawful communication protected by Section 8(c) of the Act.[7] The Employer further argues that its communications were

[7] Sec. 8(c) provides as follows: "the expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

permitted statements of fact and opinion under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).[8]

In its posthearing brief, the Employer further contends that the leaflet at issue merely points out the reality that a union elected by employees has the authority to call a strike and that the jobs of striking employees are in "jeopardy." The Employer makes the argument that the word "jeopardy" may alternatively be construed to mean that (1) an employee risks the loss of income if a strike is called because he or she is not working, or (2) that the employee can lose his or her job during the strike because the employer has the right to replace the employee. The Employer argues that either interpretation is lawful because it is fact-based.

The Employer additionally asserts:

> If the statement at issue were an opinion, it would remain privileged and lawful. However, it is difficult to characterize it as an expression of views or opinion. At most, it poses a question and asks the employees to consider a possibility that it is fact-based. However, nothing in it expressly or impliedly contains a threat of job loss or is otherwise coercive.

In support of the foregoing contentions, the Employer relies upon *Airporter Inn Hotel*, 215 NLRB 824, 825 (1974), where it was alleged that the following statement was unlawful:

> [R]efuse to sign any union authorization cards and avoid a lot of unnecessary turmoil. You will always do better with us without a union which can't and won't do anything for you except jeopardize your job. If you want job security and a good place to work under the best terms and conditions, reject the union.

In that case, the General Counsel alleged that the paragraph at issue violated Section 8(a)(1) because it admonished employees not to sign union cards lest they place their jobs in jeopardy. The Board concluded that the statements in question were neither instructions nor directions; nor did they contain any unlawful threats or promises.

There, the Board relied upon the fact that the offending paragraph was part of a longer communication to employees where the company's owner, among other things: (1) told employees that he was opposed to any union at the facility; (2) objected to the union's strategy of organizing one department at a time and stated that all employees should be given the opportunity to vote on the issue of union representation; (3) stated his lack of respect for the union then organizing employees; (4) criticized the union for not knowing about the industry; (5) expressed his personal moral opposition to being required to sign a contract with a union security clause; and (6) explained his legal right to refuse to accede to union demands. It was in this context, where the employer repeatedly stated his "views, argument and opinions," speech protected by Section 8(c), that the Board found that the final paragraph "taken in the context of the entire letter," was not unlawful as it constituted permissible campaign propaganda. 215 NLRB at 826.

[8] In *Gissel*, the Supreme Court recognized that Sec. 8(c) "implements" the First Amendment's right of free speech and that in regulating labor relations the Board must refrain from infringing on that right.

As the Board also noted, if the challenged statements had stood alone, they might well have been considered to be instructions or directions to employees, but they were not, in fact, set forth alone and could not be read out of context. Id.

Respondent further relies upon *Pennysaver & Ampress, Inc.*, 206 NLRB 497 (1973). However, the Board's conclusions in that matter are inapposite for a number of reasons. There, the General Counsel challenged several of the employer's communications to employees in the face of a union organizing campaign. One allegation concerned the following communication to employees:

> At that point the only way the union can enforce its demands is by asking you to go out on a strike. Remember that there can be no strikes if there is no union; there can be no loss of income because of strikes or loss of income because of payment of dues if there is no union.
>
> On the other hand, if you go out on strke [sic] for higher wages and benefits, you will get absolutely no benefits from the union while you are on strike. What is more, if there is a strike we would not close down our operation for even one day. We would expect that most of our employees would continue working but in any event we would hire employees to replace our present employees who strike. This is our right under the law. We tell you this not as any threat, but to make sure you are well informed before you bring this union in and it is too late.

In *Pennysaver*, the General Counsel's contention that the above-quoted communications to employees were unlawful was premised upon a related argument that the respondent had also violated the Act by informing employees that it would refuse to negotiate a union security clause, a mandatory subject of bargaining. Thus, the General Counsel's theory was predicated upon a finding that any strike would be an unfair labor practice strike. The Board rejected the General Counsel's contention that the employer's statements about union security were coercive and unlawful. Accordingly, it concluded that there was no basis for the conclusion that any strike would be caused by unfair labor practices and found, that in that context, that the above-quoted communication to employees did not contain a threat of loss of employment if the employees supported the union. As is apparent, there is little basis for comparison between *Pennysaver* and the instant case.

As regards the instant case, I find Respondent's arguments, as outlined above, unavailing. With regard to Respondent's attempt to parse or somehow explain alternate constructions of the use of the word, "jeopardize" in the context of employee jobs, I find such efforts fail to mitigate a violation of Section 8(a)(1). I conclude that there is no reasonable way to equate the query: "Do you want to give outsiders the power to jeopardize your job by putting you out on strike?" to a mere suggestion that a strike could result in a loss of income. In addition, I note that one of the suggested possible alternative interpretations of the language at issue; i.e., "that the employee can lose his or her job during the strike because the employer has the right to replace the employee," directly links strikes to job loss and fails to accommodate employees' *Laidlaw* rights in any regard. As will be discussed below, this is precisely the sort of communi-

cation to employees that the Board has found to be unlawful.

In further support of its contentions, Respondent argues that the totality of the circumstances surrounding the flyer and its dissemination render the allegation meritless. In particular, in its posthearing brief, Respondent maintains that: "[s]upervisors distributed the instant flyer to their employees. As with all flyers distributed by the Employer during the campaign, supervisors handed the flyer to employees, asked them to read it, and told them they could approach the supervisor in the event they had any questions regarding its content." Had the method of distribution and corresponding communications to employees been of importance to Respondent's case, it surely could have sought to include such facts in the stipulated record. Here, these assertions are an apparent afterthought and without support in the record submitted for my review. In any event, it is the content of the communication and not its method of dissemination which is at issue here.[9]

In *River's Bend Health & Rehabilitation Services*, 350 NLRB 184 (2007), distinguished by both the General Counsel and the Charging Party, the employer issued a letter stating, in relevant part, that a strike, "puts each striker's continued job status in jeopardy." The letter additionally explained that employees could choose whether or not to go on strike and that the employer would hire replacement workers during the strike in order to continue providing care to nursing home residents. A Board majority found this communication not to be unlawful because the employer did not threaten employees with permanent job loss, but rather informed employees of the legal fact that reinstatement may not be immediately available after a strike. Id at 185. The majority emphasized that telling employees that their "job status" as opposed to "job" was in jeopardy was more akin to stating that employees may have to wait for a position to become available rather than suggesting that their employment would be terminated. By contrast, where employer statements convey to employees that in the event of an economic strike their employment will be terminated, or are otherwise contrary to their *Laidlaw* rights, they have been found to constitute unlawful threats of discharge. *Connecticut Humane Society*, 358 NLRB No. 31, slip op. at 34 (2012) (statement that "some employees could even find themselves without a job when the strike was over" impermissibly linked strike participation with job loss); *Gelita USA*, 352 NLRB 406, 406–407, 408–410 (2008); 356 NLRB No. 70 (2011) (three member panel) (statement that economic strikers "would have no job protection if replaced" unlawful); *Kentucky River Medical Center*, 340 NLRB 536, 546–577 (2003) (statement by employer that if there was an economic strike employees would be replaced, and if and when the strike is over, if there was a position open for them they would have a job but if there was no position for them they would not have a job found unlawful); *Fern Terrace Lodge*, 297 NLRB 8, 8–9 (1989) ("an employer has the legal right to permanently replace the striking employees and the replaced striker is not automatically entitled to his job after the strike ends" similarly found to violate the Act). In certain circumstances, even where threats of job loss are accompanied by lawful statements of an employer's right to hire replacement workers, they have been found to be unlawful. See, e.g., *Connecticut Humane Society*, supra, slip op at 34 (collecting cases). In assessing the import of a statement describing employees' *Laidlaw* rights in the event of an economic strike, the Board will also consider whether such a statement is accompanied by other threats or conduct violating Section 8(a)(1). See, e.g., *River's Bend*, supra at 185.

In the instant case, in agreement with the General Counsel and the Charging Party, I find that Respondent went beyond a mere announcement of its right to replace striking employees. The query to employees: "Do you want to give outsiders the power to jeopardize your job by putting you out on strike?" implied that job loss was a consequence of a strike and failed to notify employees of any reinstatement rights to which they might be entitled. Under *Laidlaw*, the jobs of striking employees are not necessarily "jeopardized." To the contrary, as noted above, employees "retain their status as employees" and they have important reinstatement rights upon the departure of their replacements. 171 NLRB at 1369–1370. Thus, Respondent has characterized employees' reinstatement rights "in a manner inconsistent with those detailed in *Laidlaw*." *Eagle Comtronics*, supra, 263 NLRB at 516.

As the General Counsel has noted, the leaflet also fails to distinguish between economic and unfair labor strikes. In the latter instance, upon an unconditional offer to return to work, unfair labor practice strikers are entitled to immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, even if striker replacements must be terminated to make room for the returning strikers. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). In the instant case, where the statement disseminated to employees made no differentiation between economic and unfair labor practice strikes, employees would reasonably believe that if they engage in any sort of strike their jobs would be jeopardized.

While the Employer contends that the educational meetings utilizing PowerPoint presentations lawfully explained both employee and employer rights in the event of a strike, such an argument is unavailing. While it is the case that there was a reference in the PowerPoint presentation, as set forth above, to the fact that striking workers are placed on a preferential recall list in the event vacancies occur, other slides linked strikes to job loss without any explication of or reference to employees' Laidlaw rights.[10] Thus, the communications to employees about their rights as set forth in the PowerPoint presentation are, at best, equivocal and insufficient to counter the clear threat of job loss communicated in the Employer's leaflet to employees.

More generally, I reject the Employer's contention that because the leaflet in question was just one of many communications provided concerning the potential effects of strikes and employee rights, that the information conveyed to employees

[9] I additionally note that this particular issue was not a subject of investigation in the underlying objections case.

[10] In particular employees were told that: "[The union] can take employees out on strike—*jeopardizing employee jobs, resident care and our Center*"; they were also advised that: "We do know that strikes create uncertainty and place all our jobs at risk."

was consistent with its rights under Section 8(c) of the Act. While there is no specific allegation that the PowerPoint presentation exceeded the bounds of permissible communications to employees, this does not negate the obvious threat to employees conveyed in the leaflet at issue. See *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003) (citing *Gissel*, 395 U.S. at 617) ("we must . . . consider the coercive impact . . . that a particular employer statement can have even when it is arguably mitigated by other employer statements made at different times or places.") Moreover, as will be discussed below, this threat did not occur in a context free from other unfair labor practice violations. Id.

Accordingly, I find that by distributing a leaflet asking employees whether they wanted to "give outsiders the power to jeopardize your job by putting you out on strike?" Respondent has unlawfully threatened employees with job loss, in a manner inconsistent with their rights under the law, in violation of Section 8(a)(1) of the Act.

D. The Alleged Unlawful Announcement and Implementation of a Reduction in Health Care

1. Facts

As was stipulated by the parties, each of the various Care One centers which are referred to in this record provides a common health insurance plan for its employees, which is arranged through Care One Management. Effective January 1, Care One Management made changes to employees' health insurance coverage that resulted, among other things, in reduced benefits and increased cost for all employees at each center managed by Care One Management. As a result of these changes, some employees of these facilities changed or dropped their coverage.

In response to employee complaints about these changes to the health insurance plan, Care One Management arranged certain improvements to the common health insurance plan. One improvement was a reduction in employee premiums, which became effective March 23, and was retroactive to January 1. These improvements applied to all employees at facilities in New Jersey managed by Care One Management, except those employees who were eligible to vote in a union representation election.

On or about March 5, at each center, a common memorandum, giving notice of these improvements was distributed to all employees who were not eligible to vote in a representation election. At facilities with no union campaign, the memorandum was distributed to all employees. At Madison Avenue, a copy of the memorandum was only given to employees who were not eligible to vote in the election. A supervisor or manager personally handed the memorandum to each employee who was not an eligible voter in a closed envelope. The memorandum was not handed to eligible voters but was posted at the Employer's facility and was seen by some eligible voters prior to the representation election.[11] The memorandum posted at the Employer's Madison Avenue facility,[12] issued by Administrator Arezzo announces as follows:

> Three weeks ago I informed you that we were reviewing the changes that were made to the 2012 health insurance benefits and employee contribution rates. Our goal was to find a way to provide quality health care coverage at more affordable rates.
>
> Our review is now complete. I am very pleased to announce that we have been able to improve the medical insurance benefits offered to you and, in most cases, lower the cost you pay. The specific changes for 2012 include:
>
> Revised Employee Contribution Rates
>
> Employee contribution rates that increased more than 10% from 2011 to 2012 will be reduced. The new rates will be no more than 10% higher than the 2011 rates for the same plan and coverage levels.

Arezzo's memorandum also contains a chart showing employee contribution rates per pay period depending upon range of coverage, plan type, and employee tier.

Employees are advised that the new rates will begin with the March 23 pay date; that they will receive credits for the difference paid by them between January 2012 and the new rate; that amounts paid for coinsurance and copays for many services will be reduced and that there will be an open enrollment period in May 2012. The memorandum concludes:

> Before now our Center has been able to provide better medical insurance benefits at lower employee contribution rates than many other employers. Every year that becomes more difficult and in 2012 we tried to close the gap. We may have moved too quickly. These changes and rollbacks will make our medical insurance benefits better and more affordable for you.
>
> Thank you for your continued dedication to providing excellent resident care and for being part of our team.

The parties have stipulated that it was because of the pendency of the representation election, to be held on March 23, that the Employer did not notify eligible voters on March 5 that they would receive the improvements in the health insurance plan and that their employee contributions would be reduced on March 23. It was further stipulated that the Employer did not tell eligible voters why the health insurance improvements were withheld or tell eligible voters that they would receive the benefits after the election regardless of the outcome of the election.

The health insurance improvements were not raised by man-

[11] I note that, apart from the stipulated facts set forth above, and as will be discussed below, the record further establishes that the Employer utilizes the posting of memoranda as a method of communication with its employees.

[12] The memorandum was issued to: "All Office Clerical Employees, Cooks, Registered Nurses, Dieticians, Physical Therapists, Physical Therapy Assistants, Occupational Therapists, Occupational Therapy Assistants, Speech Therapists, Social Workers, Staffing Coordinators/Schedulers, Payroll/Benefits Coordinators, MDS Specialists, MDS Data Clerks, Accounts Payable Clerks, Account Receivable Assistants, Medical Records Clerks, Admissions Coordinators, Other Professional Employees, Supervisors and Managers." Thus, the memorandum by its terms specifically excluded those classifications of employees eligible to vote in the election.

agement at communication meetings with eligible voters. However, there were other occasions during the critical period when eligible voters complained to the Employer that the costs of health insurance were too high and asked if they were going to receive the improvements to the health insurance plan about which employees who were not eligible voters had been notified. Arezzo responded by stating that he was not allowed to discuss the issue with them at that time. This was the same response the Employer gave during the critical period when eligible voters asked whether the Employer could grant a specific benefit.

It is undisputed that unit employees failed to receive the improvements to their health insurance coverage as had been provided to other employees.

2. Analysis and conclusions

As a general rule, in deciding whether to grant benefits while a representation petition is pending, an employer should decide that question as it would if the union was not in the picture. *Great Atlantic & Pacific Tea Co.*, 166 NLRB 27 fn. 1 (1967); *Russell Stover Candies, Inc.*, 221 NLRB 441 (1975); *Lampi, LLC*, 322 NLRB 502 (1996). Here, some 3 weeks prior to the election, concerns raised by employees relating to a prior decision to alter their health insurance coverage were addressed and remedied. The favorable changes were announced via memorandum to employees at all of the facilities managed by Care One Management. At Respondent's facility, in particular, the announcement was not made to those employees eligible to vote in the election, but the above-cited memorandum was posted, and there can be no dispute that certain bargaining unit employees saw it, knew that other employees were to be the beneficiaries of these changes and raised this issue with the Employer.

The Board has held that the withholding of systemwide benefits from employees involved in union representation proceedings, as is the case here, while granting the same benefits systemwide to employees not involved in such proceedings violates Section 8(a)(3) and (1) of the Act. *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000); *Associated Milk Producers*, 255 NLRB 750, 755 (1981). There is an exception to this general rule as follows:

> [a]n employer may postpone such a wage or benefit adjustment so long as "[makes] clear" to employees that the adjustment would occur whether or not they select a union and that the "sole purpose" of the adjustment's postponement is to avoid the appearance of influencing the election outcome.

KMST-TV, Channel 46, 302 NLRB 381, 382 (1991) (citing *Atlantic Forest Products*, 282 NLRB 855,858 (1987).

By granting such assurances, unit employees are not left to draw their own conclusions about why benefits are being withheld or whether they will be provided at all. Here, the Employer failed to inform its unit employees that the withholding of improved health insurance benefits from them, benefits that were known to have been granted to other employees that were not involved in a union campaign, was temporary and would be provided retroactively.

Respondent argues that granting the health benefit improvements to unit employees would be incompatible with its obligations under *NLRB v. Exchange Parts*, 375 U.S. 405 (1964), which requires an employer to strictly adhere to the status quo during the so-called "critical period"—the period following the filing of a petition and preceding an election. I do not agree with this contention.

In *Exchange Parts*, supra at 409, the Court, making use of a vivid and often-cited metaphor, held that an employer violates Section 8(a)(1) by granting benefits to employees in order to influence the outcome of an election:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

In *Exchange Parts*, the Court addressed the situation before it: the granting of benefits to employees. However, the rationale informing its holding is equally applicable here. Certainly, if an employer can coerce employees by granting benefits, it can also achieve the same result by withholding them—especially when it makes plain that other employees not involved in seeking union representation have been awarded such benefits. In such an instance the velvet glove wears thin and the fist becomes even more apparent.

Consistent with this underlying principle, the Board has repeatedly held that due to the coercive effect of withholding of benefits from bargaining unit employees while granting them to others, an employer is required simply to proceed as if the union were not in the picture. *Great Atlantic & Pacific Tea Co.*, supra at 29 fn. 1; *Noah's Bay Area Bagels*, supra at 191; *First Student*, 359 NLRB No. 120, slip op. at 5. When an employer follows this course of action it, in fact, maintains the status quo, in accordance with the rationale of *Exchange Parts*.

In *Noah's Bay Area Bagels*, supra, a case presenting facts similar to those at issue here, the Board found that the employer violated Section 8(a)(3) and (1) by withholding systemwide improvements in health insurance benefits from eligible voters prior to a representation election. 331 NLRB at 189–190. In that case, prior to the start of the union's campaign, the employer reduced employee health care benefits. Due to employee dissatisfaction with the changes, the employer restored the benefits that had been cut and announced and applied this restoration to employees at all of the company's stores except those involved in an organizing campaign. The employer told unit employees that they would be given more information regarding benefits "at a later time." The Board found that the employer had a legitimate business reason for the restoration of the benefits and the timing of the announcement but that it had no lawful basis to withhold the benefit from those employees involved in the representation proceeding. Id. at 191. Because the employer failed to tell all employees that the benefits would be provided after the election, regardless of the outcome, the withholding of benefits was found to be unlawful. Id.[13]

[13] Respondent has argued that the record fails to establish that it could dictate and control the timing of the improvements of the plan. However, as the above-described Board law demonstrates, even in

In defending its position here, Respondent has argued that while *Noah's Bay Area Bagels*, supra, and similar precedent stand for the proposition that it "may," in order to avoid creating the appearance of interfering with the election, provide assurances to employees that benefits will be deferred regardless of the outcome of the election, such an announcement is merely an option provided to employers and is not required. As Respondent frames its argument, an employer may either (1) make such an announcement to employees or (2) refuse to discuss and withhold benefits to avoid the appearance of interfering in the election. This is a false choice. In fact, what Board precedent squarely holds is that the employer has either (1) the option of proceeding as if the union was not in the picture (which may require the preelection discussion of and granting of benefits, depending upon the circumstances) or (2) providing bargaining unit employees with the requisite assurances that they will receive those benefits notwithstanding the outcome of the election. In this instance, the Employer did neither.[14]

Here, the record establishes that at the Employer's facility, the memorandum announcing the changes to 2012 medical insurance benefits explicitly limited these health care benefits improvements to those employees who were not eligible to vote in the upcoming election. There was no explanation as to why the other employees, those in the petitioned-for unit, were not included. Thus, it is apparent that such employees would reasonably believe that they were being denied this benefit because of their union and concerted, protected activity. And, in fact, such employees failed to receive this benefit—one that was offered to all other employees. Accordingly, and consistent with the above-discussed precedent, I conclude that by the announcement of the implementation of systemwide health insurance improvements, and the withholding of these improvements to unit employees, Respondent violated Section 8(a)(3) and (1) of the Act.

E. The Mandatory Meeting and Video Slide Show

1. Facts

As was adduced during the hearing on the Union's objections to the election, after the petition had been filed, the Employer held two to three staff meetings per week concerning the Union. The Employer had retained the services of a firm called "National Labor Consultant," which is a labor consulting firm hired to "educate" employees regarding the Union and its campaign.

On or about March 21, the Employer conducted a mandatory meeting with eligible voters. Present at this meeting were Karstetter, Director of Recreation Sara Flaumenhaft, a National Labor Consultant representative named Keith and a Creole translator. At the objections hearing, Arezzo testified that this meeting was intended to be the "culmination of the last time [the Employer] could communicate before the election as to how the Employer felt about not wanting to have a Union." During the meeting Arezzo told employees that he had been a hospital and nursing home administrator for over 37 years and that his management style would work better without a union. He told employees that he wanted an environment where a union was not involved, and asked employees to take a "leap of faith" that he would be a fair administrator. He then asked employees who had been working at the facility for 5 years to stand up. They were then congratulated and applauded for their commitment and longevity. Arezzo then did the same for those employees with fewer than 5 years of employment.

After this occurred, the Employer presented, and the employees viewed, a slideshow entitled "We Are Family" which included photographs of 112 eligible voters, 22 managers or supervisors, and 24 employees who were neither supervisory personnel nor eligible voters in the election. The slideshow began with the printed message: "At Care One at Madison Avenue, we are more than staff. We are more than co-workers. Like George said, We are Family." As the parties have stipulated, at no time during the mandatory meeting did the Employer ask employees to communicate their views about the Union or the election.

The parties have agreed that the photographs in the slideshow were originally taken for three purposes: (a) a Valentine's Day activity, (b) a patient care program called "I-Care," or (c) posting on a glass-enclosed display in the living room/visiting room of the facility. The photographs were taken several weeks before March 21, 2012. No photographs were taken of employees who declined or refused to be photographed. Photographs were taken of most Madison Avenue personnel, including eligible voters, employees who were not eligible voters, and supervisors and managers. The Employer did not obtain consent(s) from the employees to have their images appear in the slideshow referenced in paragraph 13. The slideshow contained no disclaimer of any kind.

The employee photographs at issue are, for the most part, full-face photographs of smiling employees, rendering them easily identifiable. Some photographs show employees holding heart decals or making the shape of a heart with their hands.

The slideshow was set to a well-known recording of the song "We Are Family" which played throughout.

At the conclusion of the slideshow, Arezzo asked the employees to vote "no," and to give management a chance because, "we are family." Everyone then stood up, applauded and exited the room.

2. Analysis and conclusions

It is axiomatic that the decision as to whether or not to engage in Section 7 conduct or union activity "is a protected right with which an employer cannot interfere by compelling an employee to participate in the dispute." *Dawson Construction Co.*, 320 NLRB 116, 117 (1995) (compelling employee to hold a reserve-gate sign unlawful because employee became "a visible instrument in the implementation of the employer's decision to establish a reserve gate," thereby participating in the employer's statement about the labor dispute); *R.L White Co.*,

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those instances where an employer has a legitimate business reason for the granting of benefits, and the timing of such a grant, the withholding of benefits from employees because they are involved in a representation election is unlawful.

[14] To the extent Respondent has further argued that adherence to Board law places it in an untenable position, such an argument has been rejected. See *First Student*, supra, slip op. at 5; *Associated Milk Producers*, 255 NLRB at 755.

262 NLRB 575, 588–589 (1982) (employer violated Section 8(a)(1) by offering and encouraging employees to wear pro-company T-shirts on the day before a representation election); *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 3–4 (2011) (finding that employees were forced to make an observable choice on whether they supported the union when presented with T-shirts and beanies bearing the company logo when, under the circumstances, employees would have understood them to be campaign paraphernalia); *Fresh & Easy Neighborhood Market, Inc.*, 358 NLRB No. 65 (2012) (requiring employees to distribute coupon flyer to customers apologizing for union handbilling outside the respondent's store unlawful).

In *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001), enfd. 301 F.3d 167 (3d Cir. 2002), the Board addressed the circumstances under which an employer is permitted to include the images of its employees in campaign videos without having solicited employee consent. The Board held that an employer may include images of nonconsenting employees, "only if the videotape, viewed as a whole, does not convey the message that the employees depicted therein either support or oppose union representation. . . ." Id at 745. However, under these circumstances, the evidence must additionally establish that: (1) The employees were not affirmatively misled about the use of their images at the time of the filming; (2) the video contains a prominent disclaimer stating the video is not intended to reflect the views of the employees appearing in it; and (3) nothing in the video contradicts the disclaimer. Thus, viewed as a whole, the video must not convey the message that employees depicted therein either support or oppose union representation.

Respondent contends that *Allegheny Ludlum* is not controlling in the instant case because, viewed as a whole, the video does not convey the message that employees depicted there either support or oppose union representation. Respondent maintains that the video did not contain any antiunion message as it was designed to unite the work force in the common goal of providing "top notch" resident care. Respondent further argues that, even if I were to conclude that *Allegheny Ludlum* controls, the allegation should be dismissed because it does not convey the impression that anyone in it either supports or oppose unionization. I disagree with the foregoing contentions and find that they are not supported by the record evidence.[15]

As an initial matter, as has been stipulated, the video was shown to employees in the context of a mandatory meeting, where they were encouraged to vote no in the upcoming election, to be held within a matter of days. It is hard to see how Respondent's contention that the video was meant merely to encourage employees to provide "top notch" resident care is supported by the underlying circumstances.

In *Sony Corp. of America*, 313 NLRB 420 (1993), cited in *Allegheny Ludlum*, the Board found a violation where smiling photographs of employees were included in a campaign video without any comments by employees. The Board adopted the ALJ's finding that "a viewer could reasonably conclude that the laughing and smiling photographs of unit employees whose faces appear during the film . . . were meant to show support for the antiunion message of the film as a whole." *Allegheny Ludlum*, supra at 738, quoting *Sony* at 429.

Here, while there was no explicit antiunion message in the video itself, the Board has held, "literature or other material need not contain an explicitly antiunion message in order to be part of an employer's campaign or otherwise implicate the employee's right to decide whether to express an opinion or remain silent." *Tesco PLC*, slip op. at 2 ("The key inquiry is whether employees would understand the material to be a component of the employer's campaign"); see also *2 Sisters Food Group*, supra.

In the instant matter, the meeting in question was held 2 days prior to the election and attended by management and consultants hired to present the Employer's antiunion campaign. The expressed purpose was to encourage employees to vote against the Union. The video expressed the Employer's campaign theme that the facility and its employees were "family" (as opposed to "outsiders"),[16] and clearly a part of the Employer's crusade to encourage employees to vote against union representation. In this regard, there were unambiguous "vote no" messages communicated to employees both before and after the video was shown, and Arezzo reiterated the "we are family" message at the meeting's conclusion. Under all the circumstances I find that employees viewing the video would have concluded that it was meant to be part of the Employer's campaign to encourage employees to vote against the Union.

Moreover, the photographs taken of the employees who appeared in the video were taken for other purposes, and it is undisputed that their permission was not sought before they were included in this campaign material. Moreover, the video contained no disclaimer stating that the slideshow is not intended to express the views of the employees appearing in it. Accordingly, by showing the images of its employees in a campaign video without following the safeguards required by the Board in *Allegheny Ludlum*, Respondent violated Section 8(a)(1) of the Act.

F. The Reissuance of Respondent's Workplace Violence Policy

1. Facts

On or about March 26, 2012, 3 days following the election, Arezzo posted a letter, entitled "Teamwork and Dignity and Respect" as well as the Employer's "Workplace Violence Protection" policy on the Employer's employee bulletin board where employees could review them.

Arezzo's memorandum states as follows:

[15] Respondent makes further assertions not supported by the record. In particular, it is contended many, if not most, of the photographs were taken by an outside photography agency and the Employer was unaware of the reaction of many of the employees when asked to pose. In any event, I do not see the relevance of these assertions inasmuch as Respondent clearly had the opportunity to review the photographs prior to their being included in the video and shown to employees. Moreover, it is undisputed that the permission of these employees to appear in the video was never sought.

[16] As has been demonstrated in material quoted above, the Employer's campaign literature repeatedly referred to the Union and its agents as "outsiders." In other leaflets, stipulated into evidence, union agents were referred to as "salespeople" and "strangers."

> Now that the NLRB election is behind us, I was hoping that everyone would put their differences behind them and pull together as a united team. Even though we may have had different opinions on the Union, I thought that after the election we would treat each other with dignity and respect and reunite our Madison Avenue facility. I was hoping we could let go of our past differences and look forward, focusing all of our energy on making our Center the best it can be and providing the very best Quality of Care and Customer Service possible.
>
> Unfortunately, it appears that a few of our team members are unwilling to do this. It also has been reported to me that a few employees are not treating their fellow team members with respect and dignity. I have even heard disturbing reports that some of our team members have been threatened.
>
> While I recognize that employees have a right to make up their own minds about the union, and I respect the right employees have to be for or against the union, these rights do not give anyone the right to threaten or intimidate another team member, for any reason. CareOne at Madison Avenue has a longstanding policy prohibiting threats, intimidation and harassment (Workplace Violence Prevention policy is attached).
>
> I want everyone to be on notice that threats, intimidation, and harassment will not be tolerated at CareOne at Madison Avenue. We will enforce the Workplace Violence Prevention policy to keep our workplace free from such improper conduct. Anyone engaging in such conduct will be subject to discipline, and, depending on the facts of the situation, such discipline may include suspension or discharge for a first offense.
>
> It is very disappointing that I have to post a memo warning a few people that they will be disciplined if they threaten others. Threats should never occur in a family environment where we care about one another and should be treating each other with dignity and respect.
>
> To the vast majority of our team members, thank you for your support and for being part of the CareOne at Madison Avenue team—and family. And, thank you in advance for working with me and our leadership team as we move our Center forward and make it the best Center in the CareOne family.

The Employer's "Workplace Violence Prevention" policy states as follows:

> The Center is committed to maintaining a safe, healthy and secure work environment, and preventing violence in the workplace. Acts or threats of violence, including intimidation, harassment and/or coercion, which involve or affect any Center employee, Resident, volunteer, visitor and independent contractor and anyone else on Center premises will not be tolerated. Violations of this policy may result in disciplinary action, up to and including termination of employment and/or legal action as appropriate.

Examples of workplace violence include, but are not limited to, the following:

> Threats or acts of violence occurring on Center premises, regardless of the relationship between the Center and the parties involved in the incident. Threats or acts of violence occurring off Center premises involving someone who is acting in the capacity of a representative of the Center. Threats or acts of violence occurring off Center premises if the Center determines that the incident may lead to an incident of violence on Center's premises.
>
> An employee's unlawful or unauthorized possession or use of a dangerous or deadly weapon, including but not limited to all firearms, in the workplace is prohibited.
>
> Specific examples of conduct that may be considered threats or acts of violence under this policy include, but are not limited to, the following:
>
> Threatening physical or aggressive contact toward another person. Threatening a person or his or her family, friends, associates or property with physical harm. The intentional destruction of Center property or another's property. Harassing or threatening phone calls. Surveillance or Stalking. Veiled threats of physical harm or like intimidation.
>
> You are expected and encouraged to report any acts or threats of physical violence including intimidation, harassment and/or coercion which involve or affect the Center, or which occur on Center premises to your Center Administrator/Supervisor or the Regional Human Resources Department.

2. Analysis and conclusions

The General Counsel has alleged that the Employer violated Section 8(a)(1) when, on or about March 26, it posted the memorandum entitled "Teamwork Dignity and Respect" reissuing its "Workplace Violence Prevention Policy" in the context of its employees' recent union activities. It is also contended that the "Workplace Violence Prevention Policy" is itself facially overbroad and independently unlawful. Respondent contends that the "Workplace Violence Prevention Policy" withstands scrutiny both facially and as applied on March 26. In this regard, Respondent argues that the plain language of the policy establishes that its purpose is to ensure a safe workplace and prevent workplace violence and that it explains in clear terms what sort of conduct is prohibited. Respondent further argues that the policy does not restrict, and cannot be read as to restrict employees from communicating with any entity, including a union. Respondent additionally contends that Arezzo's memorandum related to reports of threats against other employees which followed the election and that employees would not reasonably read the memorandum and the policy together to deter or chill employees in their Section 7 rights.

a. The "Workplace Violence Prevention Policy" is facially lawful

The General Counsel argues that employees would reasonably construe the broad provisions of the Employer's policy to reach protected activity. It points to the language proscribing "[a]cts or threats of violence, including intimidation, harassment and/or coercion, which involve or affect . . . anyone." The General Counsel contends that employees would equate harassment involving or affecting "anyone" to include a co-

worker engaged in union solicitation. In support of these contentions, the General Counsel argues that the Board has held that employees have the right to "engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited." *Ryder Truck Rental, Inc.*, 341 NLRB 761 (2006) (citing *Bank of St. Louis*, 191 NLRB 669, 673 (1971)). The General Counsel further contends that by "expecting" and "encouraging" employees to report any intimidation, harassment, and/or coercion to a representative of management, the Employer is inviting employees to report on union activities in violation of Section 8(a)(1) of the Act.

An employer violates Section 8(a)(1) of the Act through the maintenance of a workrule or policy if the policy would "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir 1999). The Board has developed a two-step inquiry to determine if a workrule would have such an effect. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004). First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will nonetheless be found to violate the Act upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. at 647.

The Board has cautioned against "reading particular phrases in isolation," and will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity. Id. at 646–647 ("We will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way."); see also *Palms Hotel & Casino*, 344 NLRB 1363, 1368 (2005) ("We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it."

In *Lutheran Heritage*, supra at 647, the Board adopted the position of the Court of Appeals for the District of Columbia and, quoting *Adtranz ABB Daimler-Benz Transp. N.A. Inc. v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001) stated: "Employees have a right to a workplace free of unlawful harassment, and both employees and employers have a substantial interest in promoting a workplace that is 'civil and decent.'" 343 NLRB at 648–649. In considering a rule against profane language, the Board noted that, "employers have a legitimate right to adopt prophylactic rules banning such language because employers are subject to civil liability under federal and state law should they fail to maintain 'a workplace free of racial, sexual and other harassment' and 'abusive language can constitute verbal harassment triggering liability under state or federal law.'" Id. at 647 (quoting *Adtranz*, 253 F.3d at 27).

The Board has applied the *Lutheran Heritage* standard in a variety of circumstances, with differing results. In *Palms Hotel & Casino*, supra, the rule at issue banned "any type of conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing or interfering with fellow team Members or patrons." 344 NLRB at 1367–1368. Upholding the rule, the Board explained that the sort of behavior specified, like the profane language proscribed in *Lutheran Heritage*, was not "inherently entwined" with protected activity. It further noted, "Nor are the rule's terms so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace." Id. at 1368.

It appears from the above-cited cases that the Board will find that language that concerns itself with severe or extreme behavior such as prohibitions against abuse, intimation, and coercion to be lawful and not "inherently entwined" with protected conduct. This is especially the case where the rule in question provides specific examples of the sort of behavior it purports to prohibit. See, e.g., *Tradesmen International*, 338 NLRB 460, 462–463 (2002), where the Board found a rule prohibiting "statements which are slanderous or detrimental to the company or any of the company's employees" to be lawful. The Board found that "employees would not reasonably believe that the . . . rule applies to statements protected by the Act," because it was listed alongside examples of egregious misconduct such as sabotage and racial or sexual harassment. Cf. *Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at 1–2 (2012) (finding employer's policy prohibiting employees from making statements "that damage the Company, defame any individual or damage a person's reputation" to be unlawful because the rule had no "accompanying language that would tend to restrict its application" to legitimate business concerns).

Based upon the record as a whole, I find that a reasonable employee would not understand the Employer's "Workplace Violence Prevention Policy" to prohibit protected Section 7 activity. I note that the initial paragraph of the policy sets the parameters of the rule. I find that a reasonable employee would consider the references to "maintaining a safe, healthy and secure work environment" as something an employer would strive to achieve, to the benefit of all. Moreover, the expressed lack of toleration for "acts of violence, including intimidation harassment and/or coercion" concern those acts which an employer may reasonably expect will not occur in the workplace. Further, the policy contains specific examples which explain the type of "threats or acts of violence," in a variety of situations involving the facility, its employees and other representatives, which are prohibited. These include threats of physical contact and physical harm, intentional destruction of property, harassing or threatening phone calls, surveillance, and stalking and veiled threats of physical harm. While it is the case that "harassing or threatening phone calls" might be construed by some to refer to protected Section 7 conduct, in the particular context of the rule, it is difficult to draw such a conclusion. And as noted above, the mere fact that an employee "could" draw such an inference, is not sufficient to establish that a given rule is unlawful. *Lutheran Heritage*, supra; *Palms Hotel & Casino*, supra.

Moreover, absent from the policy on its face are the sort of ambiguous or amorphous terms which have been found by the Board to reasonably suggest a prohibition on protected conduct. See, e.g., *HTH Corp*., 356 NLRB No. 182, slip op. at 26 fn. 21 (2011) (rule banning "derogatory statements concerning any employee, supervisor, the hotel and/or the parent corporation

found to infringe on Section 7 rights); *KSL Claremont Resort, Inc*., 344 NLRB 832, 832 (2005) (finding rule that prohibited "negative conversations about associates or managers" to be unlawful because it would reasonably be construed to forbid employees from discussing complaints about supervisors with their coworkers). In *Advance Transportation Co*., 310 NLRB 920, 925 (1993), the Board similarly found a rule barring "harassment, intimidation, distraction or disruption of another employee" unlawful because "it is vague and ambiguous and so overly broad as to fail to define permissible conduct thereby fortifying Respondent with the power to define its terms and inhibit employees from exercising their rights under Section 7 of the Act."

The rule at issue here does not prohibit the sort of ambiguously defined behavior which would be construed as curtailing protected conduct. Rather, the policy contains sufficient examples and explanations of its purpose to enable a reasonable employee to understand that it prohibits the sort of conduct likely to lead to workplace violence or similarly egregious conduct and not Section 7 activity. Accordingly, in disagreement with the General Counsel and the Charging Party, I find that the Employer's "Workplace Violence Prevention Policy," when read in its appropriate context, is not facially overbroad.

The General Counsel further objects to the policy's requirement that employees report violations to members of management. This, standing alone, does not render the policy unlawful in the absence of other considerations. See *Rivers Bend Health & Rehabilitation Service*, 350 NLRB 184, 187 (2007), where the Board upheld a policy that required employees to "report [harassment or threats] to management," finding that this was not tantamount to requiring employees to report protected activity and could not reasonably be construed as such.

b. The posting of Arezzo's letter in conjunction with the reissuance of the Employer's "Workplace Violence Prevention Policy" violated Section 8(a)(1) of the Act

Here, I am not dealing with the facial challenge to the "Workplace Violence Prevention Policy" but rather to the posting of Arezzo's memorandum to employees, which incorporated the policy by reference. The fact that the memorandum referred to the "Workplace Violence Prevention" policy, which I have found to be lawful standing alone, does not necessarily warrant a determination that given the circumstances surrounding the reissuance of the policy, employees would understand it to prohibit only lawfully proscribed conduct. As the Board has found, the existence of a lawful work rule policy "is not a license for an employer to commit unfair labor practices in the name of implementing that policy." *Boulder City Hospital*, 355 NLRB 1, 2 (and cases cited at fn. 5) (2010).

Arezzo's memorandum expressly refers to union activity and specifically incorporates the policy by reference. Arezzo starts off by stating, "Now that the NLRB election is behind us, I was hoping that everyone would put their differences behind them and pull together as a team. Unfortunately it appears that a few of our team members are unwilling to do this. It has also been reported to me that a few employees are not treating their fellow team members with respect and dignity. I have even heard disturbing reports that some of our team members have been threatened." Arezzo goes on to state that although he "recognizes the right of employees to be for or against the Union," "these rights to not give anyone the right to threaten or intimidate another team member for any reason."

In this regard, I note that the record is devoid of evidence that the "threats" referenced in Arezzo's memorandum actually occurred; that Respondent made any attempt to investigate any such allegation, or that any employee was disciplined for violating the policy. Accordingly, I cannot conclude from the record before me that Arezzo's linking of his memorandum and the policy to any nonprotected postelection discord among employees was a truthful statement or, in fact, that any nonprotected conduct actually occurred. I conclude, therefore, based upon its express terms and the absence of evidence to the contrary, that the memorandum and accompanying posting was a response to union activity in the manner which *Lutheran Heritage Village* contemplates.

Moreover, in context here, which includes a union organizing campaign accompanied by other unfair labor practices, I conclude that employees would read the reissued policy in a different light. The policy was reissued and posted almost immediately after the conclusion of a close and apparently contested union election, in the absence of any evidence of actual threats, intimidation, or harassment. In this regard, I do not find it determinative that the policy predated the election or the Union's campaign. Moreover, as the Board has held, it is not sufficient to conclude that the memorandum and accompanying policy could be interpreted as noncoercive if a contrary interpretation is also reasonable. See *Boulder City Hospital*, supra at 2 (citing *Double D. Construction Group*, 339 NLRB 303, 304 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction."). Here, I find not only that Arezzo's memorandum could be construed as coercive, but that employees reasonably would find it to be so. See *Lutheran Heritage Village*, supra at 647. This conclusion is supported by Arezzo's admonition, issued after a direct reference to the NLRB election that, "these rights to not give anyone the right to threaten or intimidate another team member for any reason." Such language, in my view expands the parameters of the rule to implicate Section 7 protected conduct and, at the very least is sufficiently ambiguous to bring the reissued policy within the ambit of an unlawful communication to employees in that an employee would reasonably interpret it to restrict Section 7 activity. See, e.g., *Advance Transportation Co.*, supra (rule unlawful due to vagueness, ambiguity, overbreath, and failure to define permissible conduct thereby fortifying respondent with power to define its terms and inhibit employees in exercising Section 7 rights).[17]

Thus, the reissuance of the "Workplace Violence Prevention" policy, in conjunction with Arezzo's memorandum, violates the *Lutheran Heritage* test in that it was promulgated in

[17] Additionally, in this context, the policy's reporting requirement takes on a different dimension. When a reporting requirement specifically addresses union-related or other protected activity, it runs afoul of Sec. 8(a)(1). *Arkema, Inc*., 357 NLRB No. 103, slip op. at 8 fn. 8 (2011).

response to union activity and employees would reasonably construe the language of the workrule to prohibit Section 7 activity. Accordingly, by taking such action Respondent has violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Care One at Madison Avenue LLC d/b/a Care One at Madison Avenue (Respondent) is an employer within the meaning of the Act.

2. 1199 SEIU, United Healthcare Workers East (Union) is a labor organization within the meaning of the Act.

3. By distributing to its employees a leaflet entitled "Get The Facts! Know the Truth! What the Union Won't Tell You," Respondent threatened employees with job loss if they selected the Union as their bargaining representative and engaged in protected concerted activity, in violation of Section 8(a)(1) of the Act.

4. By announcing a reduction of healthcare premiums and copays to all its employees except those who were eligible to vote in the representation election in Case 22–RC–072946 (unit employees), Respondent violated Section 8(a)(1) of the Act.

5. By implementing a reduction of healthcare premiums and copays for all employees except unit employees, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By showing, during a mandatory meeting opposing union representation, a video containing employees' images without their consent and without a disclaimer that the video did not reflect the views of the employees appearing in it, Respondent violated Section 8(a)(1) of the Act.

7. By issuing a memorandum to employees entitled "Teamwork and Dignity and Respect" together with Respondent's "Workplace Violence Protection" policy, Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, I recommend that Respondent be ordered to post an appropriate notice to employees in order that employees may be apprised of their rights under the Act, and the Respondent's obligation to remedy its unfair labor practices. Having found that Respondent violated Section 8(a)(3) and (1) of the Act by withholding the implementation of a reduction of health care premiums and copays to unit employees retroactively to January 1, 2012, I recommend that Respondent be ordered to implement the changed healthcare benefits and reimburse these employees for losses they suffered as a result of Respondent's decision not to provide these healthcare benefits to them. This recommended make-whole order shall include out-of-pocket losses, if any, suffered by any such employee as a result of Respondent's failure to implement the changes. The sums paid to each employee shall include interest at the rate prescribed 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). Respondent should also be ordered to rescind its memorandum to employees entitled "Teamwork and Dignity and Respect" and provide assurances to employees that the "Workplace Violence Protection" policy is not intended to and will not be used to interfere with their rights under Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Care One at Madison, LLC d/b/a Care One at Madison Avenue, Morristown, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with job loss if they select the Union as their bargaining representative and engage in protected concerted activity.

(b) Announcing a reduction of healthcare premiums and copays to all its employees except those who were eligible to vote in the representation election in Case 22–RC–072946 (unit employees).

(c) Implementing a reduction of healthcare premiums and copays to all employees except unit employees.

(d) Showing a video during an election campaign containing employees' images without their consent and without a disclaimer stating that the video did not reflect the views of the employees appearing in it.

(e) Issuing a memorandum to employees entitled "Teamwork and Dignity and Respect" together with Respondent's "Workplace Violence Protection" policy.

(f) In any like or related manner, interfering, 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) Implement the changed healthcare benefits for unit employees retroactive to January 1, 2012, and make whole these employees for losses they may have suffered as a result of Respondent's failure to implement the changed healthcare benefits in the manner set forth in the remedy section of this Decision.

(b) Rescind its memorandum to employees entitled "Teamwork and Dignity and Respect" and provide assurances to its employees that the "Workplace Violence Protection" policy is not intended to and will not be used to interfere with their rights under Section 7 of the Act.

(c) Within 14 days after service by the Region, post at its facility in Morristown, New Jersey, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by

[18] 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.

[19] 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."

the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent 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 Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 31, 2013

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 threaten you with job loss if you select the 1199 SEIU, United Healthcare Workers East as your bargaining representative and engage in protected concerted activity.

WE WILL NOT announce a reduction of healthcare premiums and copays to all of our employees except those who were eligible to vote in the representation election in Case 22–RC–072946.

WE WILL NOT implement a reduction of healthcare premiums and copays to all of our employees except those who were eligible to vote in the representation election in Case 22–RC–072946.

WE WILL NOT show a video during an election campaign containing employees' images without their consent and without a disclaimer stating that the video did not reflect the views of the employees appearing in it.

WE WILL NOT issue a memorandum to employees entitled "Teamwork and Dignity and Respect" together with our "Workplace Violence Protection" policy.

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

WE WILL implement the changed healthcare benefits for our employees described above retroactive to January 1, 2012, and make these employees whole for losses they may have suffered as a result of our failure to implement the changed healthcare benefits, including out-of-pocket costs, with interest.

WE WILL rescind our memorandum to employees entitled "Teamwork and Dignity and Respect" and provide assurances to our employees that the "Workplace Violence Protection" policy is not intended to and will not be used to interfere with their rights under Section 7 of the Act.

CARE ONE AT MADISON AVENUE, LLC D/B/A CARE ONE AT MADISON AVENUE