

**Metro Mayaguez, Inc. d/b/a Hospital Perea and
Unidad Laboral De Enfermeras (OS) Y
Empleados De La Salud.** Cases 24–CA–11016,
24–CA–11129, 24–CA–11136, and 24–CA–11188

April 29, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On January 19, 2010, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief,¹ 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,² and conclusions except as stated below, to modify his remedy, and to adopt the recommended Order as modified and set forth in full below.³

1. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing payment to employees of a bonus for working on New Year's Eve. In so finding, the judge declined to approve the parties' prehearing non-Board settlement of this issue, even though the Respondent had fully paid the bonus prior to the hearing in accord with the settlement. Contrary to the judge, we approve the settlement and shall accordingly dismiss this allegation.

In determining whether to approve a settlement,

¹ In his answering brief, the General Counsel also included a limited cross-exception to the judge's failure to award compound interest on his recommended make-whole remedy. We find merit in that exception, as explained below.

² The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing an on-call shift in its operating room, we do not rely on *Area Trade Bindery Co.*, 352 NLRB 172 (2008), a case decided when the Board had only two sitting members.

³ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we have modified the judge's remedy by requiring that backpay shall be paid with interest compounded on a daily basis. We have modified the judge's recommended Order to reflect the amended remedy, to conform to the violations found, and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). We have substituted a new notice to conform to the Order as modified.

the Board will examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Independent Stave Co., 287 NLRB 740, 743 (1987). Here, factors 2 and 3 and a key element of factor 1 weigh in favor of approving the settlement. First, the Respondent's monetary payment substantially remedies the unfair labor practice. Therefore, when the settlement is viewed against the nature of the allegation and the costs and risks inherent in any litigation, we find the settlement reasonable. Second, there is no evidence of fraud, coercion, or duress in reaching the settlement. Third, the Respondent and the Charging Party Union both agreed to the settlement, and neither party nor the employees affected oppose enforcement.

The remaining element of factor—the General Counsel's position on the settlement—weighs against approval. The General Counsel opposes the settlement, citing the Respondent's unlawful unilateral conduct in a prior case.⁴ The prior violation is also relevant to factor 4, which examines whether the Respondent has a history of violating the Act. These countervailing factors are particularly significant, the judge observed, because the prior case, like the instant case, implicated the Respondent's duty to bargain with the Union.

On balance, however, we find that the Board's longstanding policy encouraging the amicable resolution of disputes without litigation is served here by approving the settlement. The parties' agreement to settle the New Year's Eve bonus issue may be viewed as an ameliorative step in the parties' relationship and in their bargaining for a new contract. Although that bargaining has been marred by the Respondent's unlawful unilateral conduct, the record in this case shows that the parties have met frequently for bargaining and have reached agreement on many issues, and there is no allegation of

⁴ See 352 NLRB 418 (2008), incorporated by reference in 355 NLRB 1314 (2010) (finding, inter alia, that the Respondent, a "perfectly clear" successor employer under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), was not entitled to set initial terms and conditions of employment unilaterally, and therefore violated Sec. 8(a)(5) and (1) by doing so).

bad-faith bargaining by the Respondent. Although the Board will refuse to be bound by any settlement that is at odds with the Act or the Board's policies,⁵ approval of the settlement here fosters rather than undercuts the Act's key goal of encouraging parties to resolve labor disputes by reaching collective-bargaining agreements rather than resorting to the Board's processes. See *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). Accordingly, we approve the settlement and dismiss the allegation that the Respondent violated the Act by failing to pay the bonus.⁶

2. We find, contrary to the judge, that a broad remedial cease-and-desist order is not warranted in this case. In *Hickmott Foods*, 242 NLRB 1357, 1357 (1979), the Board stated that a broad cease-and-desist order, enjoining a respondent from violating the Section 7 rights of employees "in any other manner," is warranted "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Accord: *Five Star Mfg.*, 348 NLRB 1301, 1302 (2006), *enfd.* 278 Fed.Appx. 697 (8th Cir. 2008).

There is no contention that the Respondent's misconduct is egregious or widespread, and the evidence before us does not support such a finding. Rather, the issue here is whether the Respondent is shown to have a proclivity

⁵ *Independent Stave Co.*, *supra* at 741.

⁶ Contrary to his colleagues, Member Pearce would adopt the judge and find that the settlement agreement should not be approved. Although he agrees with his colleagues that amicable resolution of disputes plays an important role in fostering an ongoing bargaining relationship, ultimately:

[T]he "disposition of unfair labor practice charges [pursuant to settlement] involves not simply an adjustment of the rights of private parties, but also a broader public interest," and it is the "ultimate responsibility of the agency . . . to ensure that the public interest is served by a settlement." [*George Banta Co. v. NLRB*, 604 F.2d 830, 834, 835–836 (4th Cir. 1979).] In this regard, the Board, with Supreme Court approval, has a longstanding policy of setting aside settlement agreements in order to ensure that the policies of the Act are not frustrated by an ineffectual agreement. *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944).

Howard Electrical & Mechanical, 293 NLRB 472, 491 (1989). Here, Member Pearce notes that the Respondent is a recidivist that previously made unlawful unilateral changes. 355 NLRB 1314, incorporating by reference 352 NLRB 417 (2008). Further, in this case, the Respondent made multiple unlawful unilateral changes. Although it entered into an agreement with the Union to settle one of those unlawful unilateral changes—its failure to pay employees the owed New Year's Eve bonus—in paying the employees some 7 months after the bonus was due, it neither acknowledged wrongdoing nor assured employees that it would not repeat this unlawful conduct. In these circumstances, and noting particularly the narrow remedial cease-and-desist language in this Decision, Member Pearce agrees with the judge and the General Counsel that the settlement should not be approved.

to violate the Act, based on its unlawful conduct in this case and the prior referenced case, sufficient to warrant a broad order. In view of the Respondent's history of unilateral implementation on important issues in violation of Section 8(a)(5) of the Act, the case is a close one. Nevertheless, examining the totality of circumstances here,⁷ we observe that despite the two unlawful unilateral changes the Respondent made, as found in this proceeding, the Respondent continued to bargain with the Union on both issues, first rescinding one of the changes until an agreement could be reached, and ultimately reaching agreement on both issues, as the judge found. Likewise, following the prior case, the Respondent met frequently with the Union in bargaining and reached agreement on many issues, as we observed above. In these circumstances, we find that the Respondent's conduct has not demonstrated a general disregard for the employees' rights sufficient to warrant imposition of a broad remedial order.⁸

AMENDED REMEDY

The Respondent, having unilaterally changed employees' terms and conditions of employment regarding overtime pay and on-call shift assignments, must make employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct. The make-whole remedy shall be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with 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 6 (2010).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Metro Mayaguez, Inc. d/b/a Hospital Perea, Mayaguez, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁷ See *Five Star Mfg.*, 348 NLRB at 1302 (when determining whether to issue a broad order, the Board "reviews the totality of circumstances to ascertain whether the respondent's specific unlawful conduct manifests an attitude of opposition to the purposes of the Act to protect the rights of employees generally") (internal quotation omitted).

⁸ Cf. *Pan American Grain Co.*, 346 NLRB 193 (2005) (broad order imposed based on two prior Board decisions involving violations of multiple sections of the Act); *Iron Workers Local 433 (United Steel)*, 293 NLRB 621, 623 (1989) (broad order warranted in light of respondent's history of 8(b)(4)(B) violations in two prior cases), *enfd. mem.* 930 F.2d 28 (9th Cir. 1991).

(a) Unilaterally changing terms and conditions of employment of its unit employees, including changes to overtime pay and on-call shift assignments.

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

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

(a) On request of the Unidad Laboral de Enfermeras (Os) y Empleados de la Salud (the Union) and to the extent it has not already done so, rescind the unilateral changes made to terms and conditions of employment with respect to overtime pay and on-call shift assignments, and continue in effect the terms and conditions of employment in effect prior to August 2006, until Metro Mayaguez, Inc. d/b/a Hospital Perea negotiates in good faith with the Union to a new collective-bargaining agreement or a valid impasse, or until the Union agrees to the changes.

(b) Make whole employees for any loss of pay or other benefits they may have suffered as a result of the unilateral changes, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Mayaguez, Puerto Rico, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 24, 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. 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 August 1, 2008.

(e) 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 not specifically found.

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 unilaterally change terms and conditions of employment of our unit employees, including changes to overtime pay and on-call shift assignments.

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

WE WILL, on request of Unidad Laboral de Enfermeras (Os) y Empleados de la Salud (the Union), to the extent we have not done so, rescind the unilateral changes we made to terms and conditions of employment with respect to overtime pay and on-call shift assignments, and continue in effect the terms and conditions of employment in effect prior to August 2006, until we negotiate in good faith with the Union to a new collective-bargaining agreement or a valid impasse, or until the Union agrees to the changes.

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."

WE WILL make whole employees for any loss of pay or other benefits they may have suffered as a result of our unilateral changes, with interest.

METRO MAYAGUEZ, INC. D/B/A HOSPITAL PEREA

Jose L. Ortiz, Esq., for the General Counsel.

Jose R. Gonzalez Nogueras, Esq. and *Miguel A. Nieves-Mojica, Esq. (Jimenez, Graffam & Lausell)*, of San Juan, Puerto Rico, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in San Juan, Puerto Rico, on September 1–3 and 8–10, 2009. Unidad Laboral de Enfermeras (OS) Y Empleados de la Salud (the Union) filed a charge on October 21, 2008. The first amended charge was filed January 14, 2009, and a second amended charge was filed January 21, 2009. The complaint, which issued July 30, 2009, alleges that Metro Mayaguez, Inc. d/b/a Hospital Perea (Metro Mayaguez) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by: (1) unilaterally changing the manner in which registered nurses are paid for overtime work; (2) discontinuing a bonus for employees on the New Year’s Eve night shift; and (3) unilaterally implementing an on-call shift for registered nurses in the operating room. The complaint also alleges that Registered Nurse Abigail Rios was suspended in violation of Section 8(a)(3) and (1) for refusing to work overtime at the new overtime rate. In its timely-filed answer, Metro Mayaguez essentially denies the material allegations and asserts various jurisdictional and other affirmative defenses.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Metro Mayaguez, I make the following

FINDINGS OF FACT²

I. JURISDICTION

Metro Mayaguez, a Puerto Rico corporation, is engaged in the operation of a hospital facility providing medical, surgical, and related health care services in Mayaguez, Puerto Rico, where it annually derives gross revenues in excess of \$250,000 and annually purchases and receives goods and materials valued in excess of \$50,000 directly from suppliers located outside the Commonwealth of Puerto Rico. Metro Mayaguez admits and I find that it is an employer engaged in commerce within

¹ After the record closed and the transcripts and exhibits, including translations, were received, counsel provided several missing translations and stipulated to several corrections to translations provided. The electronic mail correspondence from counsel confirming the inclusion of the missing translations and the stipulated corrections has been designated Jt. Exh. 2.

² Documents and their translated versions were designated with the same numerical reference, with the Spanish version given an additional designation of “A” and the English translation designated as “B.”

the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Previous Bargaining History*

On August 11, 2006, Metro Mayaguez purchased and assumed control of the hospital facility formerly owned and operated by Pavia Health Inc., d/b/a Metro Mayaguez Pavia Perea (Pavia). As far back as 15 years prior to Metro Mayaguez’ assumption of the hospital’s operations, Pavia recognized the Union as the exclusive collective-bargaining representative of employees in the following three bargaining units within the meaning of Section 9(b) of the Act:

Unit A

INCLUDED: All licensed graduate nurses employed by the Employer at its hospital located at Mayaguez, Puerto Rico.

EXCLUDED: All other employees, including executive secretaries, licensed practical nurses, accountants, guards, professional personnel, supervisors, nurses aides, pharmacy aides, escorts, X-ray technicians, respiratory therapy technicians, central supply technicians as defined in the Puerto Rico Labor Relations Act.

Unit B

INCLUDED: All licensed practical nurses, pharmacy aides, escorts and X-ray technicians, including respiratory technicians, operating room technicians, laboratory assistants, E.K.G., phlebotomists, and center supply technicians.

EXCLUDED: All other employees, including executives, executive secretaries, registered nurses, accounts, guards, professional personnel, and supervisors, as defined in the Puerto Rico Labor Relations Act.

Unit C

INCLUDED: All laundry, maintenance, non-skilled, warehouse, parking, and housekeeping employees, cooks, diet department employees, and non professional employees, including plumber, mason, electrician, handyman and refrigeration technicians employed by the Employer.

EXCLUDED: All other employees, including executives, executive secretaries, licensed practical nurses, graduated nurses, accountants, guards, professional personnel, supervisors, nurses aides, pharmacy aides, escorts, X-ray technicians, respiratory therapy technicians, central supply technicians as defined in the Puerto Rico Labor Relations Act.

The Union and Pavia commenced bargaining to renew that agreement in February 2006. Those discussions were not completed, however, prior to the agreement’s expiration on May 31, 2006. Nevertheless, in a letter, dated August 29, 2006, Metro Mayaguez recognized the Union as the exclusive collective-bargaining representative of bargaining unit employees. At that time, approximately 200 employees were members of the three collective-bargaining units represented by the Union. Approxi-

mately 120 of those members are registered nurses.³ The three appropriate units are generally described as follows: Unit A—registered nurses, Unit B—licensed practicing nurses and technicians, and Unit C—laundry, maintenance, and nonskilled workers. Currently, 230 of Metro Mayaguez' 300 employees are represented by the Union.⁴

Collective bargaining between Metro Mayaguez and the Union commenced in October 2006. Shortly after negotiations resumed, however, the Union filed charges alleging that Metro Mayaguez committed multiple unilateral changes to the terms and conditions of employment of its employees in violation of Section 8(a)(5) and (1) of the Act. On December 18, 2007, the United States District Court for the District of Puerto Rico issued a consent judgment after Metro Mayaguez agreed to sign a stipulation consenting to entry of adjudication and order.⁵ Subsequently, on April 30, 2008, in *Metro Mayaguez Pavia Perea*, 352 NLRB 418 (2008), the Board adopted Judge William Cates' findings and conclusions that Metro Mayaguez, as a "perfectly clear" successor, violated Section 8(a)(5) and (1) of the Act by implementing unilateral changes in employees' terms and conditions of employment, including wages, hours, changes in sick leave days, vacations, uniform incentives, attendance bonus, salary, retirement plans, and progressive disciplinary proceedings. The Board also adopted the judge's finding that Metro Mayaguez violated Section 8(a)(1) by promulgating and maintaining an overly broad no-solicitation/no-distribution rule. Finally, the Board ordered Metro Mayaguez, inter alia, to rescind all unilateral changes and, "on request of the Union, restore the terms and conditions of employment in effect prior to August 2006, until such time as it negotiated in good faith with the Union to agreement or impasse."⁶

B. Progress of the Negotiations

The members of the Metro Mayaguez' bargaining committee included: Jaime Maestre (executive director);⁷ Zaida Hernandez (director of nursing); Joannie Hernandez (director of human resources); Joannie Garcia (director of finance); and Jorge Pizarro, Esq. (labor counsel). The Union's bargaining committee members included: Arturo Grant (spokesperson); Eduardo Cruz (general shop steward); Harvey Garcia (dietary delegate); Alexis Rios (pharmacy steward); and Catalina Olan (emergency room). The parties are still negotiating over an initial collective-bargaining agreement.⁸

During the period of October 5, 2006, to April 2, 2009, the parties held approximately 30 formal bargaining sessions. Dur-

ing the same period of time, the parties agreed to approximately 50 provisions, some of which were implemented immediately.⁹ These provisions included: basic life insurance—article 28 (May 3, 2007); pension plan—article 37 (retroactive to September 1, 2006); medical insurance plan (December 31, 2007); and medical plan—article 30 (April 2, 2008). There were other issues, however, which could not be easily resolved and resulted in protracted bargaining.

C. Overtime Rate Prior to Change

For at least the past 20 years, including the period following Metro Mayaguez' purchase of the facility in August 2006 through July 2008, registered nurses received double the regular hourly rate of pay for any hours worked in excess of 8 hours per day (overtime rate).¹⁰ This practice was incorporated into the last collective-bargaining agreement between Pavia and the Union, which expired on May 31, 2006.¹¹ Based on that provision, Metro Mayaguez' registered nurses received \$14.42 per hour for regular shift work and \$28.82 per hour for overtime work.¹²

As an alternative to Pavia paying registered nurses for additional work at the overtime rate, Pavia and the Union agreed on January 25, 2002, to create a per diem rate of pay for registered nurses who volunteered to work in excess of their regular shift work. Such work was payable at a per diem rate of \$80 (voluntary per diem rate)¹³—the same amount paid to nonunion per diem personnel—and was less than the regular shift rate at the time of \$92.¹⁴ The 2002 agreement creating a voluntary per diem rate did not, however, eliminate Pavia's practice of continuing to pay registered nurses at the double time rate for mandatory overtime work.¹⁵

⁹ Joannie Hernandez maintained a chronology of the negotiations, which I received as a business record over the General Counsel's objection. (R. Exh. 14; Tr. 591, 597.)

¹⁰ I found it less than credible that Maestre, who exuded extensive knowledge about problems with Pavia's operations and fiscal predicament, was unaware of Pavia's payment of double time pay to registered nurses for overtime work. (Tr. 75.) Nevertheless, Joannie Hernandez and Supervisor Alice Morales corroborated the testimony of registered nurses Felipa Crespo and Catalina Olan regarding the existence of the past practice. (Tr. 92–93, 128–129, 373, 725–726, 748.)

¹¹ Although counsel for Metro Mayaguez queried whether Pizarro signed the August 2003 agreement regarding art. XII of the August 2003 collective-bargaining agreement, there was no credible evidence to indicate that the document was not effectively executed and then implemented by the Union and Pavia at that time. (GC Exh. 10; Tr. 180–187.)

¹² This finding is based on the credible and unrefuted testimony of registered nurse Crespo. (Tr. 92–93.)

¹³ I describe this per diem rate as "voluntary" in order to distinguish it from the subsequent per diem rate established by Metro Mayaguez in lieu of mandatory overtime.

¹⁴ The voluntary per diem rate paid by Pavia to registered nurses for voluntary overtime work is not to be confused with part-time per diem contracts used to employ nonbargaining unit part-time employees to perform a certain unit work on a "per diem" basis. (R. Exh. 16, Sec. 10.10.)

¹⁵ Grant's testimony regarding Pavia's practice with respect to the distinction between Pavia's voluntary per diem shifts and overtime (double pay) shifts, although premised primarily on the 2002 agree-

³ As there was a tendency in the documents to refer to registered nurses as "graduate nurses," both terms are used interchangeably throughout the record.

⁴ This finding is based on the undisputed estimates of Arturo Grant and Joannie Hernandez. (Tr. 177, 588–589.)

⁵ GC Exhs. 27–28.

⁶ GC Exh. 26.

⁷ Maestre also served as executive director under Pavia years prior to the hospital's purchase by Metro Mayaguez, including the point at which the Pavia recognized the Union. (Tr. 69–71.)

⁸ Metro Mayaguez' representatives generally remained the same at the meetings, but Grant and Cruz were the only consistent attendees for the Union. (Tr. 74, 178–179.)

In December 2005, the Union and Pavia commenced negotiations to increase the voluntary per diem rate. On or about March 3, 2006, the Union and Pavia arrived at a tentative agreement regarding a new voluntary per diem pay rate. However, a new voluntary per diem pay rate was never actually implemented prior to Metro Mayaguez' assumption of operations in August 2006.¹⁶ Accordingly, the voluntary per diem pay rate for registered nurses remained \$85 for the 7 a.m. to 3 p.m. shift, \$95 for the 3 to 11 p.m. shift, and \$115 for the 11 p.m. to 7 a.m. shift. After Metro Mayaguez took over in August 2006, however, registered nurses were no longer called in for voluntary per diem work and mandatory overtime became the sole mechanism for work performed beyond their regular shifts.¹⁷

In May 2007, Maestre spoke with Grant and Quinones about the need to reduce the overtime rate paid to registered nurses for mandatory overtime work and proposed that the double-time rate be changed to a per diem rate (mandatory per diem rate).¹⁸ The modification was precipitated by Metro Mayaguez' concern over financial implications looming as the result of Puerto Rico Local Law No. 27. The Commonwealth of Puerto Rico's legislature enacted Local Law No. 27 in 2005 to, inter alia, significantly increase registered nurses' salaries by July 20, 2008. The potential increase in payroll costs to Metro Mayaguez was \$500,000 per year. Maestre expressed this concern to Grant and Quinones.¹⁹

Between May 2007 and July 18, 2008, Metro Mayaguez and the union bargaining committees met approximately 14 times to negotiate the amount of a new mandatory per diem rate for registered nurses who worked over 8 hours per day or 40 hours

per week. During this bargaining process, there were minor changes to the language of the provision. The Union was receptive to Metro Mayaguez' concerns that it needed the rate change prior to the implementation of the third and last phase of Local Law No. 27 on July 20, 2008, in order to remain competitive, and might have to lay off as many as 13 nurses if the reform was not accomplished. The actual amount of such a rate change, however, proved elusive.

On July 18, 2008, Metro Mayaguez and the Union partially agreed to modify the overtime rate for mandatory overtime performed by registered nurses to a new mandatory per diem rate to be stated at section 16.13 of the future collective-bargaining agreement. The parties did not, however, discuss a specific pay rate during this meeting and it was left open for future determination. In that regard, Pizarro wrote the words, "amount pending," next to the language of the partial agreement.²⁰ That provision read as follows:

[Registered] Nurses or other specialized personnel who based on their salary are considered professionals, exempt from payment of overtime will be compensated at a per diem rate, and therefore will not have the right to double pay or time and a half in the event they work beyond the regular work schedule. This provision will prevail over any other provision in the Collective Bargaining Agreement.²¹

On July 19, 2008, Metro Mayaguez' supervisors began notifying registered nurses about the July 18 partial agreement with the Union regarding the mandatory per diem rate in lieu of the overtime pay rate, effective August 1, 2008. Metro Mayaguez also notified the Union's shop steward of this action, but did not formally notify the Union about the elimination of the overtime rate.²² As such, the overtime rate of \$95 per shift was changed to a mandatory per diem rate of \$85 for the 7 a.m. to 3 p.m. shift, \$95 for the 3 to 11 p.m. shift, and \$105 for the 11 p.m. to 3 a.m. shift.²³ On July 22, 2008, without knowing that Metro Mayaguez changed the overtime rate, Grant submitted a proposal which, among other issues, proposed a new overtime

ment, was corroborated by registered nurse Catilina Olan's credible testimony on cross-examination. (GC Exh. 11; Tr. 137-139, 148, 187-189, 193-196.)

¹⁶ Notwithstanding Grant's lack of recollection, the correspondence reflected that a tentative agreement was reached between the Union and Pavia. (R. Exhs. 8-9; Tr. 325-330, 893-894.)

¹⁷ Maestre and Joannie Hernandez testified that there was no distinction between the registered nurses' pay rate for voluntary per diem work and overtime work compensated at double time. This view, as well as their assertion that the Union and Metro Mayaguez intended to convert the new voluntary per diem pay rate, tentatively agreed to between the Union and Pavia in March 2006, to a mandatory per diem rate in lieu of the overtime pay rate, was neither credible nor supported by a reasonable construction of the documentation, including the expired collective-bargaining agreement. Other baseless attempts to deflect the question referred to directives contained in the Board's 2008 decision, which dealt with different pay issues, and the fact that registered nurses were not yet "exempt" from mandatory pay standards. (Tr. 689, 725-726, 770-771, 861-862, 869-871.)

¹⁸ As previously explained, Pavia paid nurses for overtime work at the overtime rate (double pay) for mandatory overtime or a voluntary per diem amount for voluntarily overtime. As the new per diem rate proposed by Metro Mayaguez in May 2007 (and ultimately implemented in August 2008) was to be applied to mandatory overtime, I refer to this new rate as the "mandatory per diem rate." (Tr. 687-689; R. Exh. 9.)

¹⁹ The estimated additional cost to Metro Mayaguez, as well as the applicability and effective date of Local Law No. 27 with respect to the registered nurses' salaries, were not disputed. (Tr. 76-77, 672-673, 799-800.)

²⁰ Metro Mayaguez contends that the Union understood its predicament because of the impending effect of Local Law No. 27 and was amenable to changing the overtime pay rate to a mandatory per diem pay rate. Maestre did not, however, refute the testimony of Grant and Cruz that an actual amount was not discussed at the July 18 meeting and was still to be determined. Coupled with the fact that Pizarro inserted the words, "amount pending," I find it preposterous, as asserted by Maestre and Joannie Hernandez, that the Union essentially gave him a "blank check" to implement a new per diem rate change on July 20. (Tr. 78-85, 197-199, 205-206, 345-346, 619-620, 683-687, 740-741, 772-774, 801-807, 895-896.)

²¹ The parties agreed that the date indicated on the agreement, July 8, 2008, is incorrect and that the correct date is July 18, 2008. (GC Exh. 2; Tr. 81.)

²² Other than relying on the July 18 partial agreement regarding the mandatory per diem rate, Metro Mayaguez offered no documentary proof demonstrating the Union's agreement to actual implementation of such a rate on August 1, 2008, or any other date. (Tr. 84-86, 206-207, 687, 743, 773-776.)

²³ There was no dispute between Joannie Hernandez, Grant, Olan, and Crespo as to the overtime rates prior to August 1, 2008. (Tr. 91-92, 105-107, 128, 220, 223, 687.)

rate equivalent to 150 percent of regular shift pay.²⁴ However, unit employees informed Grant that day of the announced replacement of the overtime rate by a new mandatory per diem rate.²⁵

Upon being notified of the implementation of the mandatory per diem rates, Grant protested the change in a letter to Metro Mayaguez, dated July 24, 2008.²⁶ Jorge Pizarro, Metro Mayaguez' labor counsel, replied in a letter dated July 31, 2008, but received by Grant on August 4, 2008, asserting that the parties agreed to change the overtime pay rate to a mandatory per diem rate, but without prejudice to negotiate a higher amount in future negotiations.²⁷ On August 5, 2008, after having received Metro Mayaguez' letter of August 4, 2008, the Union reiterated that it never agreed to implement a specific mandatory per diem rate and urged Metro Mayaguez to comply with Judge Cates' decision and refrain from implementing a mandatory per diem rate until a collective-bargaining agreement was reached.²⁸

On March 19, 2009, Metro Mayaguez and the Union agreed on the language regarding a new mandatory per diem rate, including the specific amounts, but left those provisions as "pending." That provision was designated as section 16.14. To date, while that provision remains pending, the mandatory per diem rates implemented in August 2008 have not changed.²⁹

D. The On-Call Shift

In or around January 2008, Metro Mayaguez' operating room doctors complained to Maestre about complications caused by long delays in performing elective surgeries in the three operating rooms. After considering opening a fourth operating room, Maestre decided to create an "on-call" shift for registered nurses. The implementation of such a shift would enable Metro Mayaguez, in emergency situations, to contact otherwise off-duty registered nurses on work-issued cellular telephones and direct them to report to work in the operating room as needed.³⁰

On February 4, 2008, Pizarro notified Grant in writing of Metro Mayaguez' urgent need to implement an on-call shift for the operating room's registered nurses and requested immediate bargaining on that subject. Metro Mayaguez specifically pro-

posed the creation of 8-hour on-call shifts for the registered nurses on weekends. On-call registered nurses would be compensated \$250 per on-call shift. The Union responded favorably to Metro Mayaguez' request for immediate bargaining over this issue separate and apart from the pending negotiations for a collective-bargaining agreement and asked once again for a proposal.³¹

A first draft proposal for an on-call shift, including a "hypothetical program," was submitted by Metro Mayaguez to the Union on March 12, 2008. The hypothetical program was again submitted to the Union on April 4, 2008.³² At a bargaining session on April 9, 2008, the Union submitted a written counterproposal to: (a) expand the "on-call" shift to weekdays, not just weekends; (b) pay \$150 for those on-call during weekdays, plus \$100 per case attended to; (c) pay \$850 to on-call personnel for weekend work, plus \$150 per case attended to; and (d) apply the shift to all personnel in the operating room, not just registered nurses. The Union also posed several questions regarding Metro Mayaguez' initial proposal.³³

Metro Mayaguez responded the same day by providing answers requested by the Union and submitted its second proposal. Essentially, it differed from the Union's counterproposal to the extent that: (a) only registered nurses would be assigned to the on-call shift; (b) registered nurses on-call during weekdays (Monday to Thursday) would be paid \$50 plus their regular shift hourly rate if called to work; (c) maintained its position that registered nurses on-call during weekends (Friday to Sunday) would be paid \$250 plus their regular shift hourly rate if called to work; and (d) provisions relating to possible discipline of employees showing up late for an on-call shift and the procedure for calling in sick during an on-call shift.³⁴

During a bargaining session on July 22, 2008, the Union submitted its second counterproposal regarding the on-call shift at section 17.4 of its proposal. It renewed its proposal to include all operating room personnel, but reduced its compensation proposal for weekday on-call shifts to \$150 plus \$75 for each case attended to, and weekend on-call shifts to \$350 plus \$100 for each case attended to. Metro Mayaguez rejected the second counterproposal. After Metro Mayaguez rejected the Union's second counterproposal, it did not submit another proposal and the parties did not hold any further discussions regarding the on-call shift until October 2008, when Pizarro informed Grant of Metro Mayaguez' intention of "establishing" the shift. Grant requested that Metro Mayaguez submit a proposal.³⁵

²⁴ R. Exh. 5.

²⁵ After reviewing the record, I credit Grant's hearsay testimony that he was notified of Metro Mayaguez' implementation of the mandatory per diem rate by Cruz, who subsequently testified that he learned of the implementation from supervisors. (Tr. 206-208.)

²⁶ GC Exh. 12.

²⁷ There is no credible evidence to support Pizarro's assertion that the Union agreed to essentially let Metro Mayaguez determine the amount of a new mandatory per diem rate and then continue bargaining after August 1, 2008, for a higher rate. (GC Exh. 13.)

²⁸ GC Exh. 14.

²⁹ Metro Mayaguez' contention, that the parties followed a custom and practice of agreeing to immediate implementation of *all* matters considered "pending" or otherwise tentatively or conceptually agreed to, was true in some, but not all, instances. (Tr. 645-646, 690.)

³⁰ The General Counsel conceded that Metro Mayaguez had a business justification for seeking to create an on-call shift. (Tr. 497, 502-503, 818-819.) Maestre did not, however, explain why he rejected the option of opening another operating room.

³¹ Grant and Cruz had poor recollection as to when the parties began negotiating the on-call issue. Nevertheless, there is little dispute as to the parties' initial communications and agreement to commence bargaining immediately over this issue separate and apart from existing negotiations for a collective-bargaining agreement. (R. Exh. 7; GC Exhs. 15, 20; Tr. 272-290, 690-694, 780-785, 789-791, 821-822, 863-867.)

³² Neither Grant nor anyone else testified to a meeting on this date, but it is referenced in Metro Mayaguez' subsequent proposal of April 9, 2008. (R. Exh. 4; Tr. 225-228.)

³³ R. Exh. 3.

³⁴ R. Exhs. 3-4.

³⁵ The Union's July 22, 2008 submission undermines Maestre's contention that the Union refused to negotiate over the on-call issue be-

The on-call issue was not raised again until Metro Mayaguez brought it up at a January 26, 2009 bargaining session.³⁶ During February, Metro Mayaguez again mentioned to Grant that they wanted to implement the on-call shift in March. Grant asked Metro Mayaguez to submit a proposal.³⁷

Metro Mayaguez submitted its third proposal at a March 19, 2009 bargaining session. This proposal essentially mirrored Metro Mayaguez' second proposal (April 9, 2008) as follows: (a) \$50 plus regular pay for registered nurses on-call during weekdays; and (b) \$250 plus regular pay for registered nurses on-call during weekends. It differed from Metro Mayaguez' second proposal to the extent that it subjected registered nurses to on-call duty depending on "service needs,"³⁸ omitted a provision assuring registered nurses would "earn greater income with the on-call program than what they currently earn," omitted a provision ascribing exclusive responsibility for the narcotics cabinet to a supervisor during on-call shifts, and added a provision enabling Metro Mayaguez to notify nurses within a 7-day period prior to the date" of an on-call assignment. Pizarro reminded Grant that Metro Mayaguez "urgently" wanted to implement the "on-call" shift in April 2009 and asked for the Union's response. However, Grant reiterated the Union's demand for the inclusion of operating room technicians and others in the on-call shift program.³⁹

Grant confirmed the Union's position in a letter, dated March 20, 2009, and asked that Metro Mayaguez explain, prior to the next union negotiating committee meeting scheduled for March 31, 2009, why it wanted to limit on-call shifts to registered nurses.⁴⁰ Pizarro replied to that letter on March 31, 2009. He explained that several draft stipulations had been offered, the most recent of which was on March 19, 2009, and reiterated Metro Mayaguez' opposition to applying the on-call shift to employees other than registered nurses. Pizarro also informed

tween April 9 and December 2008. (R. Exh. 5; Tr. 225, 289–290, 826–828, 879.)

³⁶ Grant disputed Maestre's contention that the on-call shift issue was raised at a January 26, 2009 bargaining session and asserts the matter was not discussed again until February 5, 2009. Given Grant's trouble recalling dates, I credited Maestre's recollection, which was corroborated by Metro Mayaguez' chronological record of bargaining sessions. (Tr. 225–226, 828–830, 847; R. Exh. 14.)

³⁷ There were discrepancies between Maestre and Grant as to when the former told the latter of Metro Mayaguez' desire to institute an on-call shift. However, there is no dispute that Maestre told Grant in February that he wanted to implement it by March, and again in March that he wanted to implement it in April. (Tr. 226–227, 269–272, 295–296, 829–831, 865.)

³⁸ Pursuant to Jt. Exh. 2, the parties stipulated to the following corrections in the translation for GC Exh. 15: the portion of sec. 1(e) which states, "subject to service needs," should read "subject to if service needs permits it"; and the portion of sec. 5, which refers to "period," should read "term."

³⁹ I base this finding on the fact that Grant's March 20, 2009 letter to Pizarro refers to the presentation of the third proposal the day before. (GC Exh. 15–16.)

⁴⁰ Metro Mayaguez contends that it previously answered these questions, but there is no documentation to that effect. (GC Exh. 16; Tr. 229–230, 830–831.)

Grant that Metro Mayaguez would implement the on-call shift on April 5, 2009.⁴¹

The parties negotiated over several issues at the next bargaining session on April 2, 2009, but the on-call shift issue was not among them. Although Metro Mayaguez sought to discuss the proposed on-call shift issue, the Union requested the parties hold off discussion on that point until Cruz, who was absent, could be present. Metro Mayaguez reminded the Union of the need to implement the on-call shift by April 5, 2009.⁴²

The following day, April 3, 2009, Grant and Pizarro discussed the on-call shift issue by telephone. Shortly after their telephone conversation, Grant hand-delivered the Union's third counterproposal to Pizarro. The Union's third counterproposal agreed to the terms of Metro Mayaguez' third proposal, including Metro Mayaguez' insistence on limiting on-call shifts to registered nurses, as well as a proposal to provide 7 days' prior notification before assigning nurses to an on-call shift. It differed, however, by proposing that registered nurses who actually worked an on-call shift be paid a double time rate, in contrast to the regular hourly rate proposed by Metro Mayaguez. The letter concluded with a request that the counterproposal be discussed at the next scheduled bargaining session on April 7, 2009.⁴³

Notwithstanding the movement presented by the Union's third counterproposal on April 3, 2009, Maestre proceeded that day to notify registered nurses that an on-call shift would be established on April 5, 2009.⁴⁴ Grant proceeded to call Maestre to complain about the implementation of the on-call shift, but Maestre just responded that they would discuss the matter at the next negotiation meeting.⁴⁵ Also on April 3, 2009, Pizarro tucked in a note at the end of an otherwise unrelated letter stating:

⁴¹ Grant's failure to immediately respond to Pizarro's March 19, 2008 letter was consistent with his decision to simply ignore certain declarations made by Metro Mayaguez. (GC Exh. 20.)

⁴² Maestre testified that the Union, by refusing to discuss the issue and requesting a delay, was less than diligent. (Tr. 848, 864; R. Exh. 14.) He also conceded, however, that Cruz, a technician and among the employees seeking to be covered by the on-call shift provision, was absent. (Tr. 344, 849.) In any event, it is clear that Metro Mayaguez sought to impress upon the Union the importance of implementing the on-call shift on April 5. (Tr. 867.) In any event, by seeking to discuss the on-call issue, Metro Mayaguez essentially concedes that Pizarro's March 19, 2008 letter was not its final word on the subject.

⁴³ Grant effectively refuted Metro Mayaguez' contention that the Union failed to object on April 3, 2009, to implementation of the on-call shift on April 5, 2009. (Tr. 235, 246.) Furthermore, Maestre conceded that Pizarro provided him with a copy of the Union's third counterproposal on April 3, 2009. Yet, neither he nor Pizarro informed the Union that Metro Mayaguez was implementing an on-call shift on terms other than those contained in the Union's latest proposal. Similarly, I reject the notion that the Union, by submitting a proposal, tacitly agreed to implementation. (GC Exh. 17; Tr. 849–850, 868.)

⁴⁴ This event is not disputed. (Tr. 96, 234.)

⁴⁵ Once again, Grant was unable to provide reliable testimony regarding applicable dates, as there was a discrepancy as to whether he had such a conversation with Maestre on April 3 or 7, 2009. Nevertheless, it was not contravened by Maestre that Grant called to protest on the day implementation was announced. (Tr. 235–236, 273–276, 338–342.)

On another note, we have proceeded to implement on April 5, 2009 the “On-Call” shifts in the Operating Room just as we had [indicated] to you, without prejudice of course of the negotiations continuing during the following sessions.⁴⁶

The on-call shift was implemented on April 5, 2009, under the terms of Metro Mayaguez’ third proposal to the Union. On that day, Metro Mayaguez’ management formally met with the registered nurses and informed them as to their responsibilities under the on-call system and the applicable compensation.⁴⁷

Notwithstanding the Union’s objection to the April 5 implementation of the on-call program, discussions continued over the issue. In addition, the parties had discussions regarding the on-call shift’s impact on certain employees. Specifically, on May 6, 2009, Grant informed Metro Mayaguez that the on-call system presented a significant problem for registered nurse Felipa Crespo. Crespo, who did not drive and relied on others for transportation to and from work, would have a problem getting to work on an on-call basis. Grant followed up with a similar quest to have Crespo exempted from the on-call shift assignments on May 12, 2009.⁴⁸

On May 15, 2009, Grant notified Pizarro that the Union intended to withdraw from the negotiating table regarding the on-call shift in light of Metro Mayaguez’ implementation of such a shift and the lack of fruitful negotiations over the issue. He also disavowed any side agreement regarding Crespo’s exemption from the on-call shift program. Finally, the Union further notified Metro Mayaguez that any work performed by operating room personnel beyond regular shift hours would be deemed “extraordinary” time.⁴⁹

Nevertheless, the parties met again on May 20, 2009, to negotiate over the on-call shift issue. Those discussions were unsuccessful, however, and Pizarro responded on May 21, 2009, by notifying Grant that Metro Mayaguez was rescinding the on-call shift until an agreement could be reached.⁵⁰ On May 22, 2009, Grant responded to Pizarro’s May 21, 2009 letter by condemning Metro Mayaguez’ cancellation of the on-call shift.⁵¹

On August 14, 2009, the parties finally reached an agreement regarding the on-call shift for operating room registered nurses. The agreement provided, in pertinent part, to pay the nurses \$50 per on-call weekday shift and \$300 per on-call weekend

shift, plus compensation for any hours actually worked during such a shift.⁵²

E. The New Year’s Eve Bonus

Although never mandated by a collective-bargaining agreement, Metro Mayaguez and Pavia followed an annual practice for at least the past 13 years of paying a \$50 bonus to all bargaining and nonbargaining unit employees who work the New Year’s Eve night shift. That shift begins at 11 p.m. on December 31 and ends at 7 a.m. on January 1. Typically, the New Year’s Eve bonus is distributed to those employees in their next January paychecks. Metro Mayaguez, after assuming operations in 2006, continued this annual practice for employees who worked the New Year’s Eve night shifts on December 31, 2006, and December 31, 2007.⁵³

The practice of paying a New Year’s Eve bonus ran aground, however, for the 40 bargaining unit employees who worked the New Year’s Eve night shift on December 31, 2008.⁵⁴ On January 12, 2009, the first payday of the year, an employee notified Maestre that her paycheck did not include a \$50 bonus for working the New Year’s Eve night shift on December 31, 2008. Maestre investigated, confirmed that the customary bonus had not been paid to employees who worked that night, and determined that the New Year’s Eve bonus had not been paid because of a payroll error.⁵⁵

Upon learning of the nonpaid New Year’s Eve bonus, however, Maestre did not direct that it be paid in the next paycheck. As a result, the issue did not surface again until Grant mentioned it at a bargaining session towards the end of January 2009. Joannie Hernandez informed Grant that Metro Mayaguez was not obligated to pay the New Year’s Eve bonus because it was not included in the expired collective-bargaining agreement. Grant responded by demanding the bonus be paid to the applicable employees and expressed a desire to incorporate the practice into the collective-bargaining agreement.⁵⁶

Over the next several months, the parties negotiated over the inclusion of a New Year’s Eve bonus in the collective-bargaining agreement. On August 14, 2009, the Union and Metro Mayaguez entered into a non-Board written agreement requiring Metro Mayaguez to pay the New Year’s Eve bonus to applicable employees. That agreement further provided that the

⁴⁶ The parties stipulated that the portion at the beginning of the last paragraph of the translation to GC Exh. 21, which reads, “On the other hand,” should read, “On another note.” (Jt. Exh. 2.)

⁴⁷ Metro Mayaguez correctly argues that the Union never objected to the concept of an on-call shift. However, the credible evidence, including the testimony by Metro Mayaguez’ witnesses, does not support an inference that the Union agreed to implementation of an on-call shift on or by April 5, 2009. To the contrary, the proof clearly indicates the predetermination of Metro Mayaguez to implement the on-call shift on that day and negotiate later with respect to any outstanding issues. (Tr. 273, 849–854, 879–880.)

⁴⁸ GC Exhs. 18–19.

⁴⁹ By “extraordinary” time, Grant was clearly implying that the mandatory overtime rate was applicable. (R. Exh. 6.)

⁵⁰ GC Exh. 22.

⁵¹ GC Exh. 23.

⁵² R. Exh. 24.

⁵³ Although vigorously challenging the adequacy or reliability of the proof and testimony on this issue, Metro Mayaguez did not deny the existence of the past practice of paying a New Year’s Eve bonus. (GC Exh. 4; Tr. 129–133, 140–142, 144–145, 247, 250–252, 346–347.)

⁵⁴ Metro Mayaguez did not refute the stipulated testimony of Jessica Galarza, a registered nurse who worked that shift. (Tr. 422, 862–863.)

⁵⁵ The Union did not dispute Metro Mayaguez’ contention that the absence of the bonus payment from employees’ paychecks was due to a payroll error. (Tr. 810–811, 860, 862–863.)

⁵⁶ Although Grant’s Board affidavit omitted any reference to such a statement by Joannie Hernandez, she did not refute his testimony on this point. On the other hand, given the numerous inconsistencies between Grant’s testimony and Board affidavit, I found Maestre more credible as to what transpired at this meeting, including Grant’s desire to incorporate the bonus into the agreement. (Tr. 299, 303–307, 341, 811–812.) In any event, it is clear that Maestre did nothing to correct what he described as a payroll error.

Union “will request and obtain the dismissal with prejudice of all complaints, charges, administrative and/or judicial procedure by itself or through the [Board] directly or indirectly related to the payment of the December 31 eve incentive.” The bonus was distributed to the eligible employees in their next paycheck on August 28, 2009. The Union, however, has yet to request and obtain withdrawal of the charge from the Board.⁵⁷

F. Suspension of Nurse Abigail Rios

Metro Mayaguez’ endoscopy department performs invasive gastrointestinal studies requiring that patients be sedated intravenously. Physicians performing the procedures are assisted before, during, and after the procedure by registered nurses. After the physician finishes the study, the patient is transferred to a recovery area, where he/she is kept under observation and is monitored to see if there are any adverse reactions to anesthesia or other complications from the procedure.⁵⁸

Alice Morales has supervised Metro Mayaguez’ endoscopy department since 2003. She supervises four registered nurses, including Abigail Rios, and reports to Nursing Director Zaida Hernandez. Depending on the circumstances, Morales has periodically directed nurses in the endoscopy department to work overtime.⁵⁹ Rios, a Metro Mayaguez employee since 1995, never declined Morales’ directive to work overtime prior to August 21, 2008.⁶⁰ In early August, however, Metro Mayaguez’ registered nurses began receiving compensation for mandatory overtime work at the new mandatory per diem rate. Rios responded to the newly implemented per diem rate by informing Morales, prior to August 21, 2008, that she was not willing to work overtime at that rate. As a result of Rios’ unavailability for overtime during the later afternoon hours, Morales changed Rios’ shift, with the latter’s consent, from 8 a.m. to 4 p.m. to 10 a.m. to 6 p.m.⁶¹

⁵⁷ Metro Mayaguez moved to dismiss at trial based on the agreement. The General Counsel conceded that the Union did not comply with its part of the bargain by requesting withdrawal of the charge. Nevertheless, the General Counsel insisted on its prerogative to oppose dismissal of the charge for policy and, apparently, tactical reasons. I denied the motion to dismiss that charge on the ground that conditions subsequent to the agreement were not met and placed the document, marked R. Exh. 1, in the rejected exhibits file. (R. Exh. 1; Tr. 44–68, 355, 423, 813–818.)

⁵⁸ The endoscopy department’s operations were not disputed, (Tr. 386–388.)

⁵⁹ Other than Morales, none of the endoscopy department’s nurses testified. (Tr. 371–374.)

⁶⁰ Zaida Hernandez opined that Rios was not a good employee and suggested she had a prior discipline. She conceded, however, that Rios had most recently received a positive evaluation and Metro Mayaguez provided no evidence to contravene Morales’ testimony that Rios was never disciplined prior to August 21, 2008, for refusing to work overtime or any other reason. (Tr. 376, 518–519, 523.)

⁶¹ Except to the extent that it did not conflict with her prior written statements, I credited Morales’ trial testimony over the written statements in Rios’ Board affidavit. In assessing the accounts provided by Morales, who testified and was subject to cross-examination, and Rios, who was not, Morales’ testimony is inherently more reliable. On the issue of Rios’ schedule change, however, I rely on Rios’ version, since Morales never refuted that point during her testimony. (Jt. Exh. 1, par. 7; Tr. 371–376.)

Notwithstanding the accommodation between Morales and Rios, the overtime pay issue came to a head on August 21, 2008. On that day, Rios was working her regular 10 a.m. to 6 p.m. shift. At approximately 1 p.m., Zaida Torres, a registered nurse on the 12 to 8 p.m. shift, injured her ankle. She was treated at the emergency room and did not return to work. Torres’ absence created a nursing care shortage in the endoscopy department. As a result, Morales directed two other registered nurses, Eva Ramirez and Madeline Matias, to work overtime past 2 p.m.—the end of their regular shifts. At approximately 5:45 p.m., Morales informed Ramirez and Matias, who had worked nearly 4 hours past the end of their regular shifts, to clock out.⁶²

A few minutes later, at approximately 5:50 p.m., Morales told Rios that she needed to stay overtime to care for the two remaining patients, both of whom were still recovering from anesthesia and were under observation in the department’s recovery area, for any complications resulting from their medical procedures. Rios, however, replied that she could not stay and work overtime. Morales explained that she was tired and informed Rios that she had to stay because the two remaining patients were her responsibility and, thus, her departure would constitute work abandonment.⁶³ Rios, in a loud and defiant voice, reiterated that she was leaving, would not work per diem, and added that Morales could do whatever she wanted. Rios also told Morales that she was not staying because “I had some visitors coming to my house.”⁶⁴

Morales immediately called Zaida Hernandez and informed her of Rios’ refusal to work overtime. Zaida Hernandez directed Morales to tell Rios that she was responsible for the patients and her departure would constitute abandonment. Morales relayed that threat to Rios. Rios, maintaining a loud and defiant tone, dismissed the directive and added that Morales could do whatever she wanted. After getting her personal effects from her locker, Rios returned to the department, threw her keys to the controlled substances cabinet onto Morales’ desk, and left the facility. By surrendering her keys in that

⁶² The General Counsel does not contend that Ramirez and Matias, both willing overtime workers, could or should have been asked or directed to work longer. (Tr. 371, 384–386, 402–403; Jt. Exh. 1, p.2.)

⁶³ It is not disputed that the patients required nursing care and were not ready to be discharged. Furthermore, as it conflicts with Morales’ testimony, I did not credit Rios’ statement that Morales was at the elevator and about to leave before Rios stopped her. (Tr. 374–375, 389–391; Jt. Exh. 1, par. 7.)

⁶⁴ Morales testified that Rios refused to work past 6 p.m. because she was expecting company at her home—consistent with Rios’ August 25, 2008 written reply attributing the refusal to a personal commitment. Her August 21, 2008 incident report, on the other hand, states that Rios refused to work overtime at the mandatory per diem rate and mentioned nothing about a personal commitment. (GC Exh. 9; Jt. Exh. 1; R. Exh. 10; Tr. 374–380, 390–392, 403–405.) Morales’ testimony, albeit impeached, is inherently more reliable. The problem is that Morales had two accounts. One version was contained in a business record prior to the commencement of litigation. The other version was provided at trial. Accordingly, given Morales’ conflicting statements regarding this incident, I find that Rios attributed her defiance to a rejection of the mandatory per diem rate *and* the fact that she had to leave because she was expecting company at home.

manner, Rios contravened a protocol requiring registered nurses to verify and secure the department's controlled substances (the medication protocol) before transferring her keys to Severiana Acevedo, the supervisor in charge of the medication cabinet. Over the course of the next 20 minutes, Morales assumed responsibility for the nursing care of the remaining two patients. She also performed Rios' responsibilities under the medication protocol and closed the department at 6:45 p.m.⁶⁵ Ironically, Morales' response in providing the nursing care for the two remaining patients produced a union grievance charging that Morales performed bargaining unit work.⁶⁶

A swift investigation ensued. Zaida Hernandez, in collaboration with Joannie Hernandez, considered the applicable facts and circumstances, including written versions of the incident submitted by Morales⁶⁷ and Rios, and the employee manual.⁶⁸ In a letter, dated August 27, they concluded that Rios violated several provisions of the employee manual: (1) Section 30—insubordination or lack of respect towards a supervisor, including refusal to perform a job or obey orders written or verbal (subject to a 5-day suspension); (2) Section 40—work abandonment without supervisory authorization (subject to discharge); and (3) Section 18—refusal to work overtime in cases of emergency or as needed by the institution (written admonishment for the first offense). As a result, Zaida and Joannie Hernandez issued Rios a 5-day suspension. After negotiating with Harvey Garcia, a union shop steward, Metro Mayaguez agreed to reduce the suspension to 4 days. Rios, however, refused to accept that disposition and served the 5-day suspension during the period of August 22–29.⁶⁹

Rios' conduct on August 21, 2008, was motivated by her refusal to work overtime at the mandatory per diem rate *and* her desire to get home for other personal reasons. Her conduct was spontaneous and transpired without any coordination with, or prior knowledge on the part of, the Union. As such, her refusal to work overtime on August 21 was not related to a work stoppage planned or initiated by the Union.⁷⁰ Moreover, Rios' sus-

pension was comparable to discipline previously issued by Metro Mayaguez to other employees for similar infractions:⁷¹ registered nurse Meiling Pagan—disciplined for a similar incident and disciplined in a similar manner;⁷² employee Josefina Rivera Rodriguez—suspended for 15 days for disrespectful conduct towards Maestre;⁷³ employee Felix Olan—disciplined for a similar violation on September 2, 2008;⁷⁴ and employee Jerry Ortiz (not part of the bargaining unit)—disciplined for a similar violation.⁷⁵

Legal Analysis

I. OVERTIME PAY

An employer violates Section 8(a)(5) and (1) of the Act by unilaterally imposing new and different wages, hours, and other terms and conditions of employment upon bargaining unit employees without first providing their collective-bargaining representative with notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736 (1962); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *Associated Services for the Blind*, 299 NLRB 1150, 1150–1151 (1990). This principle applies even if the collective-bargaining agreement between the parties has expired and they are in the process of bargaining over a new agreement. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

Overtime pay is also included as a mandatory subject of bargaining. See *Tecumseh Packaging Solutions, Inc.*, 352 NLRB 694, 698 (2008); *Sprain Brook Manor Nursing Home, LLC.*, 351 NLRB 1190, 1192 (2007). Having recognized the Union as the labor representative of Bargaining Unit A's employees—the registered nurses—Metro Mayaguez was, thus, obligated under Section 8(a)(5) of the Act to bargain in good faith to *impasse* or agreement before replacing their overtime rate with a per diem rate. 369 U.S., *supra* at 747.

Metro Mayaguez essentially argues that the parties reached a written agreement on July 18, 2008, which allowed it to discontinue the practice of paying double-time for mandatory overtime and implement a mandatory per diem rate in lieu thereof. The General Counsel concedes that the parties arrived at a partial agreement to replace the overtime rate with a mandatory per diem rate, but denies there was any basis for immediate implementation.

The General Counsel is correct. The agreement reached between the parties on the per diem/overtime issue was partial or tentative in nature. First, the amount of the per diem pay rate was still undetermined. Section 16.13, as initialed by the parties, expressly states that the amount of the new *per diem* rates were still pending, reflecting the intention of the parties to ne-

⁶⁵ Again, I credit Morales' credible testimony over Rios' affidavit testimony, which omits any reference to her throwing the keys down onto the desk or compliance with the medication protocol. (Tr. 398–402, 406; GC Exh. 9; Jt. Exh. 1, p.3.)

⁶⁶ There was no credible evidence to demonstrate, however, that another bargaining unit member, capable of performing that department's work, was available to complete Rios' work at that time of the day. (Tr. 390–391, 458–463; R. Exh. 12; Jt. Exh. 1.)

⁶⁷ Counsel stipulated that the portion of the translation of Morales report (GC Exh. 9), which reads, "that she is not going to leave and is not going to work per diem," should read, "that she is going to leave and she is not going to perform per diem time." (Jt. Exh. 2.)

⁶⁸ It is not disputed that the applicable manual under the circumstances was the one in effect prior to August 2006. (R. Exh. 48; Tr. 713–714, 723–724.)

⁶⁹ I found both Zaida and Joannie Hernandez credible regarding the investigatory process and a dearth of evidence to indicate that their objective investigation was tainted by the mandatory per diem pay rate issue. (Tr. 442–454, 513–515, 530–533; R. Exhs. 10–11; GC Exh. 8.)

⁷⁰ While the record is devoid of any evidence that the Union notified Metro Mayaguez of a work stoppage prior to August 21, it also lacks sufficient evidence of a connection between the Union's earlier protestations and Rios' conduct on that day. I considered Grant's vague, but

seemingly candid, response on cross-examination that Rios' conduct *could have been* connected to a work stoppage—given that several have taken place. However, his explanation that all work stoppages were preceded by written notice was not refuted. (Tr. 463–467, 571–572; Jt. Exh. 1.)

⁷¹ R. Exh. 41–46.

⁷² R. Exh. 42; Tr. 711.

⁷³ R. Exh. 43; Tr. 706–710.

⁷⁴ R. Exh. 44; Tr. 711.

⁷⁵ R. Exh. 45; Tr. 719–722.

gotiate that aspect later. Moreover, as there was no credible proof that *both* parties intended such a provision to be implemented immediately, the legal presumption is that no agreement becomes final and binding until a final collective-bargaining agreement is reached—in its entirety. See *Cold Heading Co.*, 332 NLRB 956, 971 (2000); *Taylor Warehouse Corp.*, 314 NLRB 516, 517 (1994), *enfd.* 98 F.3d 892 (6th Cir. 1996); *Stroemann Bakeries, Inc.*, 289 NLRB 1523, 1524 (1988).

Metro Mayaguez' second argument contends that the Board decision in Case 24–CA–10505 mandated implementation of the tentative agreement between Pavia and the Union in February–March 2006 regarding a new voluntary per diem amount. In that case, the Board found, among other unilateral changes, that Metro Mayaguez unlawfully announced a change in the manner in which yearly salary increases were granted. That decision did not, however, involve the voluntary per diem rate or the mandatory overtime rate. In this case, the credible evidence, including the testimony of Metro Mayaguez' witnesses, established that registered nurses always received double time for mandatory overtime while employed by Pavia and continuing after Metro Mayaguez assumed operations.

Finally, although Metro Mayaguez advised the Union that paying overtime was “expensive,” it failed to comply with its statutory duty to bargain with the Union to *impassé* over this matter. It is clear that this event was not the type of unexpected event required under Board law before an employer can take unilateral action. Metro Mayaguez failed to submit any evidence to show “exigent circumstances” for implementing the mandatory per diem rate. Exigent circumstances, as defined by the Board, have been limited to extraordinary unforeseen events having a major economic effect requiring an employer to take immediate action. Excluded, absent proof of a dire financial emergency, are economic events such as the loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages. *Harmon Auto Glass*, 352 NLRB 152, 154–155 (2008); *Pleasantview Nursing Home, Inc.*, 335 NLRB 961, 962–963 (2001), *enfd.* in relevant part 351 F.3d 747, 755–756 (6th Cir. 2003); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). Those circumstances are comparable to Metro Mayaguez' vague threat to lay off 13 nurses and, thus, there was insufficient proof that time was of the essence to such an extent justifying unilateral action as to the terms of mandatory overtime pay. Under the circumstances, Metro Mayaguez' unilateral change of the overtime rate to a new per diem rate violated Section 8(a)(5) and (1) of the Act.

II. UNILATERAL DISCONTINUATION OF NEW YEAR'S EVE BONUS

After assuming operations at the facility in August 2006, Metro Mayaguez continued a longstanding practice of paying a \$50 bonus to all employees who worked the New Year's Eve 11 p.m. to 7 a.m. shift on December 31, 2006, and December 31, 2007. It did so even though payment of such a bonus was neither part of the expired collective-bargaining agreement nor any agreement reached in collective bargaining between Metro Mayaguez and the Union. In January 2009, however, the time-honored practice of recognizing the service of employees who

welcomed the New Year by caring for the hospital's patients came to a screeching halt. Payment of the New Year's Eve bonus, routinely issued in the next paycheck in January, was missing from the approximately 40 employees' paychecks. The Union inquired about the bonus and was initially told that the omission was attributable to a payroll error. However, the payroll error was not corrected and the Union persisted, only to be told in late January 2009 that the bonus would not be forthcoming because it was not provided for in the expired collective-bargaining agreement. Concomitant with its pursuit of the New Year's Eve bonus during the months that followed, the Union sought to include a provision for such a payment into the collective-bargaining agreement still being negotiated.

On August 14, 2009, Metro Mayaguez and the Union entered into a non-Board agreement in which the former agreed to pay the New Year's Eve bonus to the employees who worked the December 31, 2008 11 p.m. to 7 a.m. shift. Under the terms of the agreement, the \$50 payment was to be issued after the Union requested and obtained dismissal of the charge relating to the bonus. Although the Union has yet to request withdrawal of the charge, Metro Mayaguez issued the bonus to the applicable employees on August 28, 2009.

An economic bonus, such as the New Year's Eve bonus, is clearly a mandatory subject of bargaining where the employer has followed a practice of paying it to applicable employees. . . *Santa Cruz Skilled Nursing Center, Inc.*, 354 NLRB No. 25, slip op. at 4 (2009) (not reported in Board volumes); *Bonnell/Tredegar Industries*, 313 NLRB 789 (1994). This principle applies even in the absence of a contractual provision recognizing such a practice, as the practice becomes an implied condition of employment premised on the presumed mutual agreement of the parties. Accordingly, any unilateral change in an implied term or condition of employment violates Section 8(a)(5) and (1) of the Act. *Finch, Pruyne & Co.*, 349 NLRB 270 fn. 31 (2007); *Lafayette Grinding Corp.*, 337 NLRB 832 (2002).

A closer call, however, lies over Metro Mayaguez' defense that the Union abrogated the settlement agreement reached on August 14, 2009. Metro Mayaguez contends that this charge should be dismissed because of the Union's conceded failure and/or refusal to request and obtain dismissal of this charge as it promised to do.

The Board has, indeed, long followed a policy of fostering the settlement of labor disputes by private negotiated agreements. *Combustion Engineering*, 272 NLRB 215 (1984); *Coca-Cola Bottling Co.*, 243 NLRB 501, 502 (1979); *American Postal Workers*, 240 NLRB 409 (1979); *Postal Service*, 234 NLRB 820 (1978). On the other hand, the Board has refused to sanction such agreements where the result would contravene the purposes and policies of the Act. *Independent Stave*, 287 NLRB 740, 741 (1987); *Beverly California Corp. v. NLRB*, 253 F.3d 291 (7th Cir. 2001). Such reluctance has arisen in instances, for example, where the charged party has a history of previous unfair labor practice violations. See *Teamsters Local 115 (Gross Metal)*, 275 NLRB 1547 (1985).

Here, the evidence clearly demonstrates a failure by Metro Mayaguez to honor its practice of paying a New Year's Eve bonus to employees who worked the overnight shift. In addi-

tion, Metro Mayaguez' brief history is saddled with a history of implementing unilateral changes constituting unfair labor practices.⁷⁶ The settlement agreement omits any admission of wrongdoing and does not assure notification to employees that Metro Mayaguez will continue, in the absence of bargaining, to continue the practice of paying the New Year's Eve bonus in the future. See *Independent Stave*, 287 NLRB 740, 741 (1987). Metro Mayaguez correctly observes that the Union never completed its part of the bargain by requesting, much less obtaining withdrawal of the charge, yet Metro Mayaguez still proceeded with payment of the New Year's Eve bonus. That fact alone, however, does not override the background facts indicating that the policies of the Act would not be served by withdrawal of the charge.

Under the circumstances, Metro Mayaguez' refusal to pay a \$50 bonus to employees who worked the 11 p.m. to 7 a.m. shift on December 31, 2008, constituted a unilateral change in violation of Section 8(a)(5) and (1) of the Act.

III. UNILATERAL IMPLEMENTATION OF AN ON-CALL SHIFT

After bargaining on and off over the issue for over a year, Metro Mayaguez implemented an on-call shift for registered nurses on April 5, 2009. The General Counsel contends that the on-call issue was implemented unilaterally while the parties were still bargaining over a collective-bargaining agreement. Metro Mayaguez contends that the Union agreed to implementation of the on-call shift and, alternatively, the parties reached an *impasse* on this urgent issue.

An *impasse* occurs whenever negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. *Laborers Health & Welfare Trust Fund v. Advance Lightweight Concrete Co.*, 484 U.S. 539, 543 (1988). The burden of proving that an *impasse* exists falls upon the party asserting such a defense. *North Star Steel Co.*, 305 NLRB 45 (1991), *enfd.* 974 F.2d 68 (8th Cir. 1992). Moreover, there is a duty to refrain from implementation unless an *impasse* has been reached on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373 (1991), *enfd.* 15 F.3d 1087 (9th Cir. 1994). There are exceptions to such a rule, however, in instances when a union engages in a pattern of continuous delay to avoid an employer's diligent effort to bargain over a matter affected by economic exigencies. *Id.* at 374.

In considering whether an *impasse* has been reached, the Board will consider the totality of the circumstances. Such analysis includes the following factors: (1) fluidity of position; (2) continuation of bargaining; (3) nature and importance of issues and the extent of difference in position; (4) bargaining history and progress in negotiations; (5) demonstrated willingness to consider the issues further; (6) duration of hiatus between bargaining sessions; (7) number and duration of bargaining sessions; and (8) contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting*, 163 NLRB 475 (1967).

Metro Mayaguez and the Union initially bargained over the on-call shift from February 4 to July 22, 2008. During that pe-

riod of time, the parties exchanged two proposals, two counter-proposals, and a myriad of information. Notably, in its second counterproposal, submitted on July 22, 2008, the Union assigned an article number to it, reflecting its posture that any accord regarding the on-call shift issue be incorporated into the collective-bargaining agreement being negotiated. At this juncture, the main stumbling block was the Union's insistence that employees in bargaining units B and C also be included in the on-call shifts. The on-call shift issue was not mentioned again until Pizarro raised it in October 2008, but Grant asked him to submit a proposal. Metro Mayaguez did not follow up with another proposal at that time, however, and several months elapsed before Pizarro brought up the issue again. On January 26, 2009, Pizarro asked to renew bargaining over the issue. Grant asked him, once again, to submit another proposal.

Metro Mayaguez restarted negotiations over the on-call shift on March 19, 2009, by submitting its third proposal, which essentially mirrored its second proposal. Metro Mayaguez also added that it intended to implement an on-call shift on April 5, 2009. At the next bargaining session on April 2, 2009, the Union asked to defer discussion of the issue because Cruz, who was affected by the proposal, was absent. Nevertheless, the Union responded with its third counterproposal on April 3, which represented significant movement in its position. The Union's latest proposal acceded to Metro Mayaguez' position that the on-call shifts include only registered nurses. It differed, however, as to the applicable pay rate for on-call shift work. Metro Mayaguez ignored that proposal and proceeded to implement on-call shifts on April 5, 2009.

This case is not unlike the scenario in *Area Trade Bindery Co.*, 352 NLRB 172, 176 (2008), where the parties met for 15 bargaining sessions over the course of 9-1/2 months during the first phase of negotiations and then a mere two times over a short period of time nearly 2 years later before the employer declared *impasse*. As Judge Pollack found in that case, bargaining over such a short period of time weighs against a finding of *impasse*. Here, there was a significant amount of bargaining activity in 2008 over the on-call issue. The issue was not seriously pursued, however, after July 2008 until Metro Mayaguez submitted its proposal of March 19, 2009. The Union's response on April 3 evinced a significant fluidity in movement, as well as willingness on the Union's part to be flexible and bargain seriously over the issue. Its concession to restrict the on-call shift to registered nurses resolved the major stumbling block on this issue during 2008 and was a huge concession. The parties, after plodding through the issue in 2008, met only once after Metro Mayaguez unleashed its March 2009 proposal—on April 2—and the Union requested a reprieve because the key shop steward was absent. After the Union responded the next day with its pivotal third counterproposal, the parties did not meet again before Metro Mayaguez implemented the on-call shifts on April 5, 2009. While Metro Mayaguez contends that the Union was well aware that it was serious about implementing the on-call shift issue on April 5, the history of this issue indicates that Metro Mayaguez made similar remarks about implementation on earlier dates, none of which transpired.

In any event, the documentation is devoid of any proof indicating assent on the part of the Union to implementation prior

⁷⁶ 352 NLRB 418 (2008).

to an agreement, much less that the parties had reached an *impasse* as to all matters under negotiation up to that point. Metro Mayaguez correctly notes conduct on the part of the Union that could be perceived as dragging out negotiations at certain points during the chronology of this issue. However, the 2008 phase of the negotiations were typified by slow movement on both sides, as they settled into their positions over who would be included in the on-call shifts. By the time the issue picked up steam in March 2009, Metro Mayaguez gave the Union only two negotiating opportunities—on March 19 and April 3, 2009—to bargain over the issue. The Union was still not prepared on April 3 with a counterproposal, but produced a significant one the next day—to no avail. At that critical point in the negotiations, the evidence contravenes any notion that the Union waived by inaction its right to bargain over the issue. Indeed, bargaining has continued with respect to attempting to reach an overall agreement. See *Bottom Line Enterprises*, supra; *RBE Electronics of S.D.*, supra; *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 (1988); *M & M Contractors*, 262 NLRB 1472 (1982). Finally, given the request by medical staff for the creation of another shift, Metro Mayaguez never explained the exigencies of imposing an on-call shift by a date certain. Indeed, the date kept shifting. Maestre testified that they considered several options, but never explained why it was so important to impose an on-call shift versus other options, such as overtime assignments or the hiring of additional nurses to staff such a shift. See *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995).

Assuming, arguendo, that Metro Mayaguez reached and communicated its final position on March 19, 2009, the Union's late movement on April 4 regarding the major impediment on this issue presented a "ray of hope" warranting further bargaining. *Atrium at Princeton, LLC*, 353 NLRB 540, 561 (2008), citing *Hayward Dodge*, 292 NLRB 434, 468 (1989). Accordingly, there was no *impasse* between the parties at that point. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999). Under the circumstances, Metro Mayaguez' unilateral implementation of an on-call shift on April 5, 2009, without affording the Union an opportunity to bargain violated Section 8(a)(5) and (1) of the Act.

IV. RIOS' SUSPENSION FOR REFUSING TO WORK OVERTIME

Where protected concerted activity is the basis for an adverse action against an employee, it is not necessary to apply the analysis devised by the Board in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). See *Caval Food*, 331 NLRB 858 (2000). Instead, the Board has held that where an employee is disciplined for conduct "that is part of the *res gestae* of protected activities, the relevant question becomes whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service." See *Ogihara America Corp.*, 347 NLRB 110, 112 (2006), *affd.* 514 F.3d 574 (6th Cir. 2008), citing *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995); and *Consumers Power Co.*, 282 NLRB 130, 132 (1986).

An employee is protected from disciplinary reprisal when he or she invokes a collectively bargained right, regardless wheth-

er the employee is right or wrong. See *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Postal Service*, 332 NLRB 340, 343–344 (2000).

Given the finding that Metro Mayaguez unlawfully imposed a mandatory *per diem* pay rate in lieu of the mandatory overtime rate in violation of Section 8(a)(5) and (1), analysis of Rios' defiant conduct on August 21, 2008, requires a determination as to whether she invoked such a right and, if so, whether she also engaged in conduct so egregious that would cause her to lose the protection of the Act.

Rios declared to her supervisor that she would not work overtime on August 21, 2008, for two reasons: a refusal to work overtime at the newly established mandatory *per diem* rate; and she was expecting guests at her home that evening. In this respect, Rios acted alone. Thus, Metro Mayaguez' defense predicated on Section 8(g) of the Act—requiring a 10-day prior notice of a work stoppage—is inapplicable to this situation, as there is no proof that Rios coordinated her actions with the Union. See *East Coast Chicago Rehabilitation Center*, 259 NLRB 996 (1982).

Rios's refusal to work overtime at the mandatory *per diem* rate was premised on protected concerted activity; her refusal to work overtime because of personal reasons was not. The fact that Rios had mixed reasons for refusing to work overtime that afternoon does not, however, detract from the fact that she invoked a collectively bargained right which should have been recognized by her supervisor. Accordingly, Metro Mayaguez had no legal basis for disciplining Rios on the grounds of insubordination, work abandonment, or refusing to work overtime.

However, Rios communicated those facts to Morales in a loud and rambunctious tone—twice. She derided Morales' statement that she was tired and declared that the two remaining patients were not her responsibility but, rather, under the charge of Morales. Rios topped off the episode by slamming her keys on the desk as she left. While Rios was not charged with failing to secure the medicine cabinet and handing the keys to the designated staff member before leaving—probably because the department was still functioning—she was clearly disrespectful toward her supervisor. I am mindful that Board cases have often afforded discriminatees leeway with respect to the use of profane and otherwise disrespectful language occurring spontaneously in response to unfair labor practices. This case, however, does not involve a shop steward in a bargaining session or an employee engaging a supervisor in an otherwise secluded office or factory setting. The disrespectful conduct was exhibited by a registered nurse in a hospital setting still occupied by two patients who were still recovering from invasive endoscopic procedures. Under the circumstances, even though Rios invoked a collectively bargained right, she lost the protection of the Act when she was disrespectful toward her supervisor. See *Ogihara America Corp.*, 347 NLRB 110 (2006), *affd.* 514 F.3d 574 (6th Cir. 2008).

The discipline imposed was authorized under Section 30 of the employee manual, which authorizes a 5-day suspension for insubordination or lack of respect toward a supervisor. Rios was not insubordinate, since Morales' directive was unlawful. She was, however, quite disrespectful toward Morales. Moreo-

ver, the discipline issued Rios was consistent with that imposed on other employees for conduct of similar severity. Here, as in *Ogihara*, there has been no showing that Metro Mayaguez failed to discipline other employees who engaged in comparable misconduct. 347 NLRB at 113. Under the circumstances, the 8(a)(1) allegation relating to Rios' discipline is dismissed.

V. THE GENERAL COUNSEL'S REQUEST FOR A BROAD CEASE-AND-DESIST ORDER

Consideration of Metro Mayaguez' actions in conjunction with prior Board decisions establishes that Metro Mayaguez is indeed a recidivist who has implemented unilateral changes since it assumed operations at the facility in 2006. The aforementioned violations consisting of unilateral changes to overtime pay, bonuses, and shift assignments indicate repeated failure to comply with its collective-bargaining responsibilities under the Act. Its proclivity for violating the Act continues as the parties struggle to enter into their first collective-bargaining agreement. See *Hickmott Foods*, 242 NLRB 1357 (1979).

Lastly, Metro Mayaguez contends that the Board lacked a legal quorum when it issued its decision in *Metro Mayaguez Pavia Perea*, 352 NLRB 418 (2008). My adjudicatory parameters are guided by Board law. In that case, as it has stated over the past several years while lacking a full complement, the Board noted at footnote 4 that effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Section 3(b) of the Act. See also *Teamsters Local 523 v. NLRB*, 590 F.3d 849, 2009 WL 4912300 (10th Cir. Dec. 22, 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W.3130 (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc., v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. September 29, 2009) (No. 09-377).

CONCLUSIONS OF LAW

1. Metro Mayaguez, Inc. d/b/a Hospital Perea, has been, and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(4) of the Act.

2. Unidad Laboral de Enfermeras (OS) y Empleados de la Salud is a labor organization within the meaning of Section 2(5) of the Act.

3. The following units are appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All licensed graduate nurses employed by the Employer at its hospital located at Mayaguez, Puerto Rico.

EXCLUDED: All other employees, including executive secretaries, licensed practical nurses, accountants, guards, professional personnel, supervisors, nurses aides, pharmacy aides, escorts, X-ray technicians, respiratory therapy technicians, central supply technicians as defined in the Puerto Rico Labor Relations Act.

INCLUDED: All licensed practical nurses, pharmacy aides, escorts and X-ray technicians, including respiratory technicians, operating room technicians, laboratory assistants, E.K.G., phlebotomists, and center supply technicians.

EXCLUDED: All other employees, including executives, executive secretaries, registered nurses, accounts, guards, professional personnel, and supervisors, as defined in the Puerto Rico Labor Relations Act.

INCLUDED: All laundry, maintenance, non-skilled, warehouse, parking, and housekeeping employees, cooks, diet department employees, and non professional employees, including plumber, mason, electrician, handyman and refrigeration technicians employed by the Employer.

EXCLUDED: All other employees, including executives, executive secretaries, licensed practical nurses, graduated nurses, accountants, guards, professional personnel, supervisors, nurses aides, pharmacy aides, escorts, X-ray technicians, respiratory therapy technicians, central supply technicians as defined in the Puerto Rico Labor Relations Act.

4. At all material times, the Union has been the exclusive representative of the employees in the above-described appropriate units for the purpose of collective bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment.

5. Metro Mayaguez violated Section 8(a)(5) and (1) of the Act on or about August 1, 2008, by changing the terms and conditions of graduate (registered) nurses with respect to overtime pay, without prior notice to the Union and without affording the Union adequate opportunity to bargain with Metro Mayaguez regarding this conduct.

6. Metro Mayaguez violated Section 8(a)(5) and (1) of the Act on or about April 5, 2009, by changing the terms and conditions of graduate (registered) nurses by implementing an on-call shift without prior notice to the Union and without affording the Union adequate opportunity to bargain with Metro Mayaguez regarding this conduct.

7. Metro Mayaguez violated Section 8(a)(5) and (1) of the Act in or about January 2009 by changing the terms and conditions of employees who worked the New Year's Eve night shift on December 31, 2008, by failing to pay them the customary \$50 bonus, without prior notice to the Union and affording the Union adequate opportunity to bargain with Metro Mayaguez regarding this conduct.

8. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) 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. Having found that Metro Mayaguez unilaterally changed overtime pay, implemented an on-call shift, and discontinued the customary New Year's Eve bonus, I shall recommend Metro Mayaguez cease and desist from making unilateral changes in the terms and conditions of employment in the appropriate units, and that Metro Mayaguez make whole the employees for any loss of pay or benefits they may have suffered as a result of such unilateral changes. I shall also recommend that Metro Mayaguez, on request of the Union,

rescind its unilateral changes, to the extent it has not already done so, put into effect the terms and conditions of employees in effect prior to August 2006, until such time as Metro Mayaguez negotiates in good faith with the Union to an agreement or valid impasse.

Because of Metro Mayaguez' repeated failure to comply with its responsibilities and proclivity for violating the Act, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]

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