

14-4028-ag

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SPRAIN BROOK MANOR NURSING HOME, LLC,

Respondent.

On Appeal from the National Labor Relations Board

FINAL FORM BRIEF FOR RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici

The only parties in this matter are Sprain Brook Manor Nursing Home, LLC (“Sprain Brook” or “Respondent”) and the National Labor Relations Board (the “Board”).

The Board is the Petitioner and Sprain Brook is the Respondent in Case No. 14-4028-ag.

There are no intervenors or *amici curiae*.

B. Rulings Under Review

The ruling under review is a “Decision and Order” of the National Labor Relations Board issued on September 29, 2014 and is reproduced at *Sprain Brook Manor Nursing Home, LLC & 1199 Seiu United Healthcare Workers E.*, 361 N.L.R.B. No. 54 (Sept. 29, 2014).

C. Related Cases

The Parties are not involved in any other pending or related cases before this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, to enable judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel for Respondent Sprain Brook Manor Nursing Home, LLC certifies that it has no parent corporations or publicly held companies that own ten percent (10%) or more of its stock and Respondent is not a publicly held company. Respondent's "general nature and purpose" is not relevant to the issues in this litigation.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does an employer violate the National Labor Relations Act, 29 U.S.C. § 158 (the “Act”), where it allows an employee to resign following demonstrable misconduct solely because the employee was previously involved in some Union activity?
2. Does an employer violate the Act where it terminates an employee following two separate (but related) incidents of misconduct solely because the employee was previously involved in some Union activity?
3. Has an employer committed an unfair labor practice under the Act when:
 - a. A vendor with whom it has no contractual or other relationship opts to cease providing a service to employees of its own volition?
 - b. The employer offers its employees a substitute meal due to the temporary unavailability of other options?
 - c. Its employee Union declines to negotiate a change to benefit payments made to employee?
 - d. The employer circulates a memorandum which the Union assumes, without inquiring of management, changes prior policy with respect to services provided to employees, despite the fact that no change has actually occurred?

STATEMENT OF THE CASE

Statement of Facts

The dispute in this matter can be effectively divided into three components. First, General Counsel to the Board (“General Counsel”) alleges that Sprain Brook violated the Act with regard to separation from employment of Catherine Alonso, a former housekeeping employee. Second, General Counsel alleges that Sprain Brook violated the Act with regards to the termination of Karen Bartko, a former nursing employee, for insubordination. Third, General Counsel alleges that Sprain Brook made certain unilateral changes to the terms and conditions of employment at the facility. Each of these contentions is baseless, and they are addressed in turn below.

Catherine Alonso

Catherine Alonso commenced her employment with Sprain Brook on September 7, 1988. A60. Alonso was initially employed as a Nursing Assistant, but was subsequently moved into Sprain Brook’s housekeeping department. Alonso had been terminated by Sprain Brook in 2005, but was subsequently reinstated. A61. As a part of her reinstatement, Alonso was also entitled to receive back pay checks, which were sent by Sprain Brook to the Board before being forwarded to Alonso. *Id.*

As of 2010, Alonso was working on a 7 AM to 3PM shift, five days per week. A62. During this time, Alonso was responsible for cleaning the ground floor at Sprain Brook, a position she held for approximately two years prior to her termination. A75, 76. According to Alonso, she reported directly to Michael Reingold, Sprain Brook's Administrator until September 2011. A76.

Alonso was no stranger to poor performance during her time at Sprain Brook. Alonso was disciplined by Sprain Brook several times beginning in September 2009 for poor performance, including one instance where she was suspended from work for one day. A94. Alonso also recalled being informed of complaints that came in from residents regarding the cleanliness of the areas she was tasked with cleaning. A101. All told, Alonso was the subject of five disciplinary action forms from September 21, 2009 through October 2010, for issues ranging from failing to clean out a refrigerator to failing to maintain proper levels of supplies. *See* A249 – 254.

On November 9, 2010, Alonso was called into Mr. Reingold's office. Mr. Reingold informed Alonso that her employment was to be terminated due to poor performance. A68. Specifically, Mr. Reingold inspected one of the Mens' Rooms that Alonso was tasked with cleaning and observed dried urine on the toilet seat. A70. Notably, Mr. Reingold observed that the water in the toilet itself was blue, suggesting that the bathroom had been "cleaned" in a haphazard fashion. A86.

While it was necessary to terminate Alonso's employment due to her poor performance, Mr. Reingold offered Alonso the opportunity to execute a voluntary resignation form. Under the terms of Alonso's resignation, she was provided with four weeks' pay as severance, as well as payment for all accrued sick and vacation time, a generous offer given that her termination owed solely to her own poor performance. A248. Additionally, Mr. Reingold indicated that Sprain Brook would not oppose Alonso's application for unemployment benefits if she was willing to resign, even despite her demonstrably poor performance. A68. Perhaps recognizing the value of this severance, as well as the potentially crucial distinction in seeking subsequent employment between being terminated and resigning from one's employment, Alonso executed the resignation form. A248.

It should be noted that Alonso was not the sole housekeeping employee who left employment with Sprain Brook during the time in question. Pat Miller, a housekeeping employee who worked on the third floor of the facility, was also terminated by Mr. Reingold at this time. A78. Alonso was not aware of the reason for Miller's departure, though the two spoke on one or two occasions after November 9, 2010, the date of Alonso's termination. A79.

Karen Bartko

Karen Bartko commenced her employment with Sprain Brook in 1995. A143. Bartko served as a Nurse's Aide, and worked a 7 AM to 3 PM shift six days per week. A144. Bartko was terminated for her insubordinate conduct on or about March 6, 2011. A165. Two (2) days prior, both Bartko and Reingold, Respondent's administrator, were entering the building, and Bartko intentionally permitted the door to slam in Reingold's face, although he was carrying a number of packages. A161, 164. Reingold confronted Bartko about this incident in the presence of Clarisse Nogueira ("Nogueira"), the Union shop steward, as well as Sprain Brook's receptionist and Director of Marketing. *Id.*

At this meeting, Reingold asked Bartko why she let the door slam in his face when she could have very easily held the door open for him as a courtesy. Bartko's response was simply (and offensively), "I would hold the door for anyone in the building except you." A169. While shocked at receiving such an insubordinate response, Reingold asked Bartko if she believed that her conduct was acceptable behavior. In response to Bartko's patently offensive and insubordinate behavior, Reingold sent her home for the day. Perhaps unsurprisingly at this juncture, Bartko responded, inexplicably, that Reingold was the one who should be sent home. A169.

It is possible that Bartko's animus towards Mr. Reingold dates back to a prior misunderstanding between the two. Specifically, Mr. Reingold observed Bartko leaving the facility with juice that she, presumably, obtained from Sprain Brook's cafeteria without prior authorization. A157. After speaking with Bartko, a fellow employee, and the Director of Sprain Brook's dining operation, Cameron Wharton, Mr. Reingold learned that employees obtaining free beverages from the cafeteria was an unexpectedly widespread practice. A158. Accordingly, Bartko was not subjected to any disciplinary action as a result of this "incident."

Regardless of the source of Bartko's clear animus towards Mr. Reingold, the fact remains that her conduct required action from Mr. Reingold to preserve his authority. Notably, Bartko was not instructed as to when she should return to work. A164. Rather than inquiring about her status with Mr. Reingold or her immediate supervisor after a reasonable period of time, Bartko opted to return to work for her next scheduled shift. A164. Bartko claims that she returned to work for her next scheduled shift at the instruction of Nogueira, a non-managerial Sprain Brook employee working in a completely different department with no supervisory authority. A162. Accordingly, Bartko's election to return to work without being directed to do so by Sprain Brook's administration was effectively insubordinate conduct in and of itself.

In response to her unilateral decision to return to work at her next scheduled shift, Bartko was subsequently informed by a representative of Sprain Brook that she should not return until further notice. A165. Gregory Speller, Vice-President of 1199 SEIU United Healthcare Workers East (the “Union”), was subsequently informed that Sprain Brook was not willing to allow Bartko to return to work due to her insubordinate and unacceptable conduct. A54.

Alleged Unilateral Changes by Sprain Brook Management

By memorandum dated December 14, 2010, Mr. Reingold informed the employees at Sprain Brook of three “changes” at the facility. A242. First, Mr. Reingold informed the staff that as of January 1, 2011, the facility would no longer be providing hot lunch as a matter of course for employees. *Id.* The facility continued to provide employees lunch in the form of a sandwich and salad. *Id.* While Mr. Reingold phrased this as a change, employees had always only received the lunch offered to residents, and even then only after the residents were served their meals. A132. Indeed, no testimony was offered below which suggests that there was ever a true change in policy on the part of Sprain Brook.

In the same memorandum discussed above, Mr. Reingold also indicated that the facility had been informed by the “check cashing company [that] they will no longer offer on site check cashing.” A242. This statement was a reference to a vendor who would set up a table at Sprain Brook on paydays and cash employee’s

checks for a fee. A121. The vendor had no contractual relationship with Sprain Brook, and Sprain Brook received no remuneration from the vendor for performing check cashing services. A194. Indeed, there is no evidence that Sprain Brook had any say in the company's decision to cease offering check cashing services. Additionally, while the company decided to stop offering check cashing services on site, it opted to offer a discount to Sprain Brook employees who cash their checks at its main storefront location. A242.

In a separate memorandum, dated February 18, 2011, Mr. Reingold reminded employees that they were "required to submit their annual PPD & Physical Exam on or before MARCH 25, 2011 completed by your Physician." A243. While the memorandum contained a reference to an employee's "Physician," there is no evidence in the record that Sprain Brook employees would be unable to obtain the required procedures from Sprain Brook personnel at no cost. Indeed, the memorandum specifically indicated that employees should direct questions to the Director of Nursing Services or any Nursing Supervisor, suggesting that the Nursing department would remain involved in the process. *Id.*

None of the witnesses who testified in this matter suggested that they attempted to ascertain from management whether these services would still be offered by the facility. Specifically, both Karen Bartko and Clarisse Nogueira testified that they did not inquire with the Nursing Department as to whether these

services would continue to be provided by Sprain Brook, but rather assumed that they would no longer be available. A134 – 135; A171. In fact, both witnesses explicitly acknowledged that they did not even ask the employee who usually performed these physicals, an RN named “Jesse,” if they were still available. A142, 171. Conversely, Sprain Brook’s Administrator at the time of the hearing, Shlomo Mushell, testified that employees continue to receive these services at no cost through the Facility. A192.

Finally, on November 21, 2011, Sprain Brook’s Benefits Administration circulated a memorandum informing employees that it was “unable to continue offering a ‘Medical Expenses’ payout as has been done in the past.” A244. This “payout” was made to employees who elected not to receive health insurance through Sprain Brook. A125. However, Sprain Brook offered those employees who previously received the payout the opportunity to enroll in the Facility’s current health plan. A244.

Notably, the Union never made a formal demand to negotiate regarding this alleged change in terms and conditions of employment even after being informed of same. As Gregory Speller, the Union has not sought to negotiate with Sprain Brook since at least June 2011. A55. Moreover, Speller admitted that Sprain Brook had contacted him, via letter, regarding a number of issues including health insurance and the closure of the housekeeping department. A55 – 56. Admittedly,

the Union and Sprain Brook amicably resolved the housekeeping department subcontracting as well as the transfer of Clarisse Nogueira to another department at her current rate of pay. A56.

Procedural History

Three unfair labor practices charges were filed by the Union in this matter, on December 1, 2010 (2-CA-40231), March 4, 2011 (2-CA-40385), and January 12, 2012 (2-CA-72458), respectively. The hearing on these charges was opened before Administrative Law Judge Mindy E. Landow on May 7, 2012, and closed on May 8, 2012. ALJ Landow issued her determination that Sprain Brook violated the Act with respect to all three charges on November 8, 2012. *Sprain Brook Manor Nursing Home, LLC and 1199 SEIU United Healthcare Workers E.*, 2012 WL 5495021 (2012). Jurisdiction over the charges was promptly transferred to the National Labor Relations Board on that same date.

On April 26, 2013, the Board issued its Decision and Order affirming the decision of ALJ Landow. *Sprain Brook Manor Nursing Home, LLC and 1199 SEIU United Healthcare Workers E.*, 359 N.L.R.B. No. 105 (2013). Subsequently, however, following the Supreme Court's decision in *Noel Canning*, the Board elected to retain the case on its own docket. *Sprain Brook Manor Nursing Home, LLC and 1199 SEIU United Healthcare Workers E.*, 200 LRRM (BNA) ¶ 1398 (2014). Subsequently, on September 29, 2014, the Board again upheld the decision

of ALJ Landow, and incorporated and adopted by reference the prior decision of the Board on April 26, 2013. *Sprain Brook Manor Nursing Home, LLC and 1199 SEIU United Healthcare Workers E.*, 361 N.L.R.B. No 54 (2014). On October 24, 2014, General Counsel filed the underlying petition for enforcement, commencing the within proceeding, to which Sprain Brook filed an answer on November 14, 2014.

SUMMARY OF THE ARGUMENT

The petition for enforcement should be denied as the decision below of the National Labor Relations Board (the “Board”) was not supported by substantial evidence. As noted *supra*, there are effectively three component parts of this decision: the allegations with respect to Catherine Alonso’s separation from employment; the allegations with respect to Karen Bartko’s separation from employment; and the allegations with respect to supposed unilateral changes to the terms and conditions of employment for Sprain Brook employees. Each of these conetions is without merit, and accordingly the petition should be denied in its entirety.

With respect to Alonso’s separation from employment, the decision below is flawed inasmuch as General Counsel has failed to demonstrate through substantial evidence that same was motivated by her Union activity. At most, General Counsel demonstrated that Alonso had previously been involved in Union activity.

However, it is apparent that it was not this activity, but rather Alonso's failure to properly discharge her duties, which led to the cessation of her employment at Sprain Brook. Indeed, there is no evidence that Alonso engaged in any protected activity at or about the time of her lawful termination. Moreover, Alonso had a long disciplinary history in the 15 months prior to her separation, and this final incident left Sprain Brook with no choice but to terminate her employment. However, rather than leaving Alonso's employment record with the stain of a termination, Sprain Brook opted to allow her to execute a voluntary resignation, and offered to provide her with valuable severance payments. Accordingly, it simply cannot be said that any of the circumstances surrounding the end of Alonso's tenure at Sprain Brook warrant a finding of an unfair labor practice, and as such the petition should be denied.

Similarly, it cannot be said that the termination of Karen Bartko constituted a violation of the Act. Bartko was initially suspended following a verbal outburst directed at Sprain Brook's then Administrator, Michael Reingold. This outburst was prompted by Bartko's own actions in allowing the door to the facility to slam in Mr. Reingold's face, and the latter's election to hold her to account for this insubordination. That Bartko then elected to speak to Mr. Reingold in a rude and further insubordinate manner left him with no choice but to suspend her employment. In keeping with her prior conduct, Bartko opted to engage in further

insubordinate conduct by returning to work without receiving prior authorization from Mr. Reingold or any other authorized representative of Sprain Brook. Inasmuch as Bartko can only blame her own inappropriate conduct for her termination, it is clear that same did not constitute an unfair labor practice. Accordingly, the petition should be denied.

Finally, the allegations of unilateral changes in the terms and conditions of employment at Sprain Brook are also not supported by substantial evidence. There are four such alleged changes: that Sprain Brook stopped providing free physicals and PPDs to employees; that Sprain Brook stopped offering hot lunches to employees; that Sprain Brook ceased on site check-cashing operations; and that Sprain Brook unilaterally stopped making payments to employees who opt out of its health insurance plan. Each of these claims is equally baseless.

With respect to the free physicals and PPDs, Sprain Brook never stopped offering these services; rather, certain employees misinterpreted a memorandum from the Administration which unfortunately referenced an employee's "physician" rather than "provider." That said, the memorandum instructed employees to direct any questions regarding these services to the Nursing Department. Unfortunately, rather than inquiring as to the status of these services, the Union instead assumed that they were no longer offered and opted instead to file an unfair labor practices charge. However, as these services never stopped, it

cannot be said that any unfair practice was committed by Sprain Brook, and as such the petition should be denied.

Similarly, Sprain Brook never truly “ceased” its hot lunch offerings. Rather, Sprain Brook simply kept to its prior practice of offering hot meals to employees only after the residents of the facility completed their lunch. Indeed, hot lunches were once again always available to Sprain Brook employees a mere six months after the services allegedly “ceased,” and they remain available to this day. Accordingly, it cannot be said that Sprain Brook committed any unfair labor practice with regard to the provision of hot meals.

Sprain Brook also did not “cease” offering on site check-cashing services. Sprain Brook previously allowed a third party, with whom it had no contract and from whom it received no remuneration, to set up a table at the facility and cash employees’ checks. At some point, this company seems to have determined that the practice was not cost effective, and opted to stop offering the service in house. As Sprain Brook never contracted for these services, and never received any remuneration for same, it cannot be said that it committed any unfair practice when the company itself decided to stop coming to Sprain Brook for this purpose.

Finally, it cannot be said that Sprain Brook failed or refused to negotiate with the Union regarding the health insurance payouts to employees. Simultaneous with this decision, Sprain Brook was engaged in negotiations with the Union on

the subject of subcontracting. However, the Union opted not to broach the issue of the health insurance payouts, presumably so that it could simply raise same in the context of a proceeding before the Board. That the Union failed to negotiate over a purported change of which it was fully aware should not be deemed to create an unfair labor practice on the part of Sprain Brook. Accordingly, as the decision below is not supported by substantial evidence in any respect, the petition to enforce same must be denied.

ARGUMENT

POINT I

THE PETITION SHOULD BE DENIED BECAUSE THE BOARD'S DETERMINATIONS REGARDING CATHERINE ALONSO ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

a. Standard of Review

A petition to enforce an order of the National Labor Relations Board is not one in which the reviewing Court of Appeals is tasked with simply “rubber stamping” the decision below. Indeed, “[i]t is the reviewing court's ‘duty to set aside [the Board's] decision if [the court] ‘cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes’” *Local One, Amalgamated Lithographers of Am., AFL-CIO v N.L.R.B.*, 729 F.2d 172, 178 (2d Cir. 1984) (internal quotation omitted). Consequentially, this Court should only uphold “the N.L.R.B.'s findings of fact if supported by substantial evidence, and the N.L.R.B.'s legal determinations if not ‘arbitrary and capricious.’” *Long Is. Head Start Child Dev. Services v N.L.R.B.*, 460 F.3d 254, 257 (2d Cir. 2006) (internal citations omitted).

“Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Gaetano & Assoc. Inc. v N.L.R.B.*, 183 Fed Appx. 17, 20 (2d Cir. 2006) “[W]hile the “standard is narrow and a court is not to substitute its judgment for that of the

agency[,] the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Long Is. Head Start Child Dev. Services*, 460 F.3d at 257.

Here, the Board effectively adopted the decision of ALJ Landow without comment or criticism. Inasmuch as the decision of ALJ Landow was flawed in the first instance, the Board’s decision to adopt the same was, plainly, not supported by substantial evidence. Accordingly, the underlying application to enforce the decision should be denied.

b. The Board’s Determinations Regarding Alonso Are Not Supported By Substantial Evidence

It is apparent that the decision below with regards to Alonso was based on even less than a “scintilla” of evidence. Indeed, the sole first-hand testimony regarding Alonso’s alleged termination was offered by Alonso herself, and even ALJ Landow found that Alonso “was a witness who demonstrated significant deficits in her recall of certain events.” *Sprain Brook*, 2012 WL 5495021. While General Counsel relied on the testimony of another employee to bolster some of Alonso’s testimony, the fact remains that Alonso was the sole witness called to testify with respect to the facts and circumstances of her alleged discharge. Notably, this testimony was peppered with inaccuracies and falsehoods which completely undermine any credibility she may possess as a witness.

The misrepresentations in Alonso's testimony go to the heart of the dispute in this matter. Sprain Brook has argued from the inception of this matter that Alonso was not terminated, but rather executed a voluntary resignation rather than face further disciplinary action for her misconduct. In her testimony below, however, Alonso denied ever executing such a resignation, and claimed to have never seen the document. Simultaneously, at another point in her testimony, Alonso readily acknowledged that she executed the very document that she claims to have "never" seen. A181. Similarly, Alonso denied ever receiving a disciplinary write up on October 19, 2009 following complaints from a prospective resident's family regarding the condition of the lobby, despite being presented with the very disciplinary slip that *she executed* following this incident. A100; A253. In light of Alonso's demonstrably false testimony, it simply cannot be said that the Board's adoption of ALJ Landow's decision was based on substantial evidence. As such, the Board's petition for enforcement of this order should be denied.

Even assuming, *arguendo*, that Alonso's testimony could be qualified as credible, the fact remains that the Board still failed to establish that her alleged "termination" was in violation of the Act. Absent an unlawful motive, an employer cannot be held liable for a violation of §8(a)(3) where it is alleged that an employee has been discriminatorily discharged for union activity. *Ogle Protection Serv.*, 149 N.L.R.B. 545 (1967). In *Wright Line*, 251 N.L.R.B. 1083 (1980), the

Board established the test to determine whether an adverse employment action in violation of the Act. “Under the Board's two-step *Wright Line* test...the Board's General Counsel must first present evidence that proves that protected conduct was a motivating factor in the discharge.” *N.L.R.B. v G & T Term. Packaging Co., Inc.*, 246 F.3d 103, 116 (2d Cir. 2001). “If the General Counsel makes such a showing, the burden shifts to the employer to show that it would have taken the same action even without the unlawful motive.” *Sutter E. Bay Hospitals v N.L.R.B.*, 687 F.3d 424, 434 (DC Cir. 2012)

In the instant matter, General Counsel has failed to demonstrate through substantial evidence that Alonso's termination was motivated by her Union activity. General Counsel will typically attempt to meet its burden through circumstantial evidence. For instance, General Counsel may attempt to show that the timing of the employer's action, *Collectramatic*, 267 N.L.R.B. 866 (1983), the pretextual nature of the employer's asserted motivation, *Philip Megdal*, 267 N.L.R.B. 82, inconsistent or disparate treatment of employees, *Carpenter's Health & Welfare Fund*, 327 N.L.R.B. 262 (1998), or shifting justifications for discharge given by the employer support the inference of unlawful motivation. Here, however, the sole evidence of Union activity presented by General Counsel is that Alonso purportedly attended an “informational picket” and a few negotiation

sessions in the months prior to her termination.¹ Beyond these limited events, General Counsel is forced to draw on effectively ancient history, namely the nearly decade old decisions relating to the initial organization of the Union at Sprain Brook.

This limited participation in Union activity is simply insufficient to demonstrate an improper motive on the part of Sprain Brook, particularly in the face of Alonso's disciplinary history. Indeed, the record contains no evidence that Sprain Brook made any statement to Alonso incident to her discipline or ultimate discharge which tend to indicate a discriminatory motive. While there is testimony that Administrator Reingold participated in some negotiation sessions that Alonso attended, there is no evidence in the record that he was aware of her participation in the informational picket or even that Reingold considered Alonso to be an avid Union supporter.

In contrast to General Counsel's failure to show any impermissible motivation on the part of Reingold, there is ample evidence in the record of Alonso's prior history. Indeed, while ALJ Landow opted to largely disregard Alonso's disciplinary history, the fact remains that she was given several chances to remedy her conduct. While it appears as though Alonso may have avoided receiving discipline for some months prior to the underlying events, this does not

¹ Not surprisingly, Alonso could not recall the dates of these events. A66 – 67.

change the fact that her past performance left Sprain Brook with good reason to monitor her performance closely and to impose discipline should she fail to perform as expected. This need to monitor her performance closely was particularly acute given that Alonso was tasked with cleaning the ground floor, which was effectively the face of the facility and which would give residents and visitors alike their first glimpse of Sprain Brook's quality. Alonso acknowledged that she was previously counseled regarding her failure to keep this area in a proper condition, A101, and was actually formally disciplined for same. A253. Accordingly, Alonso cannot now hide behind her Union affiliation to excuse her failure to maintain these high standards.

Sprain Brook's strict adherence to their policy of progressive discipline in this matter creates a strong inference of a non-discriminatory motive in the discharge of Alonso. Alonso accumulated no less than six (6) written warning spanning September 21, 2009 to November 9, 2010, all for fundamentally similar infractions. Had Alonso been terminated hastily after the first or second infraction, it is more likely inference could be drawn. However, here, Sprain Brook gave Alonso ample warning that her work habits and performance were substandard. Nonetheless, Sprain Brook retained Alonso's services. Only after Alonso's sixth disciplinary notice was she arguably terminated. This is hardly evidence of a discriminating employer set on eliminating its pro-union workforce. Accordingly,

it simply cannot be said that General Counsel met its *prima facie* burden, and as such this Court should deny enforcement of the underlying order. To the contrary, there is ample evidence to demonstrate that Alonso was simply discharged for poor performance only.

Even assuming, *arguendo*, that this Court finds that General Counsel met its initial burden under *Wright Line*, it is clear that Sprain Brook effectively rebutted same. Sprain Brook has demonstrated above that it would have taken the same action regarding Alonso's misconduct even in the absence of her limited Union activity. *See Manno Electric*, 321 N.L.R.B. 278, 280 fn. 12 (1996); *North Fork Services Joint Venture*, 346 N.L.R.B. No. 092 (2006). The Board has consistently held that, where an employer disciplines or discharges an employee for violating company policy or for their work record and not for their union activities, no §8(a)(3) violation will lie. *Airborne Freight Co.*, 343 N.L.R.B. No. 072 (2004) (employer established that it would have discharged employee because of seven legitimate warnings pertaining to intimidating and profane behavior in dealing with management, regardless of whether employee had engaged in protected activity); *Overnite Transportation Co.*, 343 N.L.R.B. No. 134 (2004) (discharge of six union supporters who had failed to disclose criminal records on their job applications was lawful, since the Board found the employer had sufficiently demonstrated it would have discharged them even in the absence of their protected concerted conduct.).

As discussed at length above, Alonso had received six (6) written warnings over the span of approximately one (1) year, all citing essentially the same or similar infractions for poor performance. This is, plainly, an unacceptable disciplinary record for any employee, regardless of their Union membership. As the Board itself has previously held, “an employee’s participation in protected concerted activity does not shield that employee from having to meet management’s expectations.” *Advanced Services, Inc.*, 2006 WL 2067932 (2006). Here, Alonso failed to satisfy management’s expectations by keeping the restrooms in the facility in an acceptable condition. Keeping the facility in a clean and orderly condition was Alonso’s sole job, and her history prior to this incident leaves no doubt that she failed to do so on a consistent basis. In light of this history, it is apparent that Sprain Brook was justified in determining that her most recent misconduct was simply the final straw.

In *Torrington Extend-A-Care Empl. Ass'n v N.L.R.B.*, 17 F.3d 580, 592 (2d Cir. 1994), this Court denied enforcement of a decision of the Board which found the termination of an employee to be an unfair labor practice. The employee in question had a lengthy disciplinary record, yet the Board still opted to find that her termination was an unfair practice. *Id.* In reversing, this Court noted that “[w]e do not think that the Act allows second-guessing of an employer's decision to fire an employee with an extensive disciplinary record who seeks to avoid the

consequences of her latest dereliction...” *Id.* At 593. A similar rationale should prevail in the instant proceeding, inasmuch as Alonso is simply attempting to hide behind her Union membership to avoid the consequences of her utter failure to discharge her duties in a reasonable fashion.

Finally, there is simply no merit to the decision below that Alonso was “threatened” by Mr. Reingold in violation of § 8(a)(1). General Counsel alleged, and the Board accepted, that Alonso was threatened with “trouble” and would be denied payments owed to her in connection with a prior action if she opted to leave her meeting with Mr. Reingold to seek Union representation. The sole basis for these assertions is Alonso’s testimony, which lacks credibility due to her complete inability to recall certain relevant facts. Regardless, however, Sprain Brook *never* threatened to withhold the payments due to Alonso from the prior litigation. Instead, and at most, Mr. Reingold indicated that Alonso would not be entitled to additional severance pay from Sprain Brook if she did not resign from her employment. Accordingly, this Court should deny enforcement of the decision below with respect to Alonso’s alleged termination.

POINT II

THE PETITION SHOULD BE DENIED BECAUSE THE BOARD'S DETERMINATIONS REGARDING THE TERMINATION OF KAREN BARTKO ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

As with its interpretation of the events surrounding Alonso's separation from employment with Sprain Brook, the decision below regarding the termination of Karen Bartko is also not supported by substantial evidence. Indeed, the record below is clear that, based upon Bartko's egregiously insubordinate behavior on multiple occasions commencing on March 4, 2011 (to wit; (i) slamming the door in her supervisor's face; (ii) her insubordinate and hostile attitude during the meeting with Reingold; and (iii) reporting to work that weekend in direct contravention of Reingold's instructions), Sprain Brook decided to terminate her employment. Contrary to her otherwise baseless allegations, Bartko was not terminated because of any purported Union activity nor was she dismissed in retaliation for her participation in any prior Board proceeding. Accordingly, the petition for enforcement should be denied.

The Board itself has previously held that employees may lawfully be discharged for insubordination without running afoul of the *Wright Line* standard. In *Davey Roofing, Inc.*, 341 N.L.R.B. No. 27, 2004 WL 342964, *1 (2004), the respondent employer had a policy in place which, upon the employees' failure to comply with same, resulted in their discharge for insubordination which was

deemed an adequate reason by the Board. *Id.* at *4. *Davey Roofing* is especially relevant in that said employee's discharge for insubordination was lawful even though there were no comparable situations of similar insubordinate acts resulting in termination of other employees. *Id.* at *4.

Similarly, this Court has recognized that "even when an employee is engaged in protected activity, he or she may lose the protection of the Act by virtue of profane and insubordinate comments." *N.L.R.B. v Starbucks Corp.*, 679 F.3d 70, 78 (2d Cir. 2012) (quoting *Verizon Wireless*, 349 N.L.R.B. 640, 642 (2007).) Thus, while "employees are permitted some leeway for impulsive behavior when engaging in concerted activity," this leeway must be "balanced against an employer's right to maintain order and respect in the workplace." *Id.* (internal quotation omitted). Here, however, there is no real suggestion that Bartko was actually engaged in any sort of protected or concerted activity when she allowed the door to the facility to close in Mr. Reingold's face or when she was grossly inappropriate when being disciplined for this conduct. Rather, as with Alonso, the Board simply determined that her prior history of Union involvement could be bootstrapped into serving as the basis for an unfair labor practices charge.

It is respectfully submitted that any employer would be justified in terminating an employee who acted in a similar manner to Bartko, no matter that employee's disciplinary history. Bartko directly disrespected Mr. Reingold in his

capacity as Sprain Brook Administrator, action which clearly warranted a response. Moreover, Bartko compounded her misconduct by opting not to check with any representative from Sprain Brook as to when her suspension would be over. Instead, Bartko simply returned to work for her next scheduled shift, which would have effectively constituted receiving no penalty at all for her misconduct. While the Board asserts that Bartko was “provoked” in this course of action, any alleged “overstated reaction” by Mr. Reingold was clearly a response to Bartko’s patently unacceptable conduct in the first instance. Moreover, there is no indication that Bartko was “provoked” into returning to work without authorization, which is the event that ultimately led to her termination.

Ultimately, Sprain Brook has demonstrated that Bartko was terminated for her admitted insubordinate conduct, and for no other reason. Bartko admitted that she verbally accosted Reingold, her supervisor, and that she returned to work without being instructed to do so by any representative of Sprain Brook. In no way was Bartko singled out or otherwise discriminated against because of her Union activity. It was insubordinate activity, and nothing more, which caused her to be discharged. Accordingly, the underlying petition for enforcement should be denied with respect to Bartko’s termination.

POINT III

THE BOARD'S DETERMINATION THAT SPRAIN BROOK MADE UNILATERAL CHANGES TO TERMS AND CONDITIONS OF EMPLOYMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Aside from its baseless determinations regarding the separation from employment of Alonso and Bartko, the decision below is erroneous regarding the purported unilateral changes in the terms and conditions of employment at Sprain Brook. General Counsel alleged four such changes; the supposed end of Sprain Brook's providing free physicals and PPDs to employees, the supposed cessation of free hot lunches, a third-party's unilateral decision to stop offering on-site check cashing services for Sprain Brook employees, and the elimination of payments to employees who elect not to participate in Sprain Brook's health insurance plan. For the reasons set forth below, the Board's decision regarding these alleged changes is not supported by substantial evidence, and therefore the petition to enforce same should be denied.

a. Sprain Brook Never Stopped Providing Employees with Free Physicals and PPDs

As a threshold matter, General Counsel failed to even establish that Sprain Brook actually ceased providing its employees with free physicals and PPDs. Indeed, not a single witness called by the General Counsel actually established that they were unable to obtain these services from Sprain Brook, or even that they inquired as to their availability. Accordingly, inasmuch as Sprain Brook never

actually implemented this supposed change, it cannot be said that the decision below was supported by substantial evidence.

It is apparent that this alleged change was nothing more than a misunderstanding regarding the language of the February 18, 2011 memorandum. That memorandum provided that employees must submit the information regarding their annual physical and PPD as obtained from their "Physician." However, the memorandum called for employees to communicate any questions to Director of Nursing Services or any Nursing Supervisor. This language, in and of itself, suggests that the Nursing Department would remain involved in this process, if not readily available to provide these services in the same manner as before.

General Counsel only elicited testimony from two witnesses regarding this alleged change, both of whom indicated that they failed to even inquire of the nursing department whether these services would continue to be available. Both witnesses readily admitted that they simply assumed that this memorandum meant that the services would no longer be available. Had these employees inquired of the Nursing Department whether they could obtain a physical or PPD, they would have been informed that the memorandum itself did not change anything about their availability. Indeed, Mr. Mushell testified that Sprain Brook continues to provide these services to employees at no charge.

Unfortunately, rather than simply follow the specific directive of the memorandum and directing questions to the Nursing Department about the availability of physicals and PPDs, the Union opted to file an unfair labor practices charge regarding same. Further compounding this error, both ALJ Landow and Board determined that Sprain Brook committed an unfair labor practice, even though it made no change regarding the availability of these services. It simply cannot be said that the determination that Sprain Brook discontinued its practice of providing free physicals and PPDs is supported by substantial evidence, and as such it should not be upheld by this Court.

b. Sprain Brook Continues to Abide By Its Past Practice of Providing Its Employees With Hot Lunches When Available

Similarly, it cannot be said that Sprain Brook made any sort of unilateral change with respect to the meals provided to its employees. Indeed, Sprain Brook continues to provide its employees with free meals for breakfast, lunch and dinner – including those of the hot variety. As Mr. Mushell testified, such meals have always been provided to its employees every day and for free. A193. Further supporting Sprain Brook’s position that no change has been made to the meal policy is Nogueira’s statements that, as a matter of practice: “We didn’t [get a] special lunch. Whatever they cooked for the residents is was [sic] for the whole employees.” A132. Accordingly, it cannot be said that the Board’s decision was supported by substantial evidence, and as such the petition should be denied.

c. Sprain Brook Had No Control Over the Check Cashing Service and Therefore Had No Duty to Bargain Over Same

Perhaps the strangest and most baseless aspect of the decision below is with regard to the alleged cessation of check cashing services for employees at Sprain Brook. There is no allegation that Sprain Brook actually provided these services itself, nor that the facility actually sought to have these services terminated. Indeed, there is nothing in the record which suggests that Sprain Brook had any involvement with these services at all aside from providing space to be used by a totally separate entity. Given that Sprain Brook never provided check cashing services in the first place, it simply cannot be said that it unilaterally ceased same. Accordingly, the decision below should not be enforced.

As set forth above, a check-cashing company previously visited Respondent's premises once a week (on Fridays) to cash checks for any employee that wished to use its services. Sprain Brook never actually engaged this company in any formal agreement, nor did it even appear to have sought the company's services in the first instance. Indeed, the sole credible testimony in the record regarding these services, namely that of Mr. Mushell, suggests that it was the check cashing company which made the "unilateral" decision to stop providing these on-site services to Sprain Brook employees.

Both General Counsel and ALJ Landow assert that, because many terms and conditions of employment are provided by third-party providers, Sprain Brook can

be held liable for the cessation of these services by a totally independent entity. Their argument in this regard relies heavily on the decision in *Ford Motor Co. v N.L.R.B.*, 441 U.S. 488 (1979), where the Supreme Court held that an employer has a duty to bargain regarding the prices of food items in vending machines operated by a third party. However, this decision is readily distinguishable, in that the employer in *Ford* received not only a portion of the revenue from these services, but also had “the right to review and approve the quality, quantity, and price of the food served.” *Id.* At 492.

Conversely, there is no allegation herein that Sprain Brook had any agreement in place at all with the check cashing company, let alone one which afforded a similar degree of control to the employer in *Ford*. The degree of influence imputed to Sprain Brook by General Counsel and ALJ Landow over the check cashing company’s operations simply did not exist, inasmuch as Sprain Brook had no power to “alter[] a subsidy...[or] change suppliers.” *Sprain Brook*, 359 N.L.R.B. No. 105 at 29 (quoting *Ford Motor Co.*, 441 U.S. at 503). Sprain Brook, plainly, had no ability to require the company to continue providing services to its employees, and as such it cannot be said that the company’s departure constitutes a unilateral change in the terms and conditions of employment by Sprain Brook. Accordingly, the petition for enforcement should be denied.

d. The Union Declined to Negotiate Over the Issue of Health Insurance Plan Payouts

Finally, it simply cannot be said that Sprain Brook unilaterally altered its prior practice of providing health insurance payouts to employees without offering the Union an opportunity to negotiate same. In fact, it was the Union who declined to raise the issue in the course of negotiations which were also underway between the parties simultaneously with this alleged change, namely Sprain Brook's desire to subcontract the laundry operations at the facility. Such good faith negotiation and outreach to the Union is hardly indicative of an employer who is alleged to have unilaterally implemented a health insurance policy that had previously been raised with the Union and to which the Union had the full ability to negotiate. That the Union failed to do so does not create an unfair labor practice on behalf of Sprain Brook.

CONCLUSION

As the decision of the Board in this matter is not supported by substantial evidence in any respect, it is respectfully submitted that the petition to enforce same by General Counsel should be denied in its entirety, plus such other and further relief as this Court deems just and proper.

Dated: Woodbury, New York
June 15, 2015

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation stated in Fed. R. App. R. 32(a)(7)(B). Specifically, using the word count feature of Microsoft Word for Windows, this brief is comprised of fewer than 14,000 words. In fact, the brief is comprised of 7,238 words.

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