

Nos. 15-70920, 15-71045 and 15-71390

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

**UNITED NURSES ASSOCIATIONS OF CALIFORNIA/UNION OF
HEALTH CARE PROFESSIONALS, NUHHCE, AFSCME, AFL-CIO**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

VERITAS HEALTH SERVICES, INC., D/B/A CHINO VALLEY MEDICAL CENTER

Intervenor

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HEALTH CARE PROFESSIONALS, NUHHCE, AFSCME, AFL-CIO**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

RICHARD F. GRIFFIN, JR.
General Counsel

JILL A. GRIFFIN
Supervisory Attorney

JENNIFER ABRUZZO
Deputy General Counsel

BARBARA A. SHEEHY
Attorney

JOHN H. FERGUSON
Associate General Counsel

National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2949
(202) 273-0094

LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petitions of United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO (“the Union”) and Veritas Health Services, Inc., d/b/a Chino Valley Medical Center (“CVMC”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order in *Veritas Health Services, Inc.*, 362 NLRB No. 32 (Mar. 19, 2015). (UER 219-23.)¹

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. §§ 151, 160(a).

¹ Citations are to Excerpts of Record (“UER”) filed with the Union’s brief, to Excerpts of Record (“EER”) filed with CVMC’s brief, and to Supplemental Excerpts of Record (“SER”) filed with the Board’s brief. When a record citation contains a semicolon, references preceding it are to the Board’s findings, and references following it are to the supporting evidence.

The Board's Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f).

The Union filed its petition on March 25, 2015, CVMC filed its petition on March 30,² and the Board filed its cross-application on April 29. These filings were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings. Both CVMC and the Union have intervened on behalf of the Board. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act because the unfair labor practices were committed in California.

STATEMENT OF ISSUES

1. Should the Court order summary enforcement of those portions of the Board's Order remedying findings that are not contested in CVMC's opening brief?

2. Does substantial evidence support the Board's finding that CVMC violated Section 8(a)(3) and (1) of the Act by discharging Nurse Magsino based on his union activity?

3. Did the Board properly determine that CVMC violated Section 8(a)(1) of the Act by serving subpoenas duces tecum on employees that sought confidential Section 7 information?

² CVMC filed its petition in the D.C. Circuit, but the case was later transferred to this Court by order from the United States Judicial Panel on Multidistrict Litigation and was consolidated with the Union's petition for review.

4. Are CVMC's challenges to the Board's remedial order meritless?
5. Has CVMC shown that the judge was biased against its case such that it was denied due process?
6. Does substantial evidence support the Board's determinations not to find a violation based on unalleged conduct and not to issue a remedy for that unfound violation?

STATEMENT OF THE CASE

Since 2010, the Union has represented CVMC's 130-person unit of nonsupervisory registered nurses after winning a Board-conducted election. In an earlier proceeding, CVMC filed objections to conduct affecting the election, including allegedly unlawful involvement of supervisory nurses in the organizing campaign, which the Board overruled. CVMC then tested the validity of the Board's certification of the Union in the D.C. Circuit, and the certification was upheld. *See Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267 (D.C. Cir. 2012). The unfair labor practices at issue here occurred during the union organizing campaign and in its immediate aftermath.

On April 13, 2013, the Board (Chairman Pearce and Members Griffin and Block) found that CVMC violated: Section 8(a)(1) of the Act by engaging in conduct that interfered with, restrained and coerced employees in the exercise of their protected rights; Section 8(a)(3) of the Act by more strictly enforcing a

tardiness policy, disciplining employees based on their support for the Union, and discharging a union activist; and Section 8(a)(5) and (a)(1) of the Act by implementing unilateral changes to the terms and conditions of employment and refusing to furnish the Union with requested information. CVMC petitioned the D.C. Circuit for review of that Order (Case No. 13-1163), and, before briefing, that court put the case in abeyance pending the Supreme Court's decision in *NLRB v. Noel Canning v. NLRB*, 134 S. Ct. 2550 (2014).

On June 26, 2014, the Supreme Court issued its decision in *Noel Canning* and held that three recess appointments to the Board in January 2012 were invalid, including the appointment of Members Block and Griffin. Subsequently, the D.C. Circuit granted the Board's request to vacate the earlier Order and remand the case to the Board for further proceedings consistent with *Noel Canning*.

On March 19, 2015, the Board (Members Hirozawa, Johnson, and McFarren) issued the Decision and Order now before the Court. (UER 219-23.) The Board explained that after considering de novo the judge's decision and the record in light of the parties' exceptions and briefs, as well as the vacated 2013 Decision and Order, it agreed with the rationale set forth there. (UER 219.) Accordingly, the Board affirmed the judge's rulings, findings, and conclusions, to the extent and for the reasons stated in that decision, which the Board incorporated by reference. (UER 219-20.)

I. THE BOARD'S FINDINGS OF FACT

A. CVMC Threatens Employees with Facility Closure, Layoffs, and Loss of Benefits; Coercively Questions Employees; and Cautions Employees that Work Flexibilities Will Be Lost If the Union Wins the Election

CVMC operates an acute-care hospital in Chino Valley, California, and employs about 560 people. In the weeks preceding the April 1 and 2, 2010 election, CVMC engaged in a vigorous anti-union campaign. On March 8, Roberta Buesching, a labor consultant hired by CVMC to speak to employees about the Union, told two nurses that contract negotiations with the Union could force a strike and that CVMC could hire replacements from other facilities and keep those nurses. (UER 199; EER 398-99.) Buesching also warned the two nurses that “[CVMC] could be closed down and they could fire all the nurses and then reopen it and keep some of the nurses if they want and bring in others from other facilities.” (UER 199; EER 399-400.)

Around this time, Chief Nursing Officer and Risk Manager Linda Ruggio and Vice President of Operations Susanne Richards conducted a meeting attended by approximately ten nurses. Richards explained dues collection, emphasized the benefits employees enjoyed without the Union, and noted that, if the Union won the election, all communications would have to go through the Union and employees could end up with more, the same, or fewer benefits after collective

bargaining. Richards warned that employees might lose the family atmosphere and flexibility of scheduling if the Union won the election. (UER 200; EER 155-56.)

On March 31, the day before the election, emergency room supervisor Carlos Gonzalez summoned nurse Teer Lina to his office, where he handed her a leaflet produced by CVMC urging employees to vote against the Union. The leaflet described how scheduling and other flexibilities could be lost if the Union won. After Gonzalez gave Lina the flyer, he told her that the relationship between management and the employees would change if the Union won the election. He then specifically reminded her about the one-month vacation that she had recently taken. (UER 200; SER 21-22, 109.)

That same day, nurse Rosalyn Roncesvalles was instructed to go to a conference room to speak with CVMC's Chief Medical Officer James Lally. Ruggio was also present. Lally, who Roncesvalles had never previously met, asked her about a pro-union flier that included her picture as a union supporter among a larger group of employees. After mocking the flier and the employees in it, Lally asked Roncesvalles whether CVMC had ever laid anyone off during her tenure. Roncesvalles was unaware of any layoffs. Lally emphasized all the crises CVMC had weathered without layoffs. He told Roncesvalles that he was aware of the union campaign, did not like the Union, and wanted her to vote no because they

had a good working relationship without the Union. (UER 201; EER 98-104, 738-41.)

B. The Union Wins the Election and CVMC Begins a Campaign of Unilateral Changes to Employees' Terms and Conditions of Employment, Disciplines Employees on the Basis of Those Changes, Gives the Impression of Employee Surveillance, Threatens Discipline Based on Union Activity, and Refuses To Furnish Information to the Union

On April 1 and 2, the Board conducted an election, which the Union won 72 to 39. A few days after the election, Lally approached nurse Ronald Magsino, who was a prominent union activist. During the organizing campaign, Magsino talked to fellow nurses about the Union, arranged meetings between the Union and nurses, and frequently appeared in photos in union flyers. Lally, referring to Magsino as a "union movie star" (EER 211), accused Magsino of violating CVMC's solicitation policy, stating that he had seen Magsino on camera talking to a group of nurses during work hours. Lally then told Magsino that this alleged conduct was grounds for discharge. (UER 201, 203; EER 205-07.)

CVMC began making unilateral changes to the terms and conditions of employment immediately after the election. On April 9, supervisor Cheryl Gilliatt disciplined several nurses for missing a staff meeting. Prior to the election, staff meetings were not mandatory, and employees were never disciplined for failing to attend. Indeed, before the election, some employees did not even notify their

supervisors if they were going to miss a meeting. (UER 212; SER 5-8, 16-18, 94, 98, 110, 111, EER 78, 143-46.)

On April 12, Lally sent a message to all managers and supervisors instructing them to ensure staff compliance with “written policies and procedures especially those related to attendance and tardiness” and to “monitor and address appropriately any shortcomings in these areas.” (SER 69.) Before the election, employees enjoyed a seven-minute grace period when reporting for work, meaning that they were not disciplined for tardiness provided they were no more than seven minutes late. After Lally’s message, CVMC supervisors began disciplining employees for tardiness if they clocked in at any point after the start of their shifts. (UER 211; SER 9-12, 23-24, 38, 39, 95, 96, 98.)

In mid-April, per-diem nurse Roncesvalles contacted her manager, Gilliatt, to discuss reimbursement for a required certification course. Roncesvalles had attended a class on March 31, 2010, because her certification was set to expire. Consistent with past practice, Roncesvalles submitted a time sheet requesting eight hours of pay for the time she spent at the March 31 course. Gilliatt had disallowed the claim, indicating that only full-time employees were eligible for such reimbursement. Roncesvalles asked Gilliatt if the full-time employee reimbursement limitation was a new policy because, in the past, she and other per-diem nurses had received compensation for their time spent in a certification

course. Gilliatt indicated that she would check with human resources. CVMC's written policy indicates that all employees will be paid for certification course time. (UER 213; SER 29-32, 34-35, 97.)

CVMC persisted in its unilateral changes. In late April, supervisor Terri Hower announced to several nurses that employees would no longer be allowed to take vacations longer than two weeks. Before the election, no such limitation existed. (UER 201; SER 13, EER 70.) The Union never received notice of these changes prior to implementation. (SER 45.)

In April, the Union submitted an information request to CVMC, seeking lists of employees and details regarding full or part-time status, wage rates, wage increases, fringe benefits, classifications, shifts, addresses and phone numbers; employee handbooks; company policies and procedures; job descriptions; benefit plans; costs of benefits; and disciplinary notices. On April 14, CVMC notified the Union that it would not provide the information because it had filed election objections. (UER 214; SER 40-44, 99-108.)

C. CVMC Announces Stringent Enforcement of New Rules and an End to the Family Atmosphere; CVMC Prohibits Employees From Talking to the Media and Continues To Give the Impression of Employee Surveillance

In early May, CVMC held mandatory meetings for all unit employees. CVMC representatives included Director of Human Resources Arthi Dupher, Ruggio, and Gilliatt. Chief Executive Officer Lex Reddy conducted the meetings.

He notified employees that CVMC would now strictly enforce policies and procedures, monitor tardiness and sick days, and deal with violators accordingly, and that the “family atmosphere” would end. Reddy expressed CVMC’s disinterest in employees’ *Weingarten* rights and warned that CVMC intended to discipline employees without a union representative present. He concluded the meeting by instructing employees not to speak to the media about the Union. (UER 202; SER 8, 53-54, EER 66-67, 87-88, 131, 141-42, 157-58, 216-20, UER 38-39.)

In May, supervisor Dolly Casas approached a group of nurses congregated in the intensive care unit. Casas asked “what are you talking about because we’re supposed to know what you are talking about.” (UER 202; EER 71.) They did not respond and the two-minute interaction ended. (EER 71.)

D. CVMC Disciplines Nurses Magsino and Yesenia DeSantiago; Supervisor Gilliatt Gives Permission to Both Nurses To Access the Patient Records To Investigate Their Disciplines

In or around May, after an inspection by the California Department of Public Health (“DPH”) of CVMC’s emergency room records, Ruggio advised Gilliatt that DPH had found that nurses Magsino and Yesenia DeSantiago had failed to take a patient’s vital signs a second time before the patient’s discharge from the emergency room. Ruggio instructed Gilliatt to give Magsino a written warning. (UER 203; EER 164-66, 483-85, 487-88.)

On May 4, Gilliat issued a warning to DeSantiago regarding her failure to take a patient's vital signs. (UER 204; EER 765.) Gilliat notified DeSantiago that she could challenge the warning. Gilliat also granted DeSantiago permission to access the patient chart and wrote down the patient's name and medical record number for DeSantiago to use. With Gilliat's permission, De Santiago accessed the patient's record and printed a copy of it. (UER 204; EER 488-50.)

On the morning of May 5, Gilliat called Magsino into her office and informed him that she was issuing him a verbal warning for being tardy in April. (UER 211; EER 158, SER 70.) Magsino had never previously been disciplined. (UER 211; EER 158.) Later that afternoon, Gilliat called Magsino back into her office and gave him a final written warning (dated the prior day) citing "unsatisfactory work performance." (UER 203-04; EER 743.) According to the warning, Magsino, as the primary nurse for a patient, "failed to obtain and document updated vital signs to patient Discharge Summary." (EER 743.) The warning indicated that "[c]ontinued failure to comply with any hospital policy will result in immediate termination with cause." (EER 743.)

During Gilliat's disciplinary meeting with Magsino, she showed him the nursing notes that he had prepared during his treatment of the patient. Those notes contained the patient's name, medical record number, and transaction number and described the patient's medical condition and course of treatment. Gilliat also

showed Magsino the emergency room report containing the doctor's dictation. That report included the patient's name, date of birth, and medical record number and described the patient's presentation at the emergency room, the patient's signs and symptoms, and the doctor's treatment and decision making. Gilliatt also showed Magsino CVMC's patient reassessment policy, and Magsino remarked that the policy did not require a nurse to repeat the taking of a patient's vital signs before discharge from the emergency room. Magsino then asked Gilliatt if he could more carefully review the emergency room report. Gilliatt consented and told Magsino that he could print a copy of the report and view it as well. She gave Magsino a note with the patient's name and medical record number, which Magsino used to access the electronic copy of his nursing notes and the emergency room report. Magsino then printed a copy of the report. Magsino tried to redact the patient's name from the report with a marker, but the name was still visible. Magsino then copied the redacted version and destroyed the original. (UER 204; EER 163-66, 251-66, SER 55-62.)

Later that day and after his review of the paperwork, Magsino returned to Gilliatt's office and explained that the doctor was aware of the patient's blood pressure and amenable to discharge. Magsino also stated that the written policy was silent on taking a patient's vital signs and instead only indicated that the nurse should review the patient's chief complaint. According to his notes, Magsino had

done so. Gilliatt told Magsino that despite this information, his discipline would stand because DPH had fined CVMC. When Magsino questioned whether her explanation constituted unsatisfactory work performance, Gilliatt replied that management instructed her to issue a warning. (UER 204; EER 163-65, 251-66, SER 55-62.)

After the meeting, Gilliatt found Magsino at the nurses' station reviewing materials related to his discipline. She instructed him to return to work and do his research at home. Magsino asked Gilliatt if he could take the materials home with him, and she told him he could. Among other items, Magsino put a copy of the medical record in his backpack to take home. (UER 204; EER 486, SER 66-68.)

E. Nurses Magsino and DeSantiago Challenge Their Disciplines; Magsino's Grievance Includes Certain Patient Information

On May 12, at Gilliatt's suggestion, Magsino challenged his discipline under CVMC's internal grievance procedure and submitted it to human resources. In his grievance, he cited Gilliatt's admission that she was only acting at Ruggio's direction in giving Magsino a final written warning. Substantively, Magsino argued that none of the paperwork and policies indicated that he should have reassessed the patient's vital signs. Magsino attached supporting documentation, including a partially-redacted copy of the emergency room report, which still contained the patient's medical record and the transaction numbers; a note from the treating doctor that supported Magsino's position, which referenced the transaction

number; and over two dozen testimonials from doctors, emergency medical technicians, and coworkers all praising Magsino's skills. (UER 204-05; EER 744-49, SER 71-92.) On May 12, DeSantiago also challenged her discipline. (UER 206; EER 311-13, 802.)

F. CVMC Finds Some, But Not All, of Magsino's and DeSantiago's Conduct Violates HIPAA and Recommends Re-training and Re-education for Both Nurses

On May 14, Ruggio summoned Magsino to her office. She informed him that he violated the Health Insurance Portability and Accountability Act ("HIPAA") by printing a patient's chart on May 5. Magsino explained that he printed the chart to respond to the final written warning and that Gilliatt gave him permission to copy the chart. He emphasized that Gilliatt had an unredacted copy of the patient's record, which included that patient's name, date of birth, and date of service, when she issued Magsino's final written warning concerning patient care. Ruggio replied that she would talk to Gilliatt. Ruggio also questioned Magsino on what he had done with the record. During the course of recounting his actions, Ruggio accused Magsino of additional HIPAA violations—copying the redacted record to ensure the patient name could not be seen, including a copy of the medical record with his grievance, and retaining a copy of the medical record in his backpack. (UER 206-07; EER 168-79.)

On May 17, DeSantiago was called to Ruggio's office. Gilliatt was also present. Ruggio told DeSantiago that she violated HIPAA by accessing a patient chart and printing the record. In response to DeSantiago's claim that Gilliatt had similarly accessed the record, Ruggio asserted that Gilliatt's actions were not a HIPAA breach. Ruggio dismissed DeSantiago's explanation that Gilliatt had given her permission to access and print the record and, in fact, had written the patient's name and medical record number on a note. DeSantiago also pressed the point that without accessing the record and reviewing its information she would have been wholly unable to challenge the discipline. Ruggio steadfastly maintained the HIPAA violation. (UER 206; EER 314-16.)

On May 19, following an investigation on behalf of CVMC, Ruggio completed a "Potential Privacy Breach Reporting Form," an internal record kept by CVMC for licensing and accrediting purposes. (UER 206; EER 650, 1125-28.) CVMC's investigation made several findings. First, the investigation concluded that Magsino committed a breach of information by: printing the medical record on May 5 and 6, copying the record, removing the record from CVMC without authorization, and distributing the record without authorization by attaching it to his grievance. (UER 206; EER 1127.) Likewise, CVMC's investigation concluded that DeSantiago committed a breach of information by printing a medical record. The investigation determined, too, that there was *no* breach when

Magsino and DeSantiago “accessed the computer to review the electronic record as [they] did believe that [they] were accessing as part of [their] job because it was in direct relation to a disciplinary counseling [they] had received.” (EER 1127.)

CVMC’s report acknowledged that Gilliatt had authorized both nurses to access a patient’s medical record and had recorded the patient’s name on a piece of paper to facilitate that access. (EER 1126.) Based on these conclusions, the investigation determined that the appropriate action for both nurses was re-education and re-training. (EER 1127-28.) It was also decided that both nurses would receive a written warning for the HIPAA violations. (EER 1127-28.) Around this time, DPH concluded its own investigation into the alleged breaches and found that they were “unsubstantiated” because “no information was shared. It was for personal use in defending themselves.” (SER 112-17.)

G. CVMC Denies Magsino’s Grievance and Discharges Him; CVMC Issues a Written Warning to DeSantiago

On May 20, Magsino met with Ruggio and Dhuper. Dhuper informed Magsino that CVMC denied his grievance and that his final written warning concerning patient care would stand. Dhuper then announced that Magsino could no longer work at CVMC. She explained that because he had received a written warning on May 14 concerning HIPAA violations *after* his now-upheld May 4 final written warning concerning patient care, he was discharged. The termination notice indicated that the reason for discharge was the HIPAA violations and that

Magsino had received previous counselings for “the same or similar reason,” listing the May 4 patient care incident and the May 3 tardiness violation. (UER 206; EER 187-90, 794-95, SER 93.)

On May 24, Gilliatt gave DeSantiago a written warning for “breach of information, HIPAA violation.” DeSantiago asked whether she would be discharged because she had then received two written warnings—one for patient care and one for HIPAA. Gilliatt told her she would not be discharged because the written warnings involved two separate, distinct events. (UER 206-07; EER 318-20, 792-93.) Gilliatt told DeSantiago that if she “was being written up for the same thing as the final written warning [patient care,] . . . then [she] would have been terminated.” (EER 319.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board (Members Hirozawa, Johnson, and McFerran) found, in agreement with the administrative law judge, that CVMC violated Section 8(a)(1) of the Act by:

- threatening to close the facility and to terminate employees and threatening a loss of benefits if employees selected a union;
- coercively interrogating employees about their union activities;
- impliedly threatening employees with layoffs if they supported a union;

- telling employees that they might lose the family atmosphere and scheduling flexibility if they selected the Union;
- giving employees the impression that their union activities are under surveillance;
- threatening to discipline an employee for engaging in union activity;
- informing employees that they could no longer take vacations longer than two weeks because the employees had selected the Union to represent them;
- telling employees that CVMC's family atmosphere was over and that henceforth CVMC would strictly enforce policies and procedures, including tardiness, because employees voted for the Union;
- broadly prohibiting employees from speaking to the media, including about the Union and terms and conditions of employment; and
- serving subpoenas on employees and the Union that requested information about employees' union activities, under circumstances where that information was not related to any issue in the legal proceeding.³

The Board also found in agreement with the judge that CVMC violated Section 8(a)(3) and (1) of the Act by: more strictly enforcing a tardiness rule and disciplining employees based on more strict enforcement because employees

³ Member Johnson would not have found that CVMC's subpoenas violated the Act. (UER 219 n.1.)

supported the Union; disciplining employees who failed to attend mandatory meetings because employees supported the Union; and discharging Ronald Magsino because he and other employees supported the Union.

Lastly, the Board determined, as did the judge, that CVMC violated Section 8(a)(5) and (1) of the Act by failing to provide requested information and by implementing the following changes without first giving the Union an opportunity to bargain: more strictly enforcing a tardiness rule and disciplining employees pursuant to more strict enforcement; beginning to discipline employees who failed to attend mandatory meetings; and terminating the practice of paying part-time employees for attending classes needed to maintain required certifications.

The Board's Order requires CVMC to: cease and desist from the unfair labor practices found; notify, and on request, bargain with the Union before changing terms and conditions of employment; rescind any unlawfully imposed discipline; restore prior practices concerning tardiness and class-time reimbursement and make whole any adversely affected employees; furnish the Union with the requested information; offer Magsino full reinstatement to his former job or, if that job no longer exists, a substantially equivalent position; make Magsino whole for any lost earnings and other benefits as a result of the discrimination against him; preserve and, upon request, provide records necessary to analyze the amount of backpay owing under this Order; post a notice for 60 days and mail a copy of the

notice to all per-diem employees and former employees employed by CVMC at any time since March 8, 2010; read the notice aloud to employees; and submit a sworn certification to the Board attesting to the steps taken to comply.

SUMMARY OF ARGUMENT

1. CVMC has not challenged many of the Board's unfair-labor-practice findings before the Court. As such, well-settled law makes clear that the Court should order summary enforcement of those portions of the Board's Order remedying findings that CVMC opted not to challenge in its opening brief to the Court.

2. The Board reasonably concluded that CVMC violated the Act by discharging Ronald Magsino because he engaged in union activity. The Board, applying its well-established *Wright Line* analysis, determined first that the General Counsel abundantly demonstrated that CVMC acted with a discriminatory motive. It relied on CVMC's uncontested knowledge of Magsino's union activities, CVMC's widespread violations, the proximity of Magsino's discharge to the Union's election victory, and the absence of any prior discipline against Magsino.

The Board properly rejected CVMC's defenses. Regarding its claim that Magsino's conduct violated HIPAA, the Board was careful to note that it was not finding that Magsino's conduct did not, in fact, violate HIPAA, but only that

CVMC failed to carry its burden of showing that the conduct violated HIPAA. In making this distinction, the Board relied on the DPH assessment, CVMC's failure to explain how an employee could challenge a performance issue without implicating HIPAA, and Gilliat's express authorizations to and complicity in Magsino's access of the medical record. Further, the Board emphasized that Magsino acted prudently in redacting certain information and only submitting the medical records to those with a "need-to-know."

Next, the Board properly found that CVMC's alternative claim that, whether Magsino violated HIPAA, it acted with a good-faith belief that he had done so was pretextual. The Board considered Gilliat's conduct, CVMC's determination that the HIPAA breaches only warranted re-training and re-education (but not discharge), CVMC's far more lackadaisical handling of similar HIPAA violations, and the overwhelming evidence of disparate treatment.

The Board also reasonably rejected CVMC's assertion that it would have discharged Magsino regardless of his union activity. The Board examined CVMC's own discipline policies and the conclusions of its investigation, and determined that no credible evidence supported CVMC's assertion that it would have taken the same action in the absence of protected activity.

Lastly, the Board properly rejected as baseless CVMC's claim that Magsino was a supervisor at the time of his discharge. The record contains no credible

evidence that Magsino stepped into Gilliatt's shoes as a supervisory charge nurse when CVMC promoted Gilliatt.

3. The Board reasonably concluded that CVMC violated Section 8(a)(1) of the Act by serving subpoenas duces tecum on employees that sought information about their activities protected by Section 7 of the Act. As the Board noted, the sweeping nature of CVMC's requested information bore no relation to the pending election challenges. Therefore, the Board explained, the overly broad and irrelevant requests would harm employees' Section 7 rights, while CVMC wholly lacked any legitimate need for the information. Further, the Board rejected CVMC's contention that an *in camera* inspection cured the harm. The Board found that the harm was the request itself, and private review by a judge would not ameliorate the harm of interrogating employees and compelling them to produce the information in the first instance.

Regarding CVMC's claimed defenses, the Board properly rejected the notion that the First Amendment's *Noerr-Pennington* doctrine shielded CVMC's subpoena-related conduct from liability. CVMC failed to show how the subpoenas themselves constitute direct petitioning. CVMC never presented to the Board any claim that the subpoenas were incidental to direct petitioning, so that issue is jurisdictionally barred from review.

4. The Board properly exercised its broad remedial discretion in directing CVMC to read the Board's notice aloud to employees. Under well-established precedent, the pervasive and numerous violations support the Board's chosen remedy. CVMC's reliance on overruled, out-of-circuit precedent and a typographical error in the judge's decision cannot establish that the Board abused its discretion. Likewise, CVMC's anemic claim that the Board Order is overbroad because it references "employees" rather than "nurses" is unfounded and fails when examined against similar orders.

5. CVMC has failed to support its specious claim that the administrative law judge was biased against its case and that it was thus denied due process. CVMC's various unsupported, hyperbolic, and non-existent claims fall far short of establishing that it suffered bias stemming from either extrajudicial sources or an extreme predisposition rendering fair judgment impossible.

6. The Board reasonably determined under its precedent that due process concerns counseled against finding a violation where the complaint allegation concerning a written prohibition on speaking to the media was sufficiently distinct from an oral prohibition. As the Board explained, the oral prohibition was not alleged in the complaint and the General Counsel did not pursue that theory after the hearing. Once the Board declined to find a violation, it properly declined to

issue a remedy. The Union has provided no basis to disturb the Board's well-reasoned determinations.

ARGUMENT

I. THE COURT SHOULD ORDER SUMMARY ENFORCEMENT OF THOSE PORTIONS OF THE BOARD'S ORDER REMEDYING FINDINGS THAT ARE NOT CONTESTED IN CVMC'S OPENING BRIEF

In its opening brief to the Court, CVMC—beyond a global due process argument claiming bias—does not contest the vast majority of the Board's unfair-labor-practice findings. Assuming, as demonstrated below (pp. 58-59), that CVMC's due process argument falls flat, the Court should order summary enforcement of those portions of the Board's order remedying the unchallenged violations. *See Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (a party "waives its defense" to violations not contested in its opening brief); *see also* Fed. R. App. Proc. 28(a)(9)(A) (party must raise all claims in opening brief).

Specifically, CVMC has not challenged the Board's determination that it violated Section 8(a)(1) of the Act by threatening to close the facility and terminate employees and threatening loss of benefits based on support for the Union, coercively interrogating employees, impliedly threatening layoffs, telling employees that they might lose the family atmosphere and scheduling flexibilities if they selected the Union, giving the impression that union activities are under surveillance, threatening discipline based on union activity, telling employees that

terms and conditions of employment (vacation and tardiness policies) would change because employees had selected the Union, and prohibiting employees from speaking to the media. Further, CVMC has waived any defense, other than the anemic due process claim of bias, to the Board's determination that it violated Section 8(a)(3) and (1) of the Act by more strictly enforcing a tardiness rule and disciplining employees under that new enforcement standard because employees supported the Union and disciplining employees for failing to attend mandatory meetings because employees supported the Union. CVMC similarly does not challenge the Board's determination that it violated Section 8(a)(5) and (1) of the Act by failing to provide requested information and by unilaterally implementing changes in the terms and conditions of employment without first giving the Union an opportunity to bargain. Notably, the uncontested violations do not disappear simply because CVMC has not challenged them. Rather, the Court should consider the Board's contested findings "against the backdrop of acknowledged violations." *Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT CVMC VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING NURSE MAGSINO BASED ON HIS UNION ACTIVITY

A. Standard of Review and Applicable Principles

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. *See* 29 U.S.C. §160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.*, 340 U.S. at 488. This Court will not reverse the Board's credibility determinations unless they are "inherently incredible or patently unreasonable." *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995). The Board's interpretation and application of the Act will be upheld provided they are rational and consistent with the Act. *See id.*; *accord Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996).

Section 7 of the Act guarantees employees the right to "form, join, or assist labor organizations . . . for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(3) of the Act safeguards that right by prohibiting "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Thus, an employer violates Section 8(a)(3)

and (1) by taking adverse employment actions against an employee because of his union activity. *See NLRB v. Mike Yourek & Son, Inc.*, 53 F.3d 261, 267 (9th Cir. 1995).

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases, articulated in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). Under this test, if substantial evidence supports the Board's finding that an employee's union activity was "a motivating factor" in the adverse employment action, the Court must affirm that conclusion unless the record as a whole should have compelled the Board to accept the employer's affirmative defense that it would have taken the same action even absent the protected activity. *See Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *accord Mike Yourek*, 53 F.3d at 267.

The Board may rely on direct evidence to establish unlawful motive, and, because an employer will rarely admit an unlawful motive, the Board may also infer discriminatory motivation from circumstantial evidence. *See NLRB v. Link-Belt Co.*, 311 U.S. 584, 597, 602 (1941); *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 726 (9th Cir. 1980); *see also Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) ("Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving.").

Evidence showing an unlawful motive includes the employer's knowledge of, and threats and expressions of hostility toward, its employees' union activities, its commission of other unfair labor practices, the questionable timing of the adverse action, its deviation from customary practices, and its reliance on shifting or pretextual explanations for the adverse action. *Healthcare Employees Union v. NLRB*, 463 F.3d 909, 920-22 (9th Cir. 2006).

To establish the affirmative defense that it would have taken the same action even absent the union activity, the employer must show it had a reasonable belief that the employee engaged in misconduct and acted on that belief when it discharged him. *McKesson Drug Co.*, 337 NLRB 935, 937 (2002). The Board need not accept an employer's asserted explanation "if there is a reasonable basis for believing it 'furnished the excuse rather than the reason for [its] retaliatory action.'" *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (internal citation omitted). Courts are particularly "deferential when reviewing the Board's conclusions regarding discriminatory motive, because most evidence of motive is circumstantial." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000); *see also Clear Pine Mouldings*, 632 F.2d at 726 (the determination of motive is "particularly within the purview of the Board").

B. Substantial Evidence Supports the Board’s Finding that the General Counsel Carried His Burden of Demonstrating that an Unlawful Motive Prompted Magsino’s Discharge

The Board determined that the General Counsel amply satisfied his burden of showing that protected union activity was a motivating factor in CVMC’s decision to discharge nurse Magsino, and before the Court, CVMC does not contest the General Counsel’s formidable showing. The Board relied on (UER 209) Magsino’s extensive union activity and CVMC’s uncontested knowledge of that activity. Indeed, CVMC considered him a “union movie star.” Further, with respect to animus, the Board considered (UER 209) that the record was replete with examples of now largely undisputed unfair labor practices committed by CVMC, including several where Magsino himself was the subject. The Board also relied on (UER 209) the proximity of Magsino’s discharge to the election and CVMC’s “general crackdown” after the election. The Board observed further (UER 209) that Magsino had no disciplinary record prior to the election and was highly regarded among coworkers. Under these circumstances, the Board properly concluded that “the General Counsel [] made a very strong showing in meeting his initial burden under *Wright Line* . . . and that [CVMC’s] rebuttal burden was [therefore] substantial. *See Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991); *see also Van Vlerah [Mech.]*, 320 NLRB 739, 744 (1996)[, *enforced*, 130 F.3d 1258 (7th Cir. 1997)].” (UER 209.)

C. The Board Reasonably Found that CVMC Failed To Carry Its Burden of Proving that It Would Have Made the Same Decision To Discharge Magsino in the Absence of His Protected Activity

Before the Board, CVMC presented a variety of arguments in support of its claim that it would have discharged Magsino even in the absence of his protected activity. It argued that Magsino's conduct violated HIPAA, or that it nonetheless had a good-faith belief that Magsino committed a HIPAA violation, and that in either instance, its disciplinary system would have permitted it to lawfully discharge him. The Board's rejection of each of these contentions is reasonable and supported by substantial evidence.

1. CVMC Failed To Carry Its Burden of Demonstrating that Magsino Violated HIPAA

CVMC spills much ink (Br. 38-42) over an analysis of HIPAA regulations and policies. The Court need not tarry over this dense regulatory scheme. Contrary to CVMC's contention, the Board did not find that there was no HIPAA violation.⁴ Rather, the Board determined (UER 209) that CVMC ultimately failed to adduce sufficient evidence that Magsino's conduct while challenging his discipline constituted a HIPAA violation. The Board concluded that "to the extent [CVMC] relies on breaches of HIPAA to justify its firing of Magsino, it has failed

⁴ In finding that CVMC failed to show Magsino's conduct violated HIPAA, the judge expressly stated: "I am careful not to conclude that Magsino did not violate HIPAA; I leave that assessment to the appropriate governmental authorities." (UER 209.)

to establish by a preponderance of the evidence that any violations occurred.”

(UER 209.) CVMC must not assign to the Board a “stubborn refusal” (Br. 39) to find a violation where CVMC’s own litigation shortcomings are at fault.

In finding that CVMC came up short, the Board relied on (UER 209) the DPH’s investigative findings that no breach had occurred.⁵ (EER 825-29.) The Board also emphasized (UER 209) CVMC’s failure to explain how an employee could ever defend against an allegation of substandard patient care without being given limited access necessary to investigate the allegation. As the Board found, “certainly such a procedure must exist,” but CVMC failed to offer any credible evidence in this regard.⁶ (UER 209.) The Board also determined (UER 209) that CVMC’s claim of a violation ignored Gilliatt’s actions, when she not only expressly authorized Magsino to access the patient record, but also gave him the information necessary to review it.

CVMC’s challenges to the Board’s decision in this regard are unpersuasive.

The Board roundly rejected CVMC’s claim (Br. 43) that the HIPAA provision that

⁵ CVMC cannot show that the Board’s partial reliance on the DPH assessment is flawed. (Br. 47.) Rather, the document directly addresses the issue of Magsino’s conduct and potential HIPAA violations, which is at the core of the discharge analysis. Accordingly, the DPH conclusions are certainly relevant, and it was proper for the Board to consider them in its overall analysis.

⁶ CVMC acknowledges a notable absence of a defined procedure inasmuch as it opines on alternatives that Magsino “should have” taken or that human resources personnel or Ruggio “could have” done. (Br. 45.)

allows for internal access to patient records for the “resolution of internal grievance” does not apply to Magsino because he is not responsible for internal grievance investigations: “[CVMC] provides no authority to support such a peculiar interpretation, and [we] reject it.” (UER 209.) CVMC also posits (Br. 44) that if the “internal grievance” provision insulates Magsino’s conduct, he violated the “minimum necessary” standard by disseminating the information to human resources. However, as the Board noted, Magsino “appears to have [done] nothing beyond what was necessary to effectively present his grievance,” (UER 209), and took multiple, cautious steps to redact all identifying information. Nor does CVMC’s reliance on the Information Security Agreement advance its challenge. That agreement prohibits employees from “operat[ing] or attempt[ing] to operate computer equipment *without specific authorization from supervisors.*” (EER 1085) (emphasis added). That agreement also instructs employees “[n]ot to disclose any portion of a patient’s record except to . . . a recipient *authorized* by CVMC who has a need-to-know in order to . . . discharge one’s employment or other service obligation to CVMC.” (EER 1085) (emphasis added). Here, the Board found (UER 210) both that Magsino was authorized to access the information and disclosed it only to those who had a need-to-know to process his grievance.

Lastly, CVMC's suggestion (Br. 47) that the DPH assessment supports a finding that Magsino violated HIPAA is misplaced. DPH concluded that the conduct under investigation constituted an internal "policies and procedures" breach. Nothing in the DPH assessment concludes that Magsino violated the regulatory scheme itself, as opposed to an internal CVMC policy.

2. CVMC's Claim that It Had a Good-Faith Belief that Magsino Engaged in Misconduct Is Purely Pretextual

The Board rejected CVMC's alternative claim that, even if Magsino had not violated HIPAA, it had a good-faith belief that Magsino had done so. Rather, the Board reasonably determined (UER 209) that CVMC's claim of a good-faith belief was pretextual. CVMC knew that Gilliatt had granted Magsino access to the patient chart and concluded in its own internal report that no HIPAA violation occurred when Magsino accessed it.⁷ "Permitting an employee to do something and then using that a basis to terminate the employee is a classic example of pretext." (UER 209.)

The Board found further evidence of pretext in CVMC's discipline documents. For instance, CVMC's internal reporting form indicated that Magsino would receive a written warning for the HIPAA violation, yet CVMC discharged

⁷ Given the numerous evidentiary and credibility findings that Gilliatt authorized Magsino to access and print the chart, CVMC's stunning assertion that there is "absolutely no evidence" that anyone ever granted Magsino access must fail. (Br. 50.)

him the day immediately following this recommended course of discipline. In Magsino's discharge notice, CVMC justified termination by curiously categorizing the HIPAA violation as "similar in nature" to Magsino's tardiness and patient care incidents. As the Board concluded, "[i]n the absence of some credible explanation, the similarity between the two escapes [us]."⁸ (UER 209.)

The Board found additional evidence of pretext in the manner CVMC handled other potential HIPAA violations during Magsino's disciplinary process. Specifically, other individuals, including the treating doctor and Gilliatt, disclosed certain patient information. The treating doctor accessed the chart a month after the patient's visit to the emergency room and disclosed the patient's transaction number in his statement that was attached to Magsino's grievance. According to the Board, CVMC "was entirely indifferent to this potential HIPAA breach" despite the fact that its own HIPAA policies cover doctors. (UER 210.) Moreover, it is undisputed that Gilliatt herself accessed and printed the patient's medical record and showed the entire unredacted version to Magsino. Gilliatt also admitted to writing the patient's name and medical record number on a slip of paper, giving it to Magsino, and authorizing him to view the record. Gilliatt's disclosures

⁸ Significantly, the Board found (UER 211-12) that CVMC unlawfully implemented changes to the grace period for starting work. CVMC did not challenge this finding before the Court. Accordingly, assuming the Court grants the Board's request for summary enforcement (pp. 25-26), Magsino's alleged tardiness violation was unlawful and is subject to rescission under the Board's Order.

continued. In Magsino's final written warning, Gilliatt included the patient's medical record number. As the Board observed, "[n]one of this [conduct] raised any concerns [to CVMC,] nor is there any credible explanation as to why it did not." (UER 210.)

Pretext was similarly evidenced by CVMC's disparate treatment of other employees who definitively breached patient confidentiality. For instance, an employee left a patient's medical record, which, unlike Magsino's grievance documents, included the patient's name and medical information, in a restroom where it was viewed by another patient. That employee received a verbal warning and was re-educated. The undisputed evidence also establishes that employees have transmitted medical records to the wrong address thereby disclosing confidential information to third parties, but these employees received only counselings. (UER 210). It is uncontested that an employee inadvertently gave a patient's test order sheet to the wrong patient. The record does not disclose any discipline at all for that HIPAA breach. Most telling in terms of disparate treatment is a comparison of CVMC's treatment of DeSantiago and Magsino. Like Magsino, DeSantiago accessed and copied a patient's medical record during the course of her grievance. Like Magsino, DeSantiago received a final written warning based on patient care in early May and then a written warning concerning HIPAA in mid-May. Unlike Magsino, however, DeSantiago's two (identical)

violations were, according to Gilliatt, sufficiently distinct such that discharge was unwarranted. Under all of these circumstances, the Board properly concluded that in discharging Magsino, CVMC “seized upon the alleged HIPAA violation as a pretext in a thinly veiled attempt to disguise its unlawful motive.” (UER 210.)

CVMC argues (Br. 51) that any comparison to CVMC’s treatment of doctors or Gilliatt is invalid because they did not have the same number of HIPAA violations and because they are uniquely privileged to access patient information for “quality assurance.” As detailed above (pp. 15, 35-37), however, Gilliatt had multiple potential disclosures. And CVMC’s assertion of “quality assurance” rests on testimony that the Board expressly discredited. *See* UER 211.

CVMC then complains at length (Br. 52-55) that the “overwhelming uncontroverted evidence” supports CVMC’s decision to discharge Magsino because it reasonably believed he committed numerous HIPAA violations and that it reasonably believed (Br. 56) that Magsino committed a “terminable offense.” CVMC’s own discipline documents, however, defeat these assertions. CVMC, after full review of the alleged HIPAA violations, ultimately concluded that these violations warranted re-education, re-training, and a written warning. At no point during Magsino’s discipline and discharge did CVMC ever suggest that the alleged HIPAA violations were so egregious that they alone warranted discharge. Rather,

this disingenuous claim arose much later and simply as yet another pretextual defense.

3. In Any Event, CVMC Failed To Show that Its Disciplinary System Would Have Supported Discharge

Even assuming that CVMC, in fact, was able to establish either that Magsino violated HIPAA protocols or that it reasonably believed he had, that would not end the inquiry. CVMC would also need to prove that its disciplinary system would support discharge under the circumstances. The Board reasonably concluded that CVMC failed to make this showing.

CVMC's discipline policy governing HIPAA infractions has three levels of violations:

- Level I: Accidental and/or due to lack of proper education;
- Level II: Purposeful break in the terms of the Confidentiality Agreement, Security Agreement, or an unacceptable level of previous violations
- Level III: Purposeful break in the terms of the Confidentiality Agreement or an unacceptable level of previous violations and accompanying verbal disclosure of patient information regarding treatment and status

(EER 801.) A Level I violation has a recommended penalty of an oral warning or reprimand accompanied by retraining and discussion of policy and procedure. A Level II violation has a recommended penalty of a written warning and acknowledgement of consequences of subsequent infractions. A Level III violation has a recommended penalty of termination. (EER 801.)

Under these standards and using the facts as they were known to CVMC at the relevant time, the Board determined that Magsino's situation seemed to fit "squarely" within Level I. (UER 210.) According to the Board, there was simply no "credible evidence" that Magsino's use of a partially redacted medical record stemmed from anything other than a lack of proper education. (UER 210.) Indeed, as the Board observed (UER 210), CVMC knew that Magsino painstakingly redacted the patient's name from all copies of the medical record so that no one could connect the medical information to a specific patient without accessing CVMC's electronic system. Further, CVMC's own recommendation was simply re-education, re-training, and a written warning. Under these circumstances, the Board reasonably concluded that CVMC's own policies do not support discharge for Magsino's conduct.

D. CVMC's Assertion that Nurse Magsino Is a Supervisor Is Baseless

Section 2(3) of the Act, 29 U.S.C. § 152(3), excludes "any individual employed as a supervisor" from the definition of "employee" protected under the Act. Section 2(11) of the Act defines a "supervisor" as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is settled that the party asserting supervisory status—here, CVMC—bears the burden of proof. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). To meet this burden, CVMC must support its claim with specific examples based on record evidence. *See Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”). Conclusory or generalized testimony is insufficient to meet the burden of proof. *See Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); *Lynwood Manor*, 350 NLRB 489, 490 (2007). Any lack of evidence in the record will be construed against the party asserting supervisory status. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1476 (2004).

Here, the Board properly determined that there was no evidence to find that Magsino was a supervisor under Section 2(11). The Board first observed (UER 210) that the March 5, 2010 election agreement between the Union and CVMC, which expressly identified six individuals who worked as regular charge/relief charge nurses and were therefore ineligible to vote, did not identify Magsino. The Board also noted (UER 210) that CVMC never conveyed to Magsino—a “union

movie star”—that he should cease union activity because CVMC considered him a supervisor.⁹

CVMC’s claim (Br 35-36) that Magsino stepped into Gilliatt’s shoes as a supervisory charge nurse when CVMC promoted Gilliatt on March 15 is without support. Indeed, the credited record evidence suggests that the number of shifts that Magsino served as relief charge nurse actually declined between February and May 2010. Nurse Marlene Bacani testified that in February 2010, Magsino served as relief charge nurse ten times. (EER 139-40.) Magsino testified that he served as relief charge nurse six times in April and three times between May 1 and 20. In the March 5, 2010 election agreement, CVMC—aware of the number of shifts Magsino had worked in February—did not identify him as an ineligible voter based on supervisory status. And yet, when Magsino had fewer shifts combined in the months of April and May (nine shifts over the 1.75 months), CVMC contends he was, at this point, a supervisor.

Further, to show supervisory status, CVMC relies almost exclusively (Br. 36-37) on the testimony of supervisor Gilliatt, a repeatedly discredited witness. As noted above (p. 27), courts are particularly deferential to credibility determinations. On more than one occasion, the administrative law judge definitively explained

⁹ CVMC is well versed in contesting prounion activity of supervisory personnel. CVMC refused to bargain with the Union for several years while it unsuccessfully contested the certification based in part on allegations that certain supervisors engaged in prounion conduct.

why Gilliatt was incredible. *See, e.g.*, UER 202 (“I have considered Gilliatt’s . . . testimony concerning these meetings but, I did not find [her] demeanor convincing; it seemed that [she was] attempting to disclose only evidence helpful to [CVMC] and withhold or gloss over testimony not so helpful.”); UER 207 (“Gilliatt impressed me as someone who, at times, was doing her best to defend the actions taken by her superiors rather than someone simply truthfully relating factual information.”); UER 213 (“Again, her demeanor was not convincing and her answers were, at times, evasive.”). Given the expressly articulated reasons for rejecting Gilliatt’s testimony, including her demeanor, evasiveness, answering only leading questions, and overall lack of candor, the judge’s credibility determination was anything but “rote” (Br. 37). Accordingly, CVMC’s suggestion (Br. 36) that the judge was “results oriented” and biased with respect to evidence concerning Magsino’s supervisory status rings hollow in the face of specific examples of Gilliatt’s lack of credibility.

Beyond Gilliatt’s discredited testimony, CVMC cites (Br. 36) the testimony of nurse Bacani, which establishes nothing concerning Magsino’s supervisory status in May 2010. Indeed, Bacani had no specific recollection of Magsino’s relief charge nurse shifts beyond February 2010. (EER 139-40.) And CVMC mischaracterizes (Br. 37) Magsino’s testimony by asserting he “admitted” that he regularly served as relief charge nurse. Rather, Magsino plainly testified that he

was scheduled in that capacity nine times between April 1 and May 20. (EER 301-05.) In short, CVMC has utterly failed to demonstrate that Magsino was a supervisor.

III. THE BOARD PROPERLY DETERMINED THAT CVMC VIOLATED SECTION 8(a)(1) OF THE ACT BY SERVING SUBPOENAS DUCES TECUM ON EMPLOYEES THAT SOUGHT CONFIDENTIAL SECTION 7 INFORMATION

A. Substantial Evidence Supports the Board's Finding that CVMC's Service of the Subpoenas Violated Section 8(a)(1)

After the Union won the election in April 2010, CVMC filed objections to the election, asserting, among many other unsuccessful challenges, that prounion supervisory conduct tainted the results. *See Veritas Health Servs. v. NLRB*, 671 F.3d 1267 (D.C. Cir. 2012). Prior to the May 10, 2010 hearing on the election objections, CVMC served subpoenas *duces tecum* on current or former employees and union representatives. The subpoenas, casting a wide net, sought:

Any and all documents relating to any communication during the relevant time period between you and any representative of the Union,

All authorization and/or membership cards signed by any Charge Nurse during the relevant time period, including any authorization and/or membership cards you signed, if you were employed by Respondent as a Charge Nurse during said period,

All authorization and/or membership cards signed by any RN during the relevant period,

All documents relating to the distribution and/or solicitation of Union authorization and/or membership cards during the relevant time period.

(EER 750-54.). The subpoenas advised that if an employee was never employed as a charge nurse during the relevant time period, CVMC was willing to allow the documents to be produced at the hearing for “an *in camera* inspection, whereupon only non-privileged documents that are relevant to [CVMC’s] Objections are provided to [CVMC].” (EER 750-54.) During the representation hearing, the administrative law judge, based on relevancy challenges, revoked portions of CVMC’s subpoenas and ordered that employee names be redacted from certain documents. In its unsuccessful test-of-certification case before the D.C. Circuit, CVMC challenged the administrative law judge’s evidentiary rulings with respect to the subpoenas. The D.C. Circuit rejected those challenges and upheld the judge’s determination that the documents and names were not relevant. *See Veritas*, 671 F.3d at 1274-75.

Subsequently, and pertaining to the present case, the Board found that the service of the subpoenas violated Section 8(a)(1). In making that determination, the Board underscored “the breadth of the subpoenas at issue here and the nature of the information requested—encompassing communications between employees and the Union, union authorization and membership cards, and all documents relating to the distribution and/or solicitation of union authorization and membership cards—[which] would subject employees’ [Section 7] activities to unwarranted investigation and interrogation.” (UER 219 n.1 (citing *Nat’l Tel.*

Directory Corp., 319 NLRB 420, 421 (1995)). Under well-established Board law, CVMC's subpoenas collide with the Board's longstanding and "overriding concern" with the confidentiality interests of employees. See *Nat'l Tel. Directory*, 319 NLRB at 421; *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999), *enforced*, 200 F.3d 1162 (8th Cir. 2000); *Manor Care*, 356 NLRB No. 39 (2010), *enforced*, 661 F.3d 1139 (D.C. Cir. 2011). The Board has long recognized "the importance of an employee's ability to sign an authorization card with confidence that the card will not be presented to the employer, because it is entirely plausible that employees would be chilled when asked to sign a union card if they knew the employer could see who signed." *Nat'l Tel. Directory*, 319 NLRB at 421 (citing *Comm. on Masonic Homes v. NLRB*, 556 F.2d 214, 221 (3d Cir. 1977) (internal quotations omitted)).¹⁰ Indeed, the Board has always kept authorization cards confidential, and the courts have denied disclosure of authorization cards under the Freedom of Information Act, 5 U.S.C. § 552. See, e.g., *Nat'l Tel. Directory*, 319 NLRB at 422; *Midvale Co.*, 114 NLRB 372, 374 (1955); *McKess Nursing Ctr. v. NLRB*, 615

¹⁰ CVMC (Br. 61) misunderstands the Board's reliance on *National Telephone Directory*. The Board relied on that case only for the governing principles concerning confidentiality of certain union activity. It did not, contrary to CVMC's claim, rely on *National Telephone Directory* as establishing a violation where an employer issues overly broad subpoenas to unit employees seeking information about union activities among employees and a union when that information bears no relation to the subject litigation.

F.2d 728 (6th Cir. 1980); *Pac. Molasses v. NLRB*, 577 F.2d 1172 (5th Cir. 1978); *Comm. on Masonic Homes*, 556 F.2d at 221.

The Board also found (UER 202-03) that the subpoenas did not seek information that was relevant to CVMC's election objections. Its election challenge went to the conduct of CVMC supervisors, and yet, the near boundless subpoena request sought information—not about the activity of supervisory charge nurses—but about employees' union activities with other employees and with the Union.¹¹ The Board properly determined that CVMC's broad request bore no relevance to the election matters before the Board. The Board then determined (UER 219 n.1)—contrary to CVMC's complaint (Br. 61) that the Board failed to balance competing interests—that the overly broad, irrelevant request would harm employees' Section 7 rights and CVMC lacked a legitimate, specific need for the information. As such, the Board found the issuance of the subpoenas violated Section 8(a)(1).

The Board rejected (UER 219 n.1) CVMC's assertion that its offer for an *in camera* inspection cured the detrimental effect of chilling "employees' willingness to engage in (or refrain from) protected activities" remaining from the unlawful subpoena requests. *See Pac. Molasses*, 577 F.2d at 1182. As the Board reasoned

¹¹ Given the thrust of the subpoenas, CVMC's assertion (Br. 61) that the information went to the "heart" of its objections is a patent overreach.

(UER 203, 219 n.1), CVMC's willingness to allow production of the documents at the hearing does not address the actual harm, which was "the very request itself." (UER 219 n.1.) The Board explained, "the harm is in the interrogation and the possibility that the employees might feel compelled to produce evidence of union activities by them and other [CVMC employees]." (UER 203.) And CVMC's offer to narrow or restrict the requested documents at the hearing does nothing to ameliorate this harm. As the Fifth Circuit cautioned, the gravity of threatened disclosure of authorization cards is "impossible to minimize," and one would be "naive to disregard the abuse which could potentially occur if employers and other employees were armed with this information." *Pac. Molasses*, 577 F.2d at 1182. That court observed further that the "inevitable result" of disclosure "would be to chill the right of employees to express their favorable union sentiments. Such a chilling effect would undermine the rights guaranteed by the [Act], and, for all intents and purposes, would make meaningless those provisions of the [Act], which guarantee secrecy in union elections." *Id.*

CVMC's claim that *Pacific Molasses* is inapposite because CVMC had a "legitimate interest in obtaining evidence to present at the Board objections hearing" (Br. 62) is belied, in significant part, by decisions to the contrary from an administrative law judge and the Board in the underlying representation case, as well as the D.C. Circuit when it reviewed the Board's certification of the Union.

CVMC failed to prove a legitimate interest in obtaining much of the subpoenaed information during the test-of-certification process and should not now be permitted to re-assert the same infirm claim of legitimate interest. Further, CVMC's self-serving belief (Br. 62) that the subpoenas would not chill employees' Section 7 rights must yield to the Board's determination otherwise given the Board's unique position and expertise. Equally unpersuasive is CVMC's suggestion (Br. 62) that the Board "routinely uses authorization cards in litigation when it suits the Board's purposes to do so." As the cases cited by CVMC demonstrate, where majority support is challenged, the Board uses only the *number* of authorization cards, not the identification of signatories. *See, e.g., Automated Bus. Sys. v. NLRB*, 497 F.2d 262, 271 (6th Cir. 1974).

B. The Board Properly Rejected CVMC's Contention that the First Amendment's *Noerr-Pennington* Doctrine Shielded Its Subpoena-Related Conduct from Liability

Despite its claims, CVMC has failed to show that the subpoenas constitute a direct petitioning of government that would warrant First Amendment protection, and the Board properly refused to relieve CVMC of its subpoena-related liability under the *Noerr-Pennington* doctrine. Further, because CVMC never argued to the Board that the subpoenas might constitute conduct incidental to a direct petition, that issue is not properly before the Court and is subject to the jurisdictional bar of Section 10(e) of the Act.

1. Applicable Principles

The Petition Clause of the First Amendment protects “the right of the people . . . to petition the Government for a redress of grievances.” U.S. Const. amend. I. Under the Supreme Court’s *Noerr-Pennington* doctrine, otherwise illegal conduct—such as concerted activity among business competitors—can still be protected by the First Amendment when it is part of a direct petition to government or “incidental” to a direct petition. The doctrine finds its origins in antitrust law. *See, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-38 (1961) (collaboration among railroad companies lobbying for legislation that would limit competition in the trucking industry did not violate antitrust laws because it was part of an exercise of their First Amendment right to petition the government); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669-70 (1965) (First Amendment protected mine operators and workers from antitrust laws when they collaborated to petition the Tennessee Valley Authority to increase minimum wages).

In the labor context, the *Noerr-Pennington* doctrine has been extended to protect *direct* petitioning of the courts. *See Bill Johnson’s Res Eddyleon \ taurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (the Board cannot enjoin a well-founded lawsuit even if initiated in retaliation for union activity); *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) (no liability under the NLRA for an employer’s

unsuccessful prosecution of lawsuits that, while not objectively baseless, were brought for the purpose of retaliating against workers for exercising Section 7 rights). The Supreme Court has carved out a discrete exception in such direct petitioning cases—holding that petitioning with an illegal objective enjoys no special protection. *See Bill Johnson’s*, 461 U.S. at 737 n.5. Further, the Supreme Court has not extended the doctrine to conduct incidental to petitioning in the labor context. *See Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 612 (D.C. Cir. 2007) (“The Supreme Court has extended *Noerr-Pennington* immunity into labor law only to protect direct petitioning, i.e., employer lawsuits . . . ; it has yet to do so in labor law for ‘incidental’ conduct.”).

2. CVMC Has Not Shown that Its Subpoenas Constitute a Direct Petition

Although its brief to the Court is less than clear, CVMC does not appear to argue that its subpoenas represent direct petitioning; nor reasonably could it. To the extent, however, that one can construe its brief to assert such a position, the Board properly rejected it, relying on *Santa Barbara News-Press*, 358 NLRB No. 155, 2012 WL 4471120 (Sep. 27, 2012), incorporated by reference in 361 NLRB No. 88 (Nov. 3, 2014), *petition for review filed*, D.C. Cir. Nos. 15-1082, 15-1154 (Apr. 9, 2015). (UER 219 n.1).

In *Santa Barbara News-Press*, the Board characterized an employer’s assertion that a subpoena seeking confidential witness affidavits from the Board

constituted direct petitioning as “utterly meritless.” 2012 WL 4471120, at *4. The employer’s request for the Regional Director to issue a subpoena was not the basis for the unfair labor practice; rather, the violation is the use of the subpoenas to compel production of employees’ Section 7 activities without any need for such production. *See id.* The Board then found that “communications with the Regional Director clearly did not constitute direct petitioning.” *Id.* To the contrary, the agency officials involved in the Board's standard subpoena process—a Regional Director and the Board’s Executive Secretary—act purely in a ministerial capacity. *See id.* “They process such requests in a nondiscretionary manner, as provided for by Section 11(1) of the [Act] and Section 102.31 of the Board’s Rules and Regulations. Thus, as to the subpoena matters at issue [], the involvement of these agency officials is limited to administering existing law and procedures; they have no policymaking authority in responding to subpoena requests.” *Santa Barbara News-Press*, 2012 WL 4471120, at *4 (citing *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 33 (1st Cir. 1970)); *see also Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000) (“Nor, by the way, does the right to petition for redress of grievances imply a duty of the government to make every government employee a petition receiver.”).

Like the employer in *Santa Barbara News-Press*, CVMC’s violation is not its request for the Regional Director to issue a subpoena; the basis for the unfair

labor practice here is CVMC's use of the Board's subpoena process to obtain information concerning employees' exercise of their Section 7 rights without any legitimate need. As discussed, the overbreadth of the subpoena request was untethered from its election objection regarding supervisory conduct. CVMC offers no evidence and makes no argument that it sought the subpoenas to influence the passage of any laws or regulations or that the subpoenas involve a "significant policy determination" in the application of the Act. *See Santa Barbara News-Press*, 2012 WL 4471120, at *4. Accordingly, to the extent CVMC makes a direct petitioning defense, the Board properly concluded that no *Noerr-Pennington* immunity attaches.

3. CVMC Is Jurisdictionally Barred from Asserting that the Subpoenas Constitute Conduct Incidental to Petitioning

Under Section 10(e) of the Act (29 U.S.C. § 160(e)), "[n]o objection that has not been urged before the Board ... shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). Section 10(e) accords with the general principle that "[s]imple fairness ... requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A.*

Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952); accord *NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126 (9th Cir. 2011).

In its exceptions brief to the Board, CVMC’s one-paragraph Petition Clause argument (SER 134) summarily cites *BE&K Construction Co.*, which, as described above (p. 49-50), is a case involving *direct* petitioning. CVMC cites no other cases, nor does it even invoke the term “incidental conduct.” CVMC’s depthless treatment of any incidental-conduct petitioning claim prevented the Board from receiving notice that the issue had been raised or analyzing the issue in the first instance. The Court is thus jurisdictionally barred from considering it now.¹²

IV. CVMC’S CHALLENGES TO THE BOARD’S REMEDIAL ORDER ARE MERITLESS

A. Standard of Review and Applicable Principles

The Board’s remedial authority is a “broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Under Section 10(c) of the Act (29 U.S.C. § 160(c)), the Board is directed to order remedies for unfair labor practices. Because Congress could not “define the whole gamut of remedies to effectuate [the policies of the Act] in an infinite variety of specific situations[,]” it vested the Board with the authority to develop appropriate remedies based on its administrative experience. *Phelps*

¹² If the Court disagrees with the Board’s jurisdictional bar argument, the Board respectfully requests that the Court remand the case to the Board for the limited purpose of allowing it to consider that issue in the first instance.

Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); accord *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969) (“[i]n fashioning its remedies under the broad provisions of [Section] 10(c) ... the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts”). The Supreme Court “has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); accord *California Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 308 (9th Cir. 1996) (the Board’s remedial order is reviewed only for “clear abuse of discretion”); *NLRB v. Nat’l Med. Hosp. of Compton*, 907 F.2d 905, 910 (9th Cir. 1990) (“The Board’s discretion in selecting appropriate remedies is exceedingly broad and is to be given special respect by reviewing courts.”) (internal quotations omitted)).

B. The Board Properly Exercised Its Discretion in Ordering a Public Reading of the Remedial Notice

Here, the Board exercised its broad discretion and directed either a responsible corporate management official or a Board agent in the presence of such official to read the notice to employees. The Board also directed that CVMC allow a union representative to be present at the public reading. Against the backdrop of the pervasive and numerous violations in this case, CVMC cannot show that the Board’s choice of remedy exceeds its broad authority.

As the Board has explained, a public notice reading “ensure[s] that the important information set forth in the notice is disseminated to all employees, including those who do not consult [] bulletin boards.” *Excel Case Ready*, 334 NLRB 4, 5 (2001). The Board’s notice remedies “are intended to inform the employees of their statutory rights and the legal limits of the [employer’s] conduct, and to assure them that further violations will not occur.” *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399-400 (D.C. Cir. 1981). A public reading of the notice is an “effective but moderate way to let in a warming wind of information and, more important, reassurance.” *United States Serv. Indus.*, 319 NLRB 231, 232 (1995), *enforced*, 107 F.3d 923 (D.C. Cir. 1997). Here, the Board found (UER 216) that CVMC’s unfair labor practices were sufficiently serious and widespread to warrant a public reading so that employees fully understood that CVMC and managers are bound by the requirements of the Act. *See Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), *enforced*, 400 F.3d 920, 929-30 (D.C. Cir. 2005). Indeed, CVMC does not contest that it threatened employees with facility closure and layoff; coercively interrogated employees; unilaterally changed vacation policies, time and attendance rules, scheduling policies, and certification course reimbursement practices because employees voted in favor of union representation; and disciplined employees under these newly changed policies. In the context of

such extensive violations, CVMC cannot credibly argue that the Board abused its discretion in ordering a public notice reading.

In a failed attempt to show that the Board's remedy is punitive, CVMC relies on obsolete, out-of-circuit caselaw. It cites (Br. 66-67) *International Union of Electric, Radio & Machine Workers v. NLRB*, 383 F.2d 230 (D.C. Cir. 1967) (“*IUE*”) and *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859 (5th Cir. 1966), to claim that a public reading is “humiliating” and “degrading.” The D.C. Circuit has recognized that *IUE* “has clearly been superseded, if not actually overruled, by [the Court’s] more recent decision in [*Teamsters Local 115*], which approved a public reading requirement though not its designation of the president as reader.” *Conair Corp. v. NLRB*, 721 F.2d 1355, 1386 n.99 (D.C. Cir. 1983); *see also Federated Logistics*, 400 F.3d at 930 (D.C. Circuit enforcing order directing public reading by responsible company official or Board agent). Likewise, the Fifth Circuit has expressly sanctioned the Board’s imposition of a notice reading in cases subsequent to *Laney & Duke* and rejected the categorical assertion that any notice reading is punitive. *See, e.g., J.P. Stevens & Co. v. NLRB*, 417 F.3d 533, 539 (5th Cir. 1969).

CVMC’s remaining contentions are equally unpersuasive. CVMC’s claim (Br. 65) that the Board abused its discretion because the judge committed a typographical error by omitting quotation marks borders on the absurd. And

CVMC cites several cases (Br. 68) in an attempt to show that it needed to be a more prolific violator before a notice reading was appropriate. This oft-advanced argument misses the mark. The cases cited by CVMC do not set a threshold of egregiousness. Rather, the Board examines each case, as it must, to determine whether traditional remedies will fully dissipate the effects of the violations. Here, beyond its weak claim of bias, CVMC does not challenge that it has committed over a dozen unfair labor practices ranging from discharge to threats and from coercion to the impression of surveillance. The Board's conclusion that these circumstances warrant a public reading is an appropriate exercise of its broad discretion to devise remedies that effectuate the policies of the Act.

C. The Board's Order Is Not Overbroad

CVMC cryptically—and without case support—contends (Br. 69-70) that the Board Order fails to differentiate between nurses and other Hospital employees “who were not involved in or impacted by the alleged unfair labor practices.” CVMC utterly fails to flesh out this claim, for that reason alone it should be rejected by the Court. Notwithstanding, the Board maintains that its Order is entirely consistent with other Board orders. *See, e.g., Pac. Beach Hotel*, 356 NLRB No. 182 (June 14, 2011) (directing a public notice reading to all employees regardless of whether all employees were affected), *enforced sub nom. HTH Corp. v. NLRB*, 693 F.3d 1051 (9th Cir. 2012); *Camelot Terrace*, 357 NLRB No. 161

(Dec. 30, 2011) (same), *petition for review filed*, D.C. Cir. Nos. 12-1071, 12-1218 (Jan. 30, 2012) (review limited to order of attorneys' fees and negotiating expenses). Further, to the extent CVMC maintains that all employees will hear the reading of the Order regardless of whether they were affected by the unlawful actions, the Board's remedy in this regard is no different than a posted notice, which is readily viewable by any employee, not just those affected.

V. CVMC HAS NOT SHOWN THAT THE JUDGE WAS BIASED AGAINST ITS CASE SUCH THAT IT WAS DENIED DUE PROCESS

CVMC alleges (Br. 70) that it was denied due process because the judge was biased against it. Such bias must normally "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the [trier of fact] learned from [her] participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Rulings and findings not stemming from extrajudicial sources may be found biased only if they show "a predisposition . . . so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994). CVMC has fallen far short of showing either kind of bias.

CVMC variously complains (Br. 22-25) that the judge made biased evidentiary rulings, assisted Board counsel, allowed the Union to manipulate the scheduling of the hearing, exhibited animosity toward CVMC counsel, and discredited some of its witnesses. While a review of CVMC's record citations reveals that these claims are unsupported, overstated, or simply imaginary, even

assuming merit to these assertions, a trier-of-fact can properly and without bias discredit *all* of a party's witness¹³ and clarify testimony.¹⁴ And adverse evidentiary rulings are no more proof of bias than adverse credibility resolutions,¹⁵ intemperate language does not evince bias,¹⁶ and "expressions of impatience, dissatisfaction, annoyance, and even anger" do not establish bias or partiality.¹⁷ Lastly, and as discussed below (pp. 60-61), the same judge who CVMC accuses of bias refused to find a violation that was not alleged in the complaint out of due process concerns. In short, CVMC's claim of bias fails.

VI. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S DETERMINATIONS NOT TO FIND A VIOLATION BASED ON UNALLEGED CONDUCT AND NOT TO ISSUE A REMEDY FOR THAT UNFOUNDED VIOLATION

The Union claims (Br. 17-23) that the Board should have granted its request to find that CVMC violated the Act by maintaining a written rule that prohibited employees from speaking to the media about the Union, which was not alleged in

¹³ See *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659-60 (1949); *Auto Workers v. NLRB*, 455 F.2d 1357, 1368 & n.12 (D.C. Cir. 1971).

¹⁴ See *NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 520 (6th Cir 1987).

¹⁵ See *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 35 (1st Cir. 1981).

¹⁶ See *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 944 & n.4 (D.C. Cir. 1999) (calling allegations by employer counsel "scurrilous").

¹⁷ *Liteky*, 510 U.S. at 555-56.

the complaint or pursued by the General Counsel during proceedings before the administrative law judge. Substantial evidence supports the Board's denial of the Union's request to conform the pleadings.¹⁸

Here, the Board found (UER 202) that the oral prohibition was broad inasmuch as CVMC did not simply instruct employees not to speak to the media *on behalf of* CVMC; rather, CVMC issued a sweeping proscription on any contact with the media. Conversely, the written policy is more restrained. It provides that “[o]nly the designated spokespersons may make statements to the members of the media *on behalf of* [CVMC], its patients, or its employees.” (UER 101.) It then directs employees who are “approached by members of the media, [to] refer them to [CVMC] Administration for assistance.” (UER 101.) This critical distinction between the two prohibitions establishes that the written rule does not, in fact, “closely mirror[]” (U. Br. 18) the oral prohibition that the Board found to have violated Section 8(a)(1). Accordingly, the Board (UER 202), out of due process concerns, denied the Union's post-hearing request to make an unfair-labor-practice finding based on conduct not alleged in the complaint. “The bare minimum of due

¹⁸ The Board maintains that a court should undertake rational basis review of its finding that the Act was not violated. *See Chamber of Commerce v. NLRB*, 574 F.2d 457, 463 (9th Cir. 1978) (citing *Int'l Ladies' Garment Workers v. NLRB*, 463 F.2d 907, 919 (1972)). Notwithstanding this position and without acquiescing to an alternative view, the Board acknowledges that this Court has held that the proper review is substantial evidence. *See Healthcare Employees Union*, 463 F.3d at 918 n.12. Here, the Board satisfies either standard.

process requires that a respondent know ahead of time what it must defend against.” (UER 202.) The Union has failed to show that the Board’s decision is unsupported by substantial evidence.

The cases cited by the Union (Br. 17-21) do not demonstrate a basis for disturbing the Board’s conclusion. Rather, they establish only that the Board “may find and remedy” a violation without a specific complaint allegation, but no case *compels* such action. In short, given the key difference between the written rule and oral prohibition, the Board’s decision not to find a violation where there was neither a complaint allegation nor a request from the General Counsel to conform the pleadings is amply supported by substantial evidence.

Likewise, the Board’s decision not to find that CVMC’s written policy violated Section 8(a)(1) disposes of the Union’s related claim (Br. 23-26) that the Board abused its discretion in not issuing a remedy for the unfound violation. As noted above (pp. 53-54), the Board enjoys broad discretion in fashioning remedies. Once the Board determined that CVMC was not on proper notice concerning the lawfulness of the written policy, there was no violation to remedy.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the petitions for review and enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

Board counsel is unaware of any related cases pending in the Ninth Circuit.

s/ Jill A. Griffin

JILL A. GRIFFIN

Supervisory Attorney

s/ Barbara A. Sheehy

BARBARA A. SHEEHY

Attorney

National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2949
(202) 273-0094

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board
January 2016

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

UNITED NURSES ASSOCIATIONS OF)
CALIFORNIA/ UNION OF HEALTH CARE)
PROFESSIONALS, NUHHCE, AFSCME,)
AFL-CIO)

Petitioner/Cross-Respondent)

v.)

NATIONAL LABOR RELATIONS BOARD)

Respondent/Cross-Petitioner)

and)

VERITAS HEALTH SERVICES, INC., D/B/A)
CHINO VALLEY MEDICAL CENTER)

Intervenor)

VERITAS HEALTH SERVICES, INC., D/B/A)
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Nos. 15-70920, 15-71045,
15-71390

Board Case No.
31-CA-29713

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,914 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 29th day of January 2016

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not by serving a true and correct copy at the address listed below:

Lisa Demidovich, Attorney
UNAC/UHCP
955 Overland Court, Suite 150
San Dimas, CA 91773

Elizabeth Parry, Special Counsel
Littler Mendelson, P.C.
1255 Treat Boulevard, Suite 600
Walnut Creek, CA 94597

Theodore Richard Scott
Littler Mendelson, P.C.
501 W. Broadway, Suite 900
San Diego, CA 92101-3577

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 29th day of January 2016