

Nos. 16-3433, 16-3657

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

NORTH MEMORIAL HEALTH CARE

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**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**

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SUMMARY OF THE CASE

The National Labor Relations Board seeks enforcement of its Order against North Memorial Health Care finding a series of unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act. First, the Board seeks summary enforcement of the uncontested portions of its Order finding that North Memorial violated the Act by discharging an employee because of his union activity, ejecting union representatives and banning them from the facility for a year, selectively removing union literature from a bulletin board, and coercively interrogating an employee about his protected conduct.

The Board also found that North Memorial violated the Act by discriminatorily prohibiting non-employee union representatives from having union-related conversations with employees in the cafeteria, physically interfering with the ability of those representatives to meet with and talk to employees, ejecting a representative and threatening his arrest, unilaterally imposing new restrictions on the activities of representatives in the cafeteria without bargaining, coercively surveilling conversations between employees and union representatives, and prohibiting the wearing of shirts with union insignia in non-patient care areas.

The Board's conclusions are based on established legal principles and factual findings that are supported by substantial evidence in the record. The Board believes that 15 minutes per side for oral argument is appropriate.

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issues	2
Statement of the case.....	3
I. Procedural history	3
II. The Board’s findings of fact	4
A. North Memorial’s cafeteria is open to the public, and employees and union representatives openly and freely have had union-related conversations there for years	4
B. MNA and SEIU plan an informational picket.....	7
C. June 23: North Memorial confronts union representatives Anthony and Scott in the cafeteria, bans them from the facility, and removes union literature from a bulletin board.....	8
D. June 24: North Memorial prohibits union apparel, confronts union presidents Jamie Gulley and Linda Hamilton in the cafeteria, monitors employee conversations with Gulley and Hamilton, and questions Anderson.....	11
E. North Memorial discharges Anderson	14
F. North Memorial confronts Anderson in the cafeteria	16
III. The Board’s conclusions and order	17
Standard of review	18
Summary of argument.....	19

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
Argument.....	21
I. The Board is entitled to summary enforcement of those portions of its Order remedying multiple uncontested unfair-labor-practice violations.....	22
II. North Memorial discriminatorily restricted union activity and communications in the public cafeteria and unilaterally changed its cafeteria-access policy	23
A. North Memorial's access restrictions discriminated against unions and union-related conversations.....	23
B. North Memorial's imposition of new restrictions on cafeteria access without bargaining was an unlawful unilateral change.....	34
III. North Memorial interfered with Section 7 rights by coercively surveilling union activity and banning union apparel.....	41
A. North Memorial coercively surveilled conversations between employees and their union representatives.....	42
B. North Memorial failed to show that special circumstances justified its presumptively unlawful ban on union apparel	45
Conclusion	52

TABLE OF AUTHORITIES

Cases	Page(s)
<i>American Commercial Lines, Inc.</i> , 291 NLRB 1066 (1988)	35-36, 39
<i>Arrow Auto. Indus.</i> , 258 NLRB 860 (1981)	42
<i>Baptist Medical System</i> , 288 NLRB 882 (1988)	30, 31
<i>Baptist Med. Sys. v. NLRB</i> , 876 F.2d 661 (8th Cir. 1989)	25, 30, 31, 32
<i>Beth Israel Hosp. v. NLRB</i> , 437 U.S. 483 (1978).....	21, 46, 47
<i>Brockton Hosp. v. NLRB</i> , 294 F.3d 100 (D.C. Cir. 2002).....	47, 48
<i>Brockton Hosp.</i> , 333 NLRB 1367 (2001).....	28
<i>Carry Cos. of Illinois, Inc.</i> , 311 NLRB 1058 (1993).....	43
<i>Cent. Hardware Co. v. NLRB</i> , 407 U.S. 539 (1972).....	23, 40
<i>Dilling Mech. Contractors, Inc.</i> , 357 NLRB 544 (2011)	24
<i>Eddyleon Chocolate Co.</i> , 301 NLRB 887 (1991).....	43
<i>Ernst Home Ctrs., Inc.</i> , 308 NLRB 848 (1992).....	36, 39

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Flexsteel Indus., Inc.</i> , 311 NLRB 257 (1993)	42
<i>Fremont Med. Ctr.</i> , 357 NLRB 1899 (2011)	42
<i>Frontier Hotel & Casino</i> , 309 NLRB 761 (1992)	32
<i>Frontier Hotel & Casino</i> , 323 NLRB 815 (1997)	35, 39
<i>Golden State Warriors</i> , 334 NLRB 651 (2001)	34-35
<i>Goodyear Tire & Rubber Co.</i> , 357 NLRB 337 (2011)	46
<i>Hawthorn Co.</i> , 166 NLRB 251 (1967)	43
<i>HealthBridge Mgmt., LLC v. NLRB</i> , 798 F.3d 1059 (D.C. Cir. 2015)	45, 46, 47, 48, 50
<i>Holdings Acquisition Co.</i> , 356 NLRB 1151 (2011)	43, 44
<i>Hoschton Garment Co.</i> , 279 NLRB 565 (1986)	43, 44
<i>KGTV</i> , 355 NLRB 1283 (2010)	34, 35
<i>King Soopers, Inc. v. NLRB</i> , 254 F.3d 738 (8th Cir. 2001)	18

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Lechmere, Inc. v. NLRB</i> , 502 U.S. 527 (1992).....	24, 26, 30, 32, 33
<i>Loehmann's Plaza</i> , 316 NLRB 109 (1995).....	32
<i>Loews L'Enfant Plaza Hotel</i> , 316 NLRB 1111 (1995).....	32
<i>Mississippi Transp., Inc. v. NLRB</i> , 33 F.3d 972 (8th Cir. 1994).....	41, 42, 49
<i>Montgomery Ward & Co. v. NLRB</i> , 692 F.2d 1115 (7th Cir. 1982).....	25-26, 27, 43
<i>Montgomery Ward & Co.</i> , 288 NLRB 126 (1988).....	25
<i>Mt. Clemens Gen. Hosp. v. NLRB</i> , 328 F.3d 837 (6th Cir. 2003).....	46
<i>Nat'l Steel & Shipbuilding Co.</i> , 348 NLRB 320 (2006).....	35
<i>New Jersey Bell Telephone Co.</i> , 308 NLRB 277 (1992).....	25, 26, 27
<i>NLRB v. Am. Firestop Solutions, Inc.</i> , 673 F.3d 766 (8th Cir. 2012).....	19
<i>NLRB v. Babcock & Wilcox Co.</i> , 351 U.S. 105 (1956).....	23, 24, 25, 30, 40
<i>NLRB v. Baptist Hosp., Inc.</i> , 442 U.S. 773 (1979).....	21, 47, 49

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. Bolivar-Tees, Inc.</i> , 551 F.3d 722 (8th Cir. 2008)	23
<i>NLRB v. Intertherm, Inc.</i> , 596 F.2d 267 (8th Cir. 1979)	42, 45
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	34
<i>NLRB v. Quick Find Co.</i> , 698 F.2d 355 (8th Cir. 1983)	19, 30
<i>NLRB v. RELCO Locomotives, Inc.</i> , 734 F.3d 764 (8th Cir. 2013)	19, 41
<i>NLRB v. Southern Maryland Hospital Center</i> , 916 F.2d 932 (4th Cir. 1990)	30
<i>Oakwood Hospital v. NLRB</i> , 983 F.2d 698 (6th Cir. 1993)	30
<i>Peerless Food Products, Inc.</i> , 236 NLRB 161 (1978)	39
<i>Porta-King Bldg. Sys. v. NLRB</i> , 14 F.3d 1258 (8th Cir. 1994)	34
<i>Rogers Elec., Inc.</i> , 346 NLRB 508 (2006)	42
<i>St. John's Mercy Health Sys. v. NLRB</i> , 436 F.3d 843 (8th Cir. 2006)	34
<i>St. Luke's Hosp.</i> , 314 NLRB 434 (1994)	45, 47, 50

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Turtle Bay Resorts</i> , 355 NLRB 1272 (2010)	36, 40
<i>W. Lawrence Care Ctr. Inc.</i> , 308 NLRB 1011 (1992)	33
<i>Wal-Mart Stores, Inc. v. NLRB</i> , 400 F.3d 1093 (8th Cir. 2005)	45, 46
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	41

TABLE OF AUTHORITIES

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	22, 23, 24, 34, 41, 44, 45, 50
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 17, 22, 24, 26, 34, 41, 42, 47
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	3, 18, 22
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 18, 22, 34, 36
Section 10(a) (29 U.S.C. § 160(a))	1
Section 10(e) (29 U.S.C. § 160(e))	1, 41
Section 10(f) (29 U.S.C. § 160(f)).....	1

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of North Memorial Health Care for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued on August 2, 2016, and reported at 364 NLRB No. 61. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”). 29 U.S.C. § 160(a). The Court has jurisdiction over this appeal because the Board’s Decision and Order is final under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). The petition and application are timely, as the Act

provides no time limit for such filings. Venue is proper in this circuit because the unfair labor practices occurred in Robbinsdale, Minnesota.

STATEMENT OF THE ISSUES

I. Is the Board entitled to summary enforcement of the uncontested portions of its Order finding unlawful discharge, interrogation, removal of union literature, and bans of union representatives?

- *NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722 (8th Cir. 2008)

II. Does substantial evidence support the Board's finding that North Memorial violated the Act by discriminatorily restricting access to its public cafeteria for union representatives and union-related conversations, and unilaterally imposing those new access restrictions without notice or bargaining?

- *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992); *Turtle Bay Resorts*, 355 NLRB 1272 (2010)
- 29 U.S.C. § 158(a)(1), 29 U.S.C. § 158(a)(5)

III. Does substantial evidence support the Board's finding that North Memorial interfered with Section 7 rights by coercively surveilling union activity and banning union insignia in non-patient care areas?

- *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978); *NLRB v. Intertherm, Inc.*, 596 F.2d 267 (8th Cir. 1979); *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059 (D.C. Cir. 2015); *Hoshton Garment Co.*, 279 NLRB 565 (1986)
- 29 U.S.C. § 158(a)(1)

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Board's General Counsel issued a complaint alleging that North Memorial committed a series of unfair labor practices over the course of four days in June 2014, based on charges filed by SEIU Healthcare Minnesota and the Minnesota Nurses Association. Specifically, the complaint alleged that North Memorial violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by prohibiting union representatives from discussing union matters with employees in the public cafeteria, interfering with the ability of union representatives to talk with employees, removing and threatening to arrest a union representative, banning two union representatives from the facility for a year, prohibiting an employee from posting union-related information on a bulletin board, surveilling employees' union activity, coercively interrogating an employee about his union activity and threatening that his activities were under surveillance, and instructing an employee and union representatives to remove union apparel or leave the building. The complaint further alleged that North Memorial violated Section 8(a)(3) and (1), 29 U.S.C. § 158(a)(3) and (1), by discharging an employee for engaging in protected union activity, and Section 8(a)(5) and (1), 29 U.S.C. § 158(a)(5) and (1), by unilaterally imposing new restrictions on union representatives' access to the cafeteria and banning two representatives for a year.

The case was submitted to an administrative law judge, who held a hearing and issued a decision and recommended order finding those violations as alleged.¹ On review, the Board affirmed the judge’s findings and conclusions, and adopted the judge’s recommended order, as modified.

II. THE BOARD’S FINDINGS OF FACT

A. North Memorial’s Cafeteria Is Open to the Public, and Employees and Union Representatives Openly and Freely Have Had Union-Related Conversations There for Years

North Memorial operates an acute-care hospital in Robbinsdale, Minnesota.¹ The Minnesota Nurses Association (“MNA”) represents approximately 1,000 registered nurses employed at North Memorial. SEIU Healthcare Minnesota (“SEIU”) represents approximately 900 North Memorial employees in four bargaining units: service workers, pharmacists, licensed practical nurses, and home-health workers. The two unions have served as collective-bargaining representatives of North Memorial employees for decades. (JA 5; JA 127, 152.)²

The main public entrance to North Memorial opens into an atrium with a coffee shop and a gift shop. Down the hall from the atrium is a cafeteria, where many employees take their meal breaks. North Memorial has no policy limiting

¹ The judge dismissed additional complaint allegations, which are not at issue in this appeal.

² “JA” citations are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; cites following a semicolon are to supporting evidence. “Br.” cites are to North Memorial’s opening brief to the Court.

what topics employees can discuss in the cafeteria. (JA 5-6; JA 310, 373, 472, 805-06, 953-54, 985.) The cafeteria is also open to the public. There are no limits on visitors speaking with employees, or on the content of their conversations. Nor is there a rule against visitors' use of electronic equipment such as laptops or smart phones. (JA 6, 9; JA 161, 303.)

For a number of years, non-employee union representatives from SEIU and MNA have regularly sat with and spoken to off-duty North Memorial employees in the cafeteria. Those encounters did not always consist of prearranged times with particular employees, and have included union representatives initiating conversations with employees as well as employees waving down representatives they saw there. (JA 5-6; JA 156-57, 238, 324-26, 380.) North Memorial has no general rule against union representatives accessing the cafeteria, and those representatives have been allowed to discuss union business while there. (JA 6; JA 303, 378, 413, 807-08.) For example, SEIU organizer Fred Anthony visited the cafeteria every time he was at North Memorial, which was every day or every other day. Prior to becoming SEIU president in 2012, SEIU representative Jamie Gulley met monthly with employees in the cafeteria. (JA 6; JA 238, 380.) MNA organizer Karlton Scott and labor-relations specialist Joseph McMahon came to North Memorial one to three days a week, and went to the cafeteria on most of those visits. (JA 6; JA 156-57, 324-25.) North Memorial was aware of that

practice, and had observed such conversations. (JA 6; JA 387, 851.) North Memorial labor-relations representative George Wesman also had spoken to SEIU organizer Anthony about pending grievances while Anthony was in the cafeteria. (JA 6; JA 379.)

Prior to the June 2014 events in this case, North Memorial had never spoken to MNA about any limits on access to the cafeteria. (JA 7, 24; JA 156-57, 325, 413.) At various points in prior years, North Memorial had told SEIU that SEIU could not hold “meetings, activities, or events” (JA 1010) there. It had also told SEIU that it did not consider gatherings of two or three individuals that included union representatives to be “meetings,” and that such gatherings were acceptable. Otherwise, North Memorial had never set the number of people that it believed would constitute a meeting. (JA 6, 25; JA 139-42, 306-07, 808-09, 851-52.) In 2013, North Memorial prohibited SEIU from holding a pre-planned, ten-person stewards’ meeting in the cafeteria, and objected to non-employee candidates for union office campaigning there. (JA 6; JA 143-44, 271-72, 1009-11.) At no point during the events at issue in this case did North Memorial tell SEIU or MNA that it wished to bargain over union access to the cafeteria or other public areas in the building. (JA 7; JA 138-39, 164-65, 247.)

Article 1(H) of the collective-bargaining agreement between North Memorial and SEIU provides that SEIU “shall have access at all reasonable times

to ... nonpatient nonpublic areas to be designated by [North Memorial] to discharge the employee's duties as representative of the Union.” (JA 8; JA 1090.) Pursuant to Article 1(H), North Memorial designated two non-public areas for use by SEIU—a collection of tables on the lower level beneath the atrium and an alcove off the hallway near an underground tunnel to a parking ramp. Individuals do not often congregate in those areas. The MNA collective-bargaining agreement does not have an analogous provision regarding designated non-public areas, but North Memorial has designated a room on the lower level as an MNA office. Neither contract addresses union access to public areas at North Memorial. (JA 5, 8; JA 703-07.)

B. MNA and SEIU Plan an Informational Picket

In early June 2014, MNA and SEIU informed North Memorial that they intended to hold an informational picket to address changes in staffing levels and scheduling. The picket was to occur on public property near North Memorial on June 24. (JA 8; JA 987, 1258.) In preparation for the picket, North Memorial hired additional outside security guards and arranged to have employee “greeters” at the entrances. It instructed the guards and greeters to tell anyone wearing an SEIU or MNA t-shirt not to enter the building, or else to change or cover the shirt. Prior to that instruction, North Memorial did not limit what visitors to the hospital could wear, and did not maintain a dress code for off-duty employees. (JA 9;

JA 182, 209, 212, 534-37.) In a letter to employees, North Memorial director of labor relations Jeffrey Cahoon stated that “North Memorial has no reason to believe that the picketers will engage in any improper conduct.” (JA 8; JA 1277.)

C. June 23: North Memorial Confronts Union Representatives Anthony and Scott in the Cafeteria, Bans Them from the Facility, and Removes Union Literature from a Bulletin Board

On June 23, SEIU organizer Anthony and MNA organizer Scott met at North Memorial to update information about the picket on the break-room bulletin boards. They met in the cafeteria, where Scott worked on his laptop while Anthony finished his lunch. Anthony had flyers regarding the picket in a closed manila envelope, but they were not visible and he did not hand them out unless somebody asked for one. While the two men were seated, off-duty employee and SEIU steward Harold Evenson approached to ask Anthony a question. Two other employees were seated nearby, but did not speak to Anthony or Scott. (JA 9; JA 229-34, 326-28.)

As Anthony and Evenson spoke, North Memorial labor-relations officials Wesman and Cahoon came to the table. Cahoon told them that he was disappointed that they were having a union meeting in the cafeteria, and that they were not allowed to do so; he referenced the designated non-public areas as the location “for this” (JA 870). Evenson left the area shortly after Wesman and Cahoon arrived. Cahoon asked Scott who he was, and, after Scott responded that

he was an MNA representative, Cahoon again stated that he was disappointed. Anthony and Scott denied that they were holding a meeting; Scott pointed out, and Cahoon acknowledged, that no MNA members were present. Cahoon stated that he would have to think about how to respond, and that he might file an unfair-labor-practice charge. Wesman and Cahoon walked away and, shortly afterward, Anthony and Scott left the cafeteria. Cahoon then called MNA labor-relations specialist McMahon to report seeing Scott in the cafeteria, and told McMahon that North Memorial was going to take aggressive action and send a strong message. (JA 9; JA 160, 132-36, 328-30, 870-71.)

Later that afternoon, Wesman, Cahoon, and North Memorial security manager Rick Ramacher confronted Anthony and Scott in an upper-floor employee break room where Anthony and Scott were posting flyers on a bulletin board. Cahoon stated that they were again not where they were supposed to be, that they were going to be banned from the facility, and that the police had been called. Wesman, Cahoon, Ramacher, and two uniformed security guards thereafter escorted Anthony and Scott down the hallway to the elevator, down to the atrium level, and from the elevator to the security office on that floor. On the way, the group passed by a number of bargaining-unit employees, patients, and families. In response to Scott's repeated questions as to what they had done wrong, Cahoon

stated only that it was not a coincidence that Anthony and Scott were together in the building the day before the picket. (JA 10; JA 237-42, 332-34.)

Robbinsdale police officers were present in the security office, and handed Anthony and Scott “trespass warnings” prepared by North Memorial. The documents stated that the two men were banned from the premises for a year and that failure to comply would result in arrest. (JA 10; JA 142-44, 336, 1260-61.) Under “explanation of issuance,” the warnings listed “conducting business in unauthorized areas and after being told to stay out of public/patient areas.” (JA 10; JA 1260-61.) Police officers escorted Anthony and Scott out of the building. (JA 10; JA 337, 735.)

Also on the 23rd, North Memorial employee and SEIU steward Melvin Anderson posted a flyer about the picket on the bulletin board in the sterile-processing/dispensing department where he worked. The department is a non-patient care area. Wesman saw the flyer and contacted department manager Judy Gubbins. Later that day, Gubbins removed the flyer and returned it to Anderson. She told him that he could not post that flyer, but that he could post other material, such as invitations to an SEIU promotional event for members and their families at the Minnesota Zoo. Anderson had posted union flyers on the bulletin board in the past without incident, and had never been told that such postings were not permitted. On prior occasions, Gubbins had posted flyers from North Memorial

responding to union flyers on the bulletin board. She had never before removed material that Anderson had posted on the board. (JA 10; JA 435-36, 444-47, 754-55, 1262.)

D. June 24: North Memorial Prohibits Union Apparel, Confronts Union Presidents Jamie Gulley and Linda Hamilton in the Cafeteria, Monitors Employee Conversations with Gulley and Hamilton, and Questions Anderson

The informational picket occurred as planned on June 24. Approximately 500 people participated in the day-long event, which was held in a public park. (JA 5; JA 159-60.)

Registered nurse Richard Geurts joined the picket after working the night shift. After about an hour and a half, he returned to North Memorial to go to the employee locker room and retrieve his belongings. Geurts was wearing a red MNA t-shirt, which had the name and insignia of the union on the front and was blank on the back; it did not reference the picket. Other picketers were wearing the same type of shirt, which was a common MNA shirt. In the atrium, Geurts was approached by North Memorial vice president of human relations Dave Abrams, who insisted that Geurts could not wear the shirt inside the building. Geurts then removed the MNA shirt, and stood bare-chested in the North Memorial atrium while he took another shirt out of his bag and put it on. (JA 11; JA 154, 181-86.)

Later that day, SEIU president Jamie Gulley and MNA president Linda Hamilton, who were present for the picket, went to the North Memorial cafeteria to

eat lunch. Gulley was wearing a purple SEIU t-shirt and Hamilton a red MNA t-shirt. Neither had arranged to meet with any employees while there. When they finished eating, Gulley and Hamilton walked towards the coffee shop in the atrium. On the way, they passed employee and MNA member Kevin Morse, who told them about the incident with Abrams and Geurts. While the three of them were speaking, a security guard approached and told Gulley and Hamilton that they could not wear the union shirts. Morse told the guard that Gulley and Hamilton were the presidents of SEIU and MNA, and then left to return to work. Gulley asked the guard if he was going to remove them from the building for wearing the shirts, and the guard responded that he would return in a few minutes, and left. As Gulley waited by the coffee shop while Hamilton used the restroom, the guard returned with a supervisor, who again stated that Gulley could not be in the building in his union shirt. Gulley again asked if he would be removed for doing so, and the supervisor said that he would check with human resources. After Gulley bought a coffee, two nurse managers approached and told Gulley and Hamilton that they needed to either remove their shirts or leave, and offered to escort them out. Gulley refused to remove his shirt, and he and Hamilton left the coffee shop and returned to the cafeteria. (JA 11-12; JA 195-96, 362-72, 417-20.)

As soon as Gulley and Hamilton entered the cafeteria with their coffee, they were surrounded by six security guards. The two presidents were asked who they

were and what they planned to do. A supervisory guard stated that they could not conduct union business in the cafeteria, referenced the designated non-public areas as places where they could talk to employees about union business, and offered to escort them out of the building. Hamilton asked for the definition of “union business,” but got no answer. Cafeteria patrons were watching the encounter. (JA 12; JA 372-74, 421-24.)

Gulley and Hamilton walked around the guards and approached a table with three to seven seated employees and asked if they could join them for a break. The employees agreed, and Gulley and Hamilton sat down. One of the employees asked Gulley a question, and, as Gulley started to answer, Wesman, Cahoon, and Ramacher approached the table and interrupted. Cahoon told them they could not conduct union business in the cafeteria, and asked what they were talking about. He asked if they were discussing the union or the Minnesota Twins game, and said they could talk about other things like baseball, but not union business. And he added that, if Gulley, Hamilton, and the employees were just talking about general things, they would not mind if he sat nearby. Cahoon, Wesman, and Ramacher proceeded to sit down at a table three to six feet away and watch Gulley, Hamilton, and the employees. At that point, the employees stopped talking and started to leave. After a few minutes, Gulley and Hamilton left as well. (JA 12; JA 374-77, 424-27, 737-38, 880-81.)

Elsewhere on the 24th, Wesman approached employee and union steward Anderson in the North Memorial atrium and asked if he had put the SEIU flyers on the sterile-processing/dispensing department bulletin board the previous day. Anderson admitted that he had, and Wesman told him the posting was unauthorized. Wesman challenged Anderson's account that SEIU representative Anthony had not been with Anderson in the sterile-processing/dispensing department for the posting, saying that he had watched Anderson with Anthony the previous day. He also mentioned that posting on bulletin boards was a reason Anthony had been banned from the facility. At one point, Anderson told Wesman that "I won't post" and "You won, George. Y'all won." After more back and forth about bulletin boards and SEIU, Anderson concluded the encounter by telling Wesman "Alright. I just quit. I quit. Period. You won't hear from me from no union stuff. Period. Somebody else can do it. Alright. You won." (JA 10-11; JA 447-52, 1263-67.)

E. North Memorial Discharges Anderson

Anderson worked as a sterile-processing/dispensing aide and case-cart aide at North Memorial for eleven years. For seven of those years, he served as an SEIU steward and a member of its executive board and negotiating committee. Although sterile-processing/dispensing department manager Judy Gubbins generally considered him a very good employee, Anderson had tardiness issues for

the entirety of his career at North Memorial. (JA 12-13; JA 435-36, 441, 473-74, 680-81.) Under North Memorial's written guidelines regarding employee tardiness, a full-time employee will receive a coaching after six instances of clocking in five minutes or more late within a twelve-month period, a verbal warning at nine such instances, a written warning at twelve, unpaid suspension at fifteen, and termination at eighteen. Clocking in less than five minutes late is addressed as part of an employee's annual performance appraisal, but a "discernible pattern" of such tardiness may be addressed through the disciplinary process. (JA 13; JA 1268.)

On June 9, Gubbins wrote to North Memorial attendance manager Stacey Sylvester explaining that Anderson had been more than five minutes late to work on a total of twelve occasions in the rolling twelve-month period. He also had seventy-four occurrences of being late five minutes or less. Gubbins asked what level of discipline to impose, and floated the possibility of a written warning or a suspension. Sylvester responded that the tardiness guidelines pointed to a written warning, but that she was not sure whether Anderson's previous suspension for tardiness warranted bumping the discipline up to another suspension. (JA 13; JA 505, 1063-64.)

On June 11, Gubbins forwarded her exchange with Sylvester to labor-relations representative Wesman and asked what he recommended. Wesman asked

Gubbins what she wanted to do. (JA 13-14; JA 1062-63.) On June 19, Gubbins asked Sylvester whether they could suspend Anderson for more than one day. (JA 14; JA 1081.) She wrote to Sylvester again on the morning of June 25—the day after the picket—and asked whether, based on the guidelines, they could do a two-day suspension. Sylvester sent her a template suspension document. (JA 14; JA 1291.) In the early afternoon, Gubbins sent a two-day suspension notice to Wesman and asked how it looked to him. (JA 14; JA 1285-86.) Sixteen minutes later, Wesman wrote back that he did not agree and that termination was warranted. Wesman’s response was the first time that discharge had been raised, and came the day after Wesman had questioned Anderson about posting SEIU flyers. (JA 14; JA 685, 1287.) Anderson had not been late to work since June 9, sixteen days earlier. (JA 14; JA 683-84.)

On June 27—his first day back at work after the picket—Anderson was discharged. Gubbins told him that he was being terminated for a pattern of tardiness. (JA 15; JA 457-59, 1269.)

F. North Memorial Confronts Anderson in the Cafeteria

SEIU hired Anderson as an organizer after he was discharged by North Memorial. On August 21, Anderson came to North Memorial, bought a cup of coffee, and sat in the cafeteria. Noticing a new employee, he introduced himself and began to speak with her. After a few minutes, Wesman approached and asked

to talk to Anderson. Anderson gave his business card and some flyers to the employee, then followed Wesman. Walking towards the exit, Wesman told Anderson that unions were not allowed in the cafeteria, as well as that Anderson was not allowed to conduct union business there and, if he did so again, he would be banned from North Memorial and arrested. Anderson was then escorted out of the building by security. (JA 16; JA 465-70, 596-97, 787-88.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On August 2, 2016, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued a Decision and Order finding that North Memorial violated Section 8(a)(1) of the Act by prohibiting non-employee SEIU and MNA representatives from having non-disruptive union-related conversations in the public cafeteria, physically interfering with the ability of those representatives to meet with and talk to employees in the cafeteria, ejecting a union representative and threatening his arrest, coercively surveilling conversations between employees and union representatives, ejecting union representatives Anthony and Scott and banning them from the facility because of their union-related conversations, prohibiting employee Anderson from posting union material on the bulletin board in the sterile-processing/dispensing department, coercively interrogating Anderson and threatening surveillance, and prohibiting an off-duty employee and union representatives from wearing shirts with union insignia in non-patient care areas.

The Board further found that North Memorial violated Section 8(a)(3) by discriminatorily discharging Anderson based on his union activities, and Section 8(a)(5) by unilaterally imposing new restrictions on the activities of non-employee union representatives in the cafeteria and banning Anthony and Scott from the building pursuant to those restrictions.

The Board's Order requires North Memorial to cease and desist from the violations found and from interfering with employee rights in any like or related manner. Affirmatively, the Order directs North Memorial to rescind the restrictions on union representatives' activities in the cafeteria, on posting union material on the sterile-processing/dispensing department bulletin board, and on wearing shirts with union insignia, as well as the trespass notices issued to Anthony and Scott. It also requires North Memorial to offer full reinstatement to Anderson, make him whole for any loss of earnings and other benefits as a result of the discrimination against him, and remove any reference to his discharge from its files. Finally, North Memorial must post a remedial notice, which also must be read aloud to employees by a North Memorial official or a Board agent.

STANDARD OF REVIEW

The Court "affords the Board's order great deference," *King Soopers, Inc. v. NLRB*, 254 F.3d 738, 742 (8th Cir. 2001), and "will enforce the Board's order if it has correctly applied the law and its factual findings are supported by substantial

evidence on the record as a whole.” *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 779-80 (8th Cir. 2013) (internal quotation marks omitted)); *see also* 29 U.S.C. § 160(e) (Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole”). “‘Substantial evidence’ is evidence that ‘a reasonable mind might accept as adequate to support’ a finding.” *NLRB v. Am. Firestop Solutions, Inc.*, 673 F.3d 766, 768 (8th Cir. 2012) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). The Court “afford[s] great deference” to the Board’s credibility determinations, *RELCO Locomotives*, 734 F.3d at 787, which it will not overturn “[a]bsent a showing of extraordinary circumstances,” *NLRB v. Quick Find Co.*, 698 F.2d 355, 359 (8th Cir. 1983).

SUMMARY OF ARGUMENT

In the days surrounding a peaceful informational picket by its employees, North Memorial engaged in a series of unfair labor practices that interfered with those employees’ ability to communicate with their chosen representatives and otherwise disrupted the collective-bargaining relationship. Many of those violations are uncontested in this appeal, and the portions of the Board’s Order as to them are entitled to summary enforcement.

In addition, the Board’s finding that North Memorial violated the Act by selectively prohibiting unions and union-related conversations in its public

cafeteria is supported by substantial evidence and is grounded on the well-established non-discrimination principle that governs access to employer property for non-employee union representatives. Because those broad restrictions broke with past practice and were imposed without notice or bargaining, they also constituted unlawful unilateral changes to employees' terms and conditions of employment. North Memorial's arguments to the contrary understate the scope of its restrictions on union activity and communication, and are premised largely on a version of events inconsistent with the credited evidence.

Compounding the deleterious effect of those violations, North Memorial also coercively surveilled conversations in the cafeteria between employees and their union representatives by monitoring such interactions from close proximity as part of an effort to stop them. The unfair labor practices continued with a ban on union apparel, for which North Memorial had no evidence to rebut the presumption of invalidity that attaches to such bans in non-patient care areas. North Memorial's aggressive and confrontational response to union activity violated its employees' rights under the Act, and undermined the tranquility that it claims its actions were meant to foster.

ARGUMENT

North Memorial responded to its employees' protected union activity of an informational picket with a barrage of unfair labor practices—many of which are uncontested—that interfered with or retaliated against the exercise of their rights under the Act. Its campaign of threats, force, prohibitions, and retaliation reveals a confrontational approach to labor relations that belies the contention that its actions were directed at maintaining a calm environment.

Although North Memorial has a legitimate interest in providing uninterrupted patient care, it receives no immunity for its labor-law violations simply because it is a hospital. Employees in the healthcare setting have rights under the Act, and restrictions on union activity in non-patient care areas are presumptively unlawful. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 495, 507 (1978). By contrast, such limits in immediate patient-care areas are presumptively valid. *Id.* at 495. As the Supreme Court has recognized, “Congress has committed to the Board the task of striking the appropriate balance among the interests of hospital employees, patients, and employers” when labor-relations issues arise in such settings. *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 779 (1979). The Board’s findings and conclusions in this case are aligned with those principles and well-supported by the credited evidence.

I. The Board Is Entitled to Summary Enforcement of Those Portions of Its Order Remediating Multiple Uncontested Unfair-Labor-Practice Violations

North Memorial does not contest the Board’s finding that it committed multiple unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act during and in the days surrounding the informational picket. Specifically, North Memorial broaches no challenge to the finding that it violated Section 8(a)(3), which prohibits “discrimination in regard to hire or tenure of employment ... [to] discourage membership in any labor organization,” 29 U.S.C. § 158(a)(3), by discharging employee and union steward Melvin Anderson because of his union activity. In addition, North Memorial does not deny that it “interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of the rights guaranteed” in Section 7 in violation of Section 8(a)(1), 29 U.S.C. § 158(a)(1), by ejecting union representatives Anthony and Scott and banning them from the facility for a year, selectively removing union literature from the sterile-processing/dispensing department bulletin board, and coercively interrogating Anderson about his protected conduct and threatening surveillance of that conduct. Nor does it challenge the finding that it violated Section 8(a)(5)’s prohibition on an employer “refus[ing] to bargain collectively with the representatives of his employees,” 29 U.S.C. § 158(a)(5), by banning Anthony and Scott. Accordingly, “[t]he Board is entitled to summary enforcement of th[os]e uncontested portions of its order.”

NLRB v. Bolivar-Tees, Inc., 551 F.3d 722, 727 (8th Cir. 2008) (internal quotation marks omitted).

II. North Memorial Discriminatorily Restricted Union Activity and Communications in the Public Cafeteria and Unilaterally Changed Its Cafeteria-Access Policy

Along with its other unfair labor practices surrounding the informational picket, North Memorial interfered with and imposed new restrictions on the ability of employees and union representatives to meet and communicate in the public cafeteria, including by prohibiting union-related conversations. Based on established legal principles and its factual findings, the Board determined that those restrictions violated the Act both as discriminatory limits on union activity and as unilateral changes to the employees' terms and conditions of employment.

A. North Memorial's Access Restrictions Discriminated Against Unions and Union-Related Conversations

Courts and the Board have long recognized that communication with fellow employees and union representatives is core to an employee's right under Section 7 of the Act to "engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157. That is, "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956); *see also Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972) (noting "the importance of freedom of communication to the free

exercise of organization rights,” including “union officials ... discuss[ing] organization with employees” and employees “discuss[ing] organization among themselves”).

Employer limits on the ability to communicate thus may violate Section 8(a)(1). Accordingly, although an employer generally can decide who may enter its facility, the Supreme Court has recognized that “§ 7 of the NLRA may, in certain limited circumstances, restrict an employer’s right to exclude nonemployee union organizers from his property.” *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992). An employer cannot, for example, discriminate against union activity by selectively denying access to union representatives or prohibiting them from discussing union matters at the same time that it allows other non-employee access or communications. *Babcock & Wilcox*, 351 U.S. at 112; *Dilling Mech. Contractors, Inc.*, 357 NLRB 544, 551 (2011).³

Under that principle, an employer commits an unfair labor practice by maintaining or enforcing “access rules [that] discriminate against union solicitation,” *Lechmere*, 502 U.S. at 535 (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978)), or distribution of union material, *Babcock*

³ Employer restrictions on union access also are unlawful if the union has “no other reasonable means of communicating its organizational message to the employees,” *Lechmere*, 502 U.S. at 535 (internal quotation marks omitted), but that principle is not implicated by the case at bar.

& Wilcox, 351 U.S. at 112; accord *Baptist Med. Sys. v. NLRB*, 876 F.2d 661, 664 (8th Cir. 1989) (“[A]n employer may not discriminate by allowing some nonemployee solicitation activity and prohibiting such activity by union organizers.”). Similarly, an employer that operates a restaurant in its facility that is otherwise open to the public may not “prohibit a union organizer from utilizing its restaurant solely because the organizer was discussing organizational activities with off-duty employees.” *Montgomery Ward & Co.*, 288 NLRB 126, 127 (1988), *enforcement denied on other grounds*, 904 F.2d 1156 (7th Cir. 1990). Invoking *Babcock & Wilcox*, the Board has explained that such a policy “flies in the face of the Supreme Court’s admonition against discrimination ... when determining the propriety of access restrictions.” *Id.*

The Board thus found unlawful discrimination in *New Jersey Bell Telephone Co.* where the employer maintained an access policy that applied only to union representatives and only when they spoke to employees about union matters; discussions of non-union topics, such as baseball, were permitted. 308 NLRB 277, 281 & n.16 (1992). Such a rule “directed only against the conduct of ‘union business’” was “invalid on its face.” *Id.* at 305. Likewise unlawful were the employer’s actions in *Montgomery Ward & Co. v. NLRB*, in which a company official enforced a no-solicitation policy against union representatives sitting with off-duty employees in the cafeteria because he assumed they were talking about

union matters, even though he had never enforced the policy against any other group. 692 F.2d 1115, 1122-23 (7th Cir. 1982). By contrast, the access rule in *Lechmere* was lawful because it applied to all non-employees—Girl Scouts as well as unions. 502 U.S. at 530 & n.1.

Substantial evidence supports the Board’s finding that North Memorial discriminatorily prohibited union representatives Anthony, Scott, Gulley, Hamilton, and Anderson from speaking to off-duty employees in the cafeteria because of the union-related nature of their conversations, and otherwise interfered with their ability to meet with employees there. Such selective denial of access to a public, non-patient care area violates Section 8(a)(1) of the Act.

North Memorial repeatedly told SEIU and MNA representatives that they could not talk about union matters in the cafeteria. Yet North Memorial does not otherwise restrict the topics that visitors can discuss with employees there. The discriminatory approach was made clear by labor-relations director Cahoon, who stated expressly that Gulley and Hamilton could talk only “about other things” (JA 738) besides the union and “can talk about the Twins, but ... can’t talk about union business” (JA 425). As under the unlawful policy in *New Jersey Telephone*, 308 NLRB at 281 & n.16, union representatives were permitted to speak with employees about baseball, but not about union matters. As the Board found, Cahoon’s distinction between permissible non-union subjects and impermissible

union subjects shows that “exactly the same cafeteria gathering ... would have been fine with [North Memorial] as long as it did not involve the discussion of union matters.” (JA 21.)

Similarly, Gulley, Hamilton, and Anderson were told that they could not engage in “union business” (JA 373, 422, 469), even though access restrictions “directed only against ... ‘union business’” are precisely what the Board found illegal in *New Jersey Telephone*, 308 NLRB at 305. Cahoon and labor-relations representative Wesman likewise interrupted Anthony’s conversation with employee Evenson to tell them that they were not allowed to do “this” in the cafeteria (JA 870). Cahoon repeated that same instruction after learning that Scott was an MNA representative, even though he was only sitting at a table using his laptop—an activity that is not otherwise prohibited. And none of the interactions between employees and representatives involved signs, outbursts, table-to-table solicitation or distribution, or other disruptive activity that might have provided neutral grounds for North Memorial’s actions; its restrictions were instead “based solely on the union content of the conversations.” (JA 21.) Like the access policies in *New Jersey Telephone*, 308 NLRB at 281, 305, and *Montgomery Ward*, 692 F.2d at 1122-23, such content-based, union-only restrictions are unlawful.⁴

⁴ In its brief, North Memorial contends that its access restrictions were “justif[ied]” by the existence of the one-day picket (Br. 47-48), but it gave no indication to employees and union representatives that its unqualified prohibition

The record evidence further shows that North Memorial selectively interfered with union representatives in other ways, as well. Despite the lack of any formal, neutral policy regarding non-employee access, Wesman singled out SEIU and MNA by informing Anderson that unions were not allowed in the cafeteria, then ejecting him from the building and threatening to have him arrested after he spoke with an off-duty employee there. North Memorial also physically interfered with Gulley’s and Hamilton’s ability to talk to employees by surrounding them with a phalanx of security guards when they entered the cafeteria and interrogating them as to their identity and purpose. Certainly no other non-employee visitors must face such an ordeal when taking a coffee break.⁵

on union communications was limited to that day or that context. And it repeated those prohibitions to Anderson in August—nearly two months after the picket. In any event, “special circumstances” (Br. 47) cannot justify North Memorial’s facially discriminatory policy; indeed, even otherwise valid restrictions on union activity are unlawful if applied discriminatorily. *See, e.g., Brockton Hosp.*, 333 NLRB 1367, 1375 (2001), *enforced*, 294 F.3d 100 (D.C. Cir. 2002).

⁵ North Memorial does not defeat the Board’s finding of discrimination by characterizing the representatives’ presence in the cafeteria as a “meeting.” (Br. 18-19, 23, 44.) North Memorial has no generally applicable policy prohibiting “meetings” in the cafeteria or limiting other types of visitors as to their number. At most, North Memorial had told SEIU—and SEIU only—that “meetings” between some undefined number of employees and union representatives in the cafeteria were prohibited. In any event, as explained *infra* pp. 37-38, the representatives’ visits in this case were of a nature that North Memorial had said it did not consider to be meetings.

Highlighting that evidence, the Board found that North Memorial “violated the Act by discriminating against ... union-related conversations” and that those selective restrictions were “in clear violation of the *Babcock & Wilcox* rule.” (JA 20-21.) North Memorial’s factual challenge (Br. 42-46) to that finding understates the scope of its restrictions on union activity. The prohibition was not, as North Memorial would have it, limited to restricting representatives from “meeting with multiple employees, passing out literature, and catching employees coming and going” (Br. 45-46). North Memorial’s contention (Br. 44) that no other non-employee visitors had engaged in such conduct is thus beside the point.⁶ The Board’s finding was based instead on North Memorial’s broad prohibition on discussing union-related matters in the cafeteria. The correct point of comparison is thus whether other types of conversations were allowed, and Cahoon’s own statements show that they were.⁷

⁶ North Memorial’s assertion that the Board “failed to show that [North Memorial] had ever permitted such use” (Br. 45) is similarly immaterial. And because the Board’s General Counsel presented the direct evidence of discrimination described above, there is no merit to North Memorial’s broader contention (Br. 43-46) that the Board shifted the burden of proof to it.

⁷ North Memorial’s argument is also premised on a description of the union representatives’ cafeteria visits that is not borne out by the credited evidence. As detailed below, pp. 37-38, Anthony and Anderson each spoke to only one employee, and Scott spoke to none. Neither Gulley and Hamilton nor Scott had any union literature. Anthony had a closed folder of flyers, and gave one out only if asked; he supplied flyers to requesting employees elsewhere in the building, but did not recall whether he did so in the cafeteria (JA 231-32, 293). Only Anthony

North Memorial's remaining arguments fare no better, as they evince a similar misunderstanding of the Board's decision. Given that the Board's decision was firmly and expressly grounded in the well-established non-discrimination principle articulated in cases like *Babcock & Wilcox* and *Lechmere*, this case is not, as North Memorial claims (Br. 39-41), ruled by *Baptist Medical System v. NLRB*, 876 F.2d 661 (8th Cir. 1989) (*Baptist Medical II*), denying enforcement to *Baptist Medical System*, 288 NLRB 882 (1988) (*Baptist Medical I*). In *Baptist Medical II*, the Court expressly held that the employer "did not engage in discrimination against the union," and that its restrictions on union representatives were based on a generally applicable access rule. 876 F.2d at 662, 664. North Memorial has no such facially neutral rule.⁸ Further, the facts that concerned the Court in *Baptist Medical II* are not present here. At no point did MNA or SEIU representatives display an open box of union literature or dispatch employees to solicit co-workers to come over and speak to them. *Id.* at 664. And rather than forbidding "blatant

passed out literature unsolicited, and only to one employee. North Memorial's contrary description of events is based largely on its own witnesses' accounts and assumptions rather than on the credited testimony. Yet it makes no contention that "extraordinary circumstances" exist so as to warrant overruling the Board's credibility determinations. *Quick Find Co.*, 698 F.2d at 359.

⁸ As in *Baptist Medical II*, and unlike here, the courts in North Memorial's other cited cases (Br. 40) of *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 937 (4th Cir. 1990), and *Oakwood Hospital v. NLRB*, 983 F.2d 698, 702-03 (6th Cir. 1993), also found no evidence of discrimination.

promotional activity,” North Memorial prohibited “casual conversation” between employees and their representatives about the unions. *Id.* at 664-65.⁹

The Board relied here on parts of its own decision in *Baptist Medical I*, but North Memorial is incorrect in suggesting (Br. 38-41) that the Board is simply repeating the legal analysis that the Court rejected when denying enforcement. In *Baptist Medical II*, the Court read the Board’s decision as standing for the proposition that “union organizers essentially must be granted access so long as their activity is not disruptive of the facility’s operation,” even if the employer had a generally applicable access restriction. 876 F.2d at 664. But the Board did not apply such a per se rule here.¹⁰ Nor was the Board’s analysis limited to whether the union representatives simply “use[d] the public facility in a manner consistent with its intended use,” *id.* at 663, but instead looked to whether their use was selectively limited. Further, the Board here cited *Baptist Medical I* as an example

⁹ North Memorial’s attempt (Br. 41-42) to analogize the conduct in this case to *Baptist Medical II* is premised on the same flawed characterization of the facts discussed above, pp. 29-30.

¹⁰ The Board did not, as North Memorial asserts (Br. 41), “find as dispositive the fact that the union activity in the cafeteria was not disruptive.” The lack of disruptive conduct by SEIU or MNA representatives served as evidence supporting the Board’s finding of discrimination, by showing that North Memorial had no reason for the restrictions other than the union-related nature of the conversations. But it was not the sole basis for the Board’s decision, given the direct evidence of North Memorial’s selective, content-based restrictions on cafeteria access and conversation.

of the non-discrimination principle, noting that its holding “squarely rest[s] on the nondiscrimination rule that the Supreme Court set forth in *Babcock & Wilcox*.” (JA 21.) And the Court in *Baptist Medical II* recognized that principle—that access policies that discriminate against union activity violate the Act—as “[u]nquestionabl[e].” 876 F.2d at 664.

Similarly, because North Memorial’s access restrictions fall within the non-discrimination exception recognized in *Lechmere*, 502 U.S. at 535, North Memorial finds no support by invoking (Br. 32-34) that case’s holding that an employer generally can exclude non-employee union organizers. In addition, as the Board noted (JA 21), *Lechmere* did not involve the situation presented here where the union is not seeking to organize employees in the facility, but is already their recognized bargaining representative. Cf. *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992) (banning union representatives from facility unlawfully “restrain[ed] ... employees who were engaging in the union activity of conversing with their bargaining representative”; no discussion of *Lechmere*), *enforced*, 71 F.3d 1434 (9th Cir. 1995).¹¹ Ultimately, the Court need not decide whether

¹¹ The cases that North Memorial cites (Br. 33-35) for the proposition that *Lechmere* extends beyond the initial organizing context involved union agents using the employer’s property to communicate with the public as part of a picket or boycott. See, e.g., *Loehmann’s Plaza*, 316 NLRB 109, 109-10 (1995) (handbilling and area-standards picketing), *petition for review denied sub nom. UFCW Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996); *Loews L’Enfant Plaza Hotel*, 316 NLRB 1111, 1111 (1995) (same). They did not involve, as here, union agents

Lechmere applies with full force under such circumstances, because North Memorial’s discriminatory access restrictions are unlawful under *Lechmere*.

Finally, North Memorial misperceives the nature of the violation by emphasizing (Br. 9-10, 37) the terms of its collective-bargaining agreement with SEIU. The fact that “[t]here is no contract language that grants the Unions unfettered access to the hospital” (Br. 9) does not excuse its discriminatory treatment—North Memorial’s prohibition was a statutory, not a contractual, violation. Similarly off-base is North Memorial’s insistence (Br. 10) that it has a “right to limit the activities of non-employee SEIU representatives to designated areas” under Article 1(H) of the contract. That provision addresses access only to *non-public* areas; it says nothing about whether or under what circumstances SEIU representatives can access public areas like the cafeteria. North Memorial cannot use Article 1(H) to justify its restrictions on access to the public cafeteria simply “by placing its own limiting gloss on the provision—especially a gloss [in] conflict with the provision’s plain meaning.” *W. Lawrence Care Ctr. Inc.*, 308 NLRB 1011, 1012 (1992). Moreover, no analogous provision to Article 1(H) appears in the collective-bargaining agreement with MNA.

accessing the facility to interact with members, share updates, and otherwise serve in a representative capacity.

In sum, the direct evidence of North Memorial's discrimination against unions and union-related conversations in the public cafeteria reveals a clear Section 8(a)(1) violation. Along with North Memorial's numerous other unfair labor practices surrounding the picket, those restrictions on employees' ability to access their union representatives interfered with their exercise of Section 7 rights. Because North Memorial imposed those limits unilaterally, they also undermined the collective-bargaining relationship and further weakened SEIU's and MNA's positions as the employees' representatives.

B. North Memorial's Imposition of New Restrictions on Cafeteria Access Without Bargaining Was An Unlawful Unilateral Change

An employer violates the Act by unilaterally changing terms and conditions of employment for union-represented employees without providing the union with notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1261 (8th Cir. 1994). Such changes constitute an employer "refus[ing] to bargain collectively with the representatives of his employees" in violation of Section 8(a)(5). 29 U.S.C. § 158(a)(5).¹² A unilateral change is unlawful regardless of whether the changed term is incorporated in a collective-bargaining agreement or is a matter of established past practice. *KGTV*, 355 NLRB 1283, 1294 (2010); *Golden State Warriors*, 334

¹² Violations of Section 8(a)(5) also derivatively violate Section 8(a)(1). *St. John's Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 n.5 (8th Cir. 2006).

NLRB 651, 652-53 (2001), *enforced mem.*, 50 F. App'x 3 (D.C. Cir. 2002). In the latter situation, the party asserting the existence of a past practice has the burden to prove such a practice. *Nat'l Steel & Shipbuilding Co.*, 348 NLRB 320, 323 (2006), *enforced*, 256 F. App'x 360 (D.C. Cir. 2007).

The statutory prohibition on such unilateral changes applies to policies regarding union access to the employer's facility, as "access by representatives of an incumbent union for representational purposes is a mandatory subject of bargaining." *Frontier Hotel & Casino*, 323 NLRB 815, 817 (1997), *enforced in relevant part*, 118 F.3d 795 (D.C. Cir. 1997). Accordingly, an employer cannot unilaterally "restrict a union agent's right to access the employer's facility, in the agent's representative capacity, where such access has been established ... through past practice" if "the proposed changes are material, substantial, and significant." *KGTV*, 355 NLRB at 1294. A change in access policy is material if it "actually interferes with" employees' ability to meet or communicate with their representatives. *Frontier Hotel*, 323 NLRB at 818; *see also id.* (finding material change when employer's "new restriction was specifically aimed at union representatives and it actually resulted in denying employee access to the representatives"). The Board thus has found unlawful changes where the employer unilaterally imposed new limits on "where union agents could meet with employees or what they could discuss." *Am. Commercial Lines, Inc.*, 291 NLRB

1066, 1071 (1988); *see also Ernst Home Ctrs., Inc.*, 308 NLRB 848, 848-49 (1992) (reducing number of locations where employees and representatives could meet). When the change occurs in the context of a “concerted strategy to weaken and discredit the union in the eyes of the employees,” then “it is proper to look at the other elements of that strategy in order to determine whether the issue is material and substantial.” *Turtle Bay Resorts*, 355 NLRB 1272, 1276 (2010) (quoting *Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991)).

The Board’s finding that North Memorial unilaterally changed its cafeteria-access policy in violation of Section 8(a)(5) is supported by substantial evidence in the record. North Memorial’s prohibition on union-related conversations in the cafeteria and insistence that they occur only in certain non-public areas was a departure from past practice as to both MNA and SEIU. North Memorial previously had no limits on what employees could discuss in the cafeteria, and Wesman himself testified (JA 807-08) that union representatives could initiate conversations with off-duty employees and could talk about union matters. Its officials knew that such conversations took place with representatives from both unions, and did nothing to stop them.

Prior to June 23, MNA representatives—including Scott and Hamilton—had spoken with off-duty employees in the cafeteria without any interference from North Memorial and without being told of any limitation. Those encounters were

not always pre-arranged, but sometimes occurred when employees and representatives saw each other in the cafeteria. Yet when Scott sat in the cafeteria on the 23rd—the day before the planned picket—Cahoon told him that what he was doing could occur only in the non-public areas designated by North Memorial, even though he was not even speaking with any MNA members. And the next day, Hamilton was interrogated by security and North Memorial officials upon entering the cafeteria as to who she was and what business she had, and was told that only non-union discussions were allowed there.

SEIU representatives had a similar history of frequenting the cafeteria to speak with employees about the union without incident. Although North Memorial and SEIU had clashed over the *extent* of union activity permitted in the cafeteria, North Memorial had never before imposed an outright prohibition on union-related conversations there. Any past disagreement as to what else union representatives could do in the cafeteria thus does not alter the existence of a past practice of permitting such conversations.¹³

Moreover, North Memorial had not previously taken issue with gatherings of two or three people that included a union representative. Yet Anthony was

¹³ North Memorial's recitation (Br. 10-16) of its disagreements with SEIU over other cafeteria-access issues is thus but a detour. Even less relevant are the access disputes North Memorial invokes (Br. 11-12, 15) that were unrelated to the cafeteria.

speaking to one employee (with MNA representative Scott sitting silently at the table) when Cahoon told him that such interactions should occur in the designated non-public areas. Other employees were nearby, but North Memorial had never insisted that union representatives isolate themselves when talking with an employee—if such isolation were even possible in a public cafeteria—to avoid such incidental proximity. Similarly, Anderson was having a one-on-one conversation when Wesman told him that unions were not allowed in the cafeteria. When Gulley was first stopped at the entrance to the cafeteria, the security guards blocking his way had no way of knowing how many (if any) employees he would address if he entered. Although he sat with several employees, he spoke only to one; as the Board noted regarding the others, “the record does not show that they were all part of a single group or conversation.” (JA 25.) The actions of Anthony, Gulley, and Anderson thus bore little resemblance to the scheduled, ten-person stewards’ meeting or the campaigning by candidates for union office that North Memorial previously had told SEIU were not allowed in the cafeteria.¹⁴

¹⁴ North Memorial again attempts to downplay the scope of its new restrictions by asserting (Br. 50) that it had no past practice of permitting the unions to hold large meetings, hand out flyers, or meet employees coming and going. This is again a red herring, though, as the Board’s finding of a unilateral change was not based on restrictions on such conduct. Cahoon’s flat prohibition on formerly permitted union-related conversations made no reference to how many people were involved or how the conversations were initiated, and Anderson was told unqualifiedly that unions (not just union flyers) were not allowed in the cafeteria.

As to both MNA and SEIU, North Memorial’s unilateral changes in access policy were material and substantial. By banning union-related conversations in the cafeteria and restricting them to the designated non-public areas, North Memorial “actually interfere[d] with” its employees’ ability to communicate with their chosen representatives through limits “specifically aimed at” those representatives. *Frontier Hotel*, 323 NLRB at 818. As in *American Commercial Lines*, 291 NLRB at 1071, it limited “where union agents could meet with employees” and “what they could discuss.” Off-duty employees previously could speak with their union representatives in either the public cafeteria or the non-public areas, but now had only the latter option—a net reduction in available locations. *Peerless Food Products, Inc.*, cited by North Memorial (Br. 51), is thus distinguishable, as it involved only a change in location but not an overall reduction; at the same time that the employer restricted access to one area it granted access to another as an alternative. 236 NLRB 161, 161, 164 (1978); *see also Ernst Home Ctrs.*, 308 NLRB at 849 (distinguishing *Peerless Food Products* on similar grounds). *Peerless Food Products* also involved a generally applicable access limitation, not the union-specific restriction here. 236 NLRB at 164. Moreover, because the designated non-public locations at North Memorial are less frequented by employees than is the cafeteria, the change lessened the opportunity for impromptu interactions with union representatives.

The material nature of the changes also becomes clear when viewed in the context of the other unfair labor practices in North Memorial's "strategy to weaken and discredit" SEIU and MNA in the days surrounding the picket. *Turtle Bay Resorts*, 355 NLRB at 1276. The new restrictions were of a piece with banning Anthony and Scott from the facility for a year (in part because of their presence in the cafeteria), discharging union steward Anderson because of his union activity, selectively removing union literature from a bulletin board, coercively surveilling conversations between employees and union representatives, and prohibiting union apparel. Both separately and in combined effect, North Memorial's actions interfered with the ability to communicate and to access chosen representatives that undergird employees' right to organize. *See Cent. Hardware*, 407 U.S. at 542-43; *Babcock & Wilcox*, 351 U.S. at 113.

Finally, North Memorial did not give SEIU or MNA notice or an opportunity to bargain regarding any changes to its cafeteria-access policy for union representatives and union-related conversations. It did not inform either union of the changes prior to their implementation on June 23 and 24. North Memorial's only argument to the contrary (Br. 51-52) is premised on a June 13 letter from North Memorial to SEIU and MNA about picketing that says nothing about the cafeteria or union-related conversations. But any argument based on that letter is not properly before the Court, as North Memorial did not raise it to the

Board. Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board ... shall be considered by the court” absent “extraordinary circumstances.” 29 U.S.C. § 160(e); *see also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (explaining that, when “[t]he issue was not raised during the proceedings before the Board ... judicial review is barred”); *accord RELCO Locomotives*, 734 F.3d at 794. North Memorial presents no such circumstances, and the argument is thus jurisdictionally barred.

North Memorial’s newly imposed prohibitions on unions and union-related conversations thus infringed on both employee rights and the collective-bargaining relationships. Yet its campaign of unfair labor practices extended beyond the discriminatory and unilateral denial of access to further actions that would interfere with the Section 7 rights of communication and self-organization.

III. North Memorial Interfered with Section 7 Rights By Coercively Surveilling Union Activity and Banning Union Apparel

An employer violates Section 8(a)(1) of the Act by engaging in conduct that “reasonably tends to interfere with the employees’ exercise of their Section 7 rights.” *Mississippi Transp., Inc. v. NLRB*, 33 F.3d 972, 977-78 (8th Cir. 1994) (internal quotation marks omitted). Substantial evidence supports the Board’s finding that North Memorial effected such interference by coercively surveilling union activity and by prohibiting union apparel.

A. North Memorial Coercively Surveilled Conversations Between Employees and Their Union Representatives

An employer violates Section 8(a)(1) by engaging in coercive surveillance of union activity. *Fremont Med. Ctr.*, 357 NLRB 1899, 1916 (2011); *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 273 (8th Cir. 1979). Such surveillance is unlawful because it “could inhibit the employees’ right to pursue union activities untrammelled by fear of possible employer retaliation.” *Mississippi Transp.*, 33 F.3d at 978 (internal quotation marks omitted); *accord Flexsteel Indus., Inc.*, 311 NLRB 257, 257 (1993) (explaining that “employees should be free to participate in [a] union ... without the fear that members of management are peering over their shoulders, taking note of who is involved”). When evaluating the coerciveness of employer surveillance, the Board considers factors such as “the duration of the observation, the [employer’s] distance from employees while observing them, and whether ... the employer engaged in other coercive conduct during its observation.” *Fremont Med. Ctr.*, 357 NLRB at 1916 (internal quotation marks omitted).

Although an employer lawfully may observe public union activity that occurs on or near its premises, such observation crosses the line into an unfair labor practice when the employer does something “out of the ordinary.” *Rogers Elec., Inc.*, 346 NLRB 508, 509 (2006); *Arrow Auto. Indus.*, 258 NLRB 860, 860 (1981), *enforced mem.*, 679 F.2d 875 (4th Cir. 1982). For example, an employer’s

monitoring of public union activity is unlawful when it is part of an effort to halt that activity. Thus, the Board found coercive surveillance in *Hoschton Garment Co.* where the employer “did not merely observe union activity, but rather attempted to prohibit” it by watching a handbilling union representative after telling him to leave. 279 NLRB 565, 566, 569-70 (1986); *see also Holdings Acquisition Co.*, 356 NLRB 1151, 1151-52 (2011) (high-level manager watched employee after telling him to stop distributing union material); *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991) (employer monitored handbilling, ordered it to stop, and threatened to call police).

Likewise out of the ordinary is an employer’s “unreasonably close” physical proximity to the observed activity, such as sitting at the same table as employees or union representatives. *Montgomery Ward*, 692 F.2d at 1119, 1128; *see also Hawthorn Co.*, 166 NLRB 251, 251 (1967) (foreman sat next to employees in cafeteria), *enforced in relevant part*, 404 F.2d 1205 (8th Cir. 1969); *Carry Cos. of Illinois, Inc.*, 311 NLRB 1058, 1072-73 (1993) (official stood two to three feet away), *enforced*, 30 F.3d 922 (7th Cir. 1994). In such circumstances, the employer’s action moves beyond casual observing and tends to chill employees’ exercise of their rights.

The Board’s finding of coercive surveillance is consistent with those settled principles and supported by substantial evidence. Cahoon, Wesman, and

Ramacher conspicuously monitored employees' interactions with their union representatives in a manner that went beyond casual observation. The three high-level North Memorial officials interrupted a conversation in the cafeteria between Gulley, Hamilton, and an off-duty employee and told them that union-related discussions were prohibited. Only after that introduction did they sit down and observe the employees and representatives. As in *Hoschton Garment Co.*, 279 NLRB at 566, and *Holdings Acquisition Co.*, 356 NLRB at 1151-52, Cahoon, Wesman, and Ramacher thus made clear that their monitoring was directly tied to stopping the employees from exercising Section 7 rights; they were, as the Board found, "intentionally and aggressively using surveillance to intimidate employees and chill union conversations" (JA 23). Moreover, they observed from close physical proximity, sitting at an adjacent table three to six feet away. By asking what the employees and union representatives were discussing and stating that they would not mind if he sat nearby if they were talking about baseball, Cahoon also telegraphed that he was going to eavesdrop on their conversation.

Such circumstances tend to interfere with and coerce employees in the exercise of their rights. Reasonable employees would feel pressure not to engage in protected activity while under the watchful eye of the very North Memorial officials who just told them it was prohibited. And not only *could* such surveillance chill protected activity, it actually did so. The employees stopped

talking with Gulley and Hamilton, got up from the table, and left shortly after Cahoon, Wesman, and Ramacher sat down nearby. Such evidence of actual interference is not required to find a violation under the Board's objective standard, but provides additional support for the Board's conclusion that a reasonable employee would be coerced under the circumstances.

North Memorial does not contest the Board's finding that the surveillance was coercive. Instead, North Memorial's only argument (Br. 49) is that it could monitor Gulley and Hamilton because it had the right to exclude them from the cafeteria. But as explained above, North Memorial's selective restriction on cafeteria access was itself unlawful. Because the prohibition on unions and union-related conversations was discriminatory, it cannot justify the coercive surveillance.

B. North Memorial Failed To Show That Special Circumstances Justified Its Presumptively Unlawful Ban on Union Apparel

Wearing union insignia or apparel signals support for the union and serves as a form of communication with other employees, and is thus protected activity under Section 7. *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1097 (8th Cir. 2005); *Intertherm*, 596 F.2d at 272; *St. Luke's Hosp.*, 314 NLRB 434, 435 (1994). Accordingly, the Board has long held, with court approval, that a healthcare employer's restriction on union apparel in non-patient care areas—like prohibitions on other forms of Section 7 activity—is presumptively unlawful. *HealthBridge*

Mgmt., LLC v. NLRB, 798 F.3d 1059, 1067-68 (D.C. Cir. 2015); *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 846 (6th Cir. 2003); *see generally Beth Israel Hosp.*, 437 U.S. at 495, 507. On the other hand, the Board recognizes a healthcare employer’s interest in providing care without disruption by holding that limits on union apparel in immediate patient-care areas are presumptively valid.

HealthBridge Mgmt., 798 F.3d. at 1068.

An employer can rebut the presumption of invalidity for restrictions in non-patient care areas by demonstrating “special circumstances”—a showing that “requires evidence that a ban is ‘necessary to avoid disruption of health-care operations or disturbance of patients.’” *HealthBridge Mgmt.*, 798 F.3d at 1068 (quoting *Beth Israel Hosp.*, 437 U.S. at 507); *see also Wal-Mart Stores*, 400 F.3d at 1098 (explaining that “[t]he burden of establishing [special] circumstances rest[s] on the employer” (internal quotation marks omitted)). In determining whether an employer has met its burden, “speculation about the possible effect” of union insignia is insufficient. *Mt. Clemens Gen. Hosp.*, 328 F.3d at 847; *see also Goodyear Tire & Rubber Co.*, 357 NLRB 337, 341 (2011) (“General, speculative, isolated or conclusory evidence of potential disruption ... does not amount to special circumstances.”). Although an employer need not wait until an actual disruption has occurred, it must present more than an abstract interest in avoiding possible disruption. If such an interest were sufficient to justify all restrictions in

non-patient care areas, the *Beth Israel* presumption of invalidity would have no force.

Accordingly, the court found no special circumstances in *HealthBridge Management* where the employer offered simply “conjectural” opinions from a labor-relations official and an outside expert that were not based on any specific experiences or conversations with patients or healthcare professionals at the facility. 798 F.3d at 1071-72; *see also Brockton Hosp. v. NLRB*, 294 F.3d 100, 104 (D.C. Cir. 2002) (noting “no evidence of any complaint by a patient or a patient’s relative” regarding prohibited activity as “especially telling” evidence that prohibition was unjustified (internal quotation marks omitted)); *St. Luke’s Hosp.*, 314 NLRB at 435 (same). By contrast, *Baptist Hospital* emphasized that doctors had tied the challenged restriction to their experience with patients at the hospital; such evidence supported a finding of special circumstances as to certain areas near patient rooms. 442 U.S. at 782-84.

Substantial evidence supports the Board’s finding that North Memorial violated Section 8(a)(1) by prohibiting off-duty employee Geurts and union representatives Gulley and Hamilton from wearing union t-shirts in the atrium on June 24. Because the atrium is a public, non-patient care area, North Memorial’s restriction on union apparel there was presumptively unlawful. *Beth Israel Hosp.*, 437 U.S. at 495, 507; *HealthBridge Mgmt.*, 798 F.3d at 1067-68. And the record

supports the Board's finding that North Memorial failed to meet its burden of rebutting that presumption. North Memorial presented no evidence that individuals wearing SEIU or MNA t-shirts in the atrium disrupted healthcare operations or disturbed patients, or created a likelihood of such disruption or disturbance. Indeed, the nurse manager who instructed Gulley and Hamilton to remove their shirts admitted that they were not being disruptive. (JA 211.)¹⁵ And prior to the picket, Cahoon stated in an all-employee letter that North Memorial had no such concern with possible misconduct by picketers. There were no complaints about the shirts from patients or family members. *Brockton Hosp.*, 294 F.3d at 104. Further, the shirts bore simply the name of the union, and did not contain any inflammatory message or any language about North Memorial.

As in *HealthBridge Management*, 798 F.3d at 1071, North Memorial offered only the speculation of human-resources officials like Dave Abrams and operations official Jeff Wicklander that union apparel might cause disruption or stress. There was no testimony regarding any conversations with healthcare providers or patients as to how they would respond to a purple or red t-shirt in the atrium; Abrams's and Wicklander's opinions were not based on "actual interactions with or comments from [patients], family members, or employees," *id.* Nor, unlike in *Baptist*

¹⁵ North Memorial's contention that Gulley and Hamilton were "provocative and suspicious" (Br. 47) is thus contrary to its own witness's testimony.

Hospital, 442 U.S. at 782-84, was the prohibition tied to any past experiences at North Memorial that would indicate what type of action or image was likely to cause a disturbance. Absent such evidence, North Memorial has not rebutted the presumption of invalidity.¹⁶

North Memorial points (Br. 53-55) to the informational picket as grounds for the prohibition, but does not explain how the existence of the picket transformed the t-shirts into a threat to patient care. Geurts, Gulley, and Hamilton did not carry picket signs, chant slogans, talk to the public, distribute literature, or otherwise bring the picket activity with them into the building. The shirts themselves made no reference to the picket, but were common SEIU and MNA apparel. Moreover, North Memorial's prohibition made no allowance for whether the individual wearing the shirt was in fact part of the picket. And contrary to North Memorial's characterization, none of its officials or guards stated that the ban was on "picketing T-shirts" (Br. 21-22, 52-54), but instead referred to "union t-shirts" or simply "that shirt" (JA 184, 368).¹⁷

¹⁶ North Memorial notes that Gulley and Hamilton were not employees (Br. 52), but the restriction on union shirts was not limited to non-employees. In addition, employee Kevin Morse was present when the security guard confronted Gulley and Hamilton about the shirts, and witnessing a directive that union presidents could not wear union shirts would "reasonably tend[] to interfere" with an individual employee's own willingness to do so. *Mississippi Transp.*, 33 F.3d at 977-78.

¹⁷ Although North Memorial claims (Br. 7) that the prohibition did not extend to all forms of union insignia, the same analysis applies for bans on particular apparel

Finally, North Memorial's actions belie its contention (Br. 9, 47-48, 54-55) that its responses to union activity were motivated by an interest in maintaining a tranquil environment. Abrams' encounter with Geurts resulted in an employee standing shirtless in the lobby—a situation that North Memorial vice president Wicklander recognized (JA 567) would be disruptive. And on multiple occasions, North Memorial had uniformed security guards or police officers escort union representatives through the hallways or out of the building, in full view of employees, patients, and families. Likewise, when six guards confronted and surrounded Gulley and Hamilton in the cafeteria, they became the center of attention for whomever else was present. Indeed, Wicklander admitted (JA 565-66) that such a large, concentrated security presence inside the hospital could cause stress. Such dramatic measures by North Memorial were more likely to heighten any tensions stemming from union activity than alleviate them.

The ban on union apparel was thus another salvo in North Memorial's confrontational approach to employee rights, and another entry in its series of unfair labor practices that interfered with such rights. North Memorial's displeasure with its employees for engaging in “concerted activities for ... mutual aid or protection,” 29 U.S.C. § 157, by holding a peaceful informational picket in

as for blanket bans. *See HealthBridge Mgmt.*, 798 F.3d at 1064, 1071-72 (employer banned some insignia, but not others); *St. Luke's*, 314 NLRB at 434-35 (same).

support of their views on staffing levels and scheduling does not justify its crackdown on other such activities. Nor does its status as a hospital give it license to violate the Act. The Board's legally and factually supported decision clears away unlawful impediments from the channels of communication between North Memorial nurses, pharmacists, service workers, and home-health aides and their chosen representatives, and preserves the rights under the Act that such communication fosters.

CONCLUSION

The Board respectfully requests that the Court deny North Memorial's petition for review and enforce the Board's Order in full.

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December 2016

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

NORTH MEMORIAL HEALTH CARE)	
)	
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)	Nos. 16-3433, 16-3657
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	18-CA-132107
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 11,956 words of proportionally spaced, 14-point type, the word-processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 22nd day of December, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated at Washington, DC
this 22nd day of December, 2016

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