

**Nos. 16-1556, 16-1845**

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

**QUALITY HEALTH SERVICES OF P.R., INC. d/b/a  
HOSPITAL SAN CRISTOBAL**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR  
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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition for review of Quality Health Services of P.R., Inc. d/b/a Hospital San Cristobal (the Hospital) and the cross-application for enforcement of the National Labor Relations Board (the Board) of a Board Order issued against the Hospital on April 28, 2016, reported at 363 NLRB

No. 164. (JA 84-87.)<sup>1</sup> The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the National Labor Relations Act (the Act) (29 U.S.C. §§ 151 et seq., 160(a)), which empowers the Board to prevent unfair labor practices. The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act. 29 U.S.C. §160(e) and (f). The Court has jurisdiction under the same section of the Act. The petition for review and the cross-application are timely; the Act places no time limit on such filings. Venue is proper under Section 10(f) because the unfair labor practices occurred in this circuit. 29 U.S.C. § 160(f).

### **STATEMENT OF THE ISSUES**

1. Whether the Board is entitled to summary enforcement of the unchallenged portions of its Order?
2. Whether substantial evidence supports the Board’s finding that the Hospital violated Section 8(a) (5) and (1) of the Act by unilaterally subcontracting unit work performed by respiratory therapy technicians to per-diem employees?

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<sup>1</sup> “JA” refers to the parties’ Joint Appendix filed with the Hospital’s opening brief. References preceding a semicolon are to the Board’s findings; cites following a semicolon are to supporting evidence. “Br.” cites are to the Hospital’s opening brief. “Supp. Add.” refers to the Board’s Supplemental Addendum filed with this brief, which contains the Board’s July 25, 2012 Decision and Order, reported at 358 NLRB 769 (2012). The Board incorporated by reference its 2012 Decision and Order in its 2016 Decision and Order. The Supplemental Addendum also contains Joint Exhibit 52, which was inadvertently omitted from the parties’ Joint Appendix.

3. Whether substantial evidence supports the Board's finding that the Hospital violated the Act by unilaterally discharging the respiratory therapy technicians and subcontracting their work to Respiratory Therapy Management?

4. Whether the Hospital's challenge to the Board's remedy is properly before the Court?

5. Whether the Hospital's challenge to the complaint's validity is untimely and the Court, therefore, lacks jurisdiction to consider it?

### **STATEMENT OF THE CASE**

During an 18-month period, starting in June 2010 and ending in November 2011, the Board's Acting General Counsel filed three complaints against the Hospital alleging a series of unlawful unilateral changes that the Hospital made as part of its ongoing efforts to implement cost-saving measures. This case involves the third complaint, issued by the Acting General Counsel after Unidad Laboral de Enfermeras(os) y Empleados de la Salud (the Union) filed charges against the Hospital. (JA 32-34.)

Following a hearing, an administrative law judge issued a decision and recommended order on February 2, 2012, finding that the Hospital violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by issuing and distributing a memorandum to employees that prohibited discussions between employees concerning the Hospital's subcontracting of work performed by its respiratory

therapy technicians. (JA 44-46.) The judge also found that the Hospital violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally subcontracting work performed by the respiratory therapy technicians to nonunit per-diem employees and unilaterally discharging all of the respiratory therapy technicians and subcontracting their work. (JA 47-51.) On July 25, 2012, the Board (Members Hayes, Griffin, and Block) issued a decision affirming the judge's findings, but modifying the recommended remedy. *See Quality Health Servs. of P.R.*, 358 NLRB 769 (2012). (Supp. Add. 1-14.)

On September 13, 2012, the Hospital petitioned this Court for review of that Order, and the Board sought enforcement. (1st Cir. Nos. 12-1929, 12-2113.) On June 26, 2014, while the case was pending before this Court, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid, including the appointment of Members Griffin and Block. (JA 84.) On March 27, 2015, the Court granted the Board's motion to vacate the Board's July 25, 2012 Decision and Order and remanded the case to the Board for further consideration in light of *Noel Canning*. (JA 84.)

On April 28, 2016, a properly constituted Board panel (Chairman Pearce and Members Hirozawa and McFerran) issued the Decision and Order now before the Court, which found that the Hospital committed the violations set forth in the

Board's earlier decision. (JA 84-87.) Relevant portions of the factual and procedural history of the case before the Board are set forth below, followed by a summary of the Board's Decision and Order.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. The Parties; Background**

The Hospital, located in Ponce, Puerto Rico, employs approximately 300 employees. Since March 1, 2002, the Union has served as the exclusive collective-bargaining representative for most of the Hospital's employees. The most recent collective-bargaining agreement between the Union and the Hospital expired on February 28, 2010. At the time of the hearing in this case, the parties were negotiating a successor agreement. (JA 33; JA 17-31, 103.)

Starting in June 2010, the Hospital, in an effort to cut operating costs, made several changes without first notifying and bargaining to impasse with the Union. (JA 34.) Those unilateral changes led to two separate Board decisions finding that the Hospital acted unlawfully in changing employees' terms and conditions of employment. *See Hospital San Cristobal*, 358 NLRB 547 (2012) (finding that the Hospital violated the Act by unilaterally discontinuing its practice of paying incentives or bonuses to certain nursing employees); *Hospital San Cristobal*, 356 NLRB 699 (2011) (finding that the Hospital violated the Act by unilaterally changing its past practices concerning holiday pay and sick leave, reducing the

number of employees' holidays, and eliminating permanent shifts for employees in the Respiratory Therapy Department).

**B. The Hospital Considers Subcontracting the Respiratory Therapy Department Due to Economic Concerns**

This case involves the Hospital's unilateral changes affecting the respiratory therapy technicians in the Respiratory Therapy Department. The technicians assist in treating, evaluating, and caring for patients with breathing problems. The technicians are members of the bargaining unit. As of May 2010, the technicians worked one of three shifts: 7:00 am to 3:00 pm, 3:00 pm to 11:00 pm, and 11:00pm to 7:00 am. Technicians rotated among the three shifts because the Hospital had eliminated permanent shift assignments, an action that the Board found unlawful. (JA 34-35, 39 n.15; JA 103.)

In January 2011, continuing its plan to pursue cost-cutting measures, the Hospital considered privatizing the services provided by the eleven employees in the Respiratory Therapy Department. (JA 34-35; JA 228, 283, 286-87.) The Hospital evaluated proposals from several subcontractors and eventually selected Respiratory Therapy Management (RTM) to provide the subcontracted services. (JA 34; JA 110-14, 154-55.) The Hospital originally estimated an annual savings of \$100,000 if it subcontracted with RTM to provide all of the Hospital's respiratory therapy services. (JA 35; JA 119, 346-47.)

On March 15, Executive Director Pedro Benetti advised the Union by letter that the Hospital “will be privatizing the [Respiratory Therapy Department] services beginning on April 15, 2011.” (JA 35; JA 117.) The Hospital offered to bargain over the effects of that decision, but not the decision itself. (JA 35; JA 117, 229-30, 313-14.) On March 23, the Union requested information concerning the financials of the Respiratory Therapy Department, including billing and payroll information, and details of the projected savings from subcontracting the services. (JA 35; JA 122-25.) On March 24, the parties met for 30 minutes, during which they discussed the Hospital’s subcontracting plan. The Union repeated its request for information concerning the subcontracting decision, particularly any documentation to demonstrate the Hospital’s claim of \$100,000 savings. (JA 35; JA 118-21.) During the meeting and in subsequent communications, the Hospital continued to maintain that bargaining was limited to the impact of its decision to subcontract. (JA 35; JA 125.)

**C. The Hospital Uses Respiratory Therapy Management To Provide Per-Diem Employees**

Around the same time that the Hospital was considering privatization of respiratory services, it implemented significant changes to the Respiratory Therapy Department without bargaining. (JA 36; JA 126.) On March 25, the Hospital subcontracted with RTM to provide nonunit respiratory therapy technicians on a per-diem, or as-needed, basis. (JA 36; JA 126, 172, 222, 232, 248, 251-52, 296-

97.) RTM would provide respiratory therapy technicians to cover shifts that could not be staffed by Hospital employees because of vacation, disability and sick leave, the reduced number of full-time staff in the Department, and shift assignment restrictions. (JA 36; JA 126, 249, 261, 296-97.)

Under the parties' collective-bargaining agreement, the Hospital could hire "temporary employees" under certain conditions. (JA 36; JA 104.) The agreement defines "temporary employee" as "any person contracted to work in an emergency, or to substitute a regular employee in case of absence due to illness, vacation or any other similar motive." (JA 36; JA 104.) Unit personnel have "preference over the temporary employees to cover vacant positions." (JA 36 n.6; JA 104.) Human Resources Director Candie Rodriguez stated that the per-diem employees provided by RTM were not temporary employees. (JA 36; JA 249.)

In late March and early April, three of the Hospital's respiratory therapy technicians resigned, reducing the number of full-time technicians to eight. (JA 36; JA 103.)

**D. The Hospital Issues a Memorandum Directing Employees Not To Make Certain Comments Concerning the Hospital's Subcontracting Plans**

On March 30, Rodriguez met with union representatives Ariel Echevarria and Evelyn Santa to discuss a grievance. (JA 37; JA 129.) During the grievance meeting, Rodriguez raised the issue of a note found on the car of Carlos Diaz, the

Respiratory Therapy Department supervisor. (JA 37; JA 127, 129.) Rodriguez expressed concern that someone left the “menacing” note because Diaz had proposed the idea of subcontracting the services performed by the Department. According to Echevarria, Rodriguez said that the Union and employees represented by the Union were the “prime suspects.” (JA 37; JA 127.) That same day after the meeting, Echevarria sent a follow-up letter to Rodriguez advising her that the Diaz accusations were “serious” and that she needed “to have proof.” (JA 37; JA 127.)

By letter dated March 31, Rodriguez informed the Union of further concerns regarding union representatives warning employees in other departments that their departments might be targeted next for privatization. (JA 37; JA 129 -30.)

Rodriguez’s letter insisted that employees “desist from making these comments.” (JA 37; JA 130.) The letter advised further that Rodriguez had circulated an all-employee memorandum “prohibiting this behavior.” (JA 37; JA 130.)

Rodriguez’s March 31 memorandum directed that “employees have to desist” from making comments about other departments being privatized and sought to assure employees that the Hospital had no other subcontracting plans. The memorandum “instructed all [s]upervisors, and urged [all employees], to report . . . employees that are [engaging] in this conduct in order to take the necessary corrective measures.” (JA 27; JA 131.)

**E. The Hospital Executes a Service Agreement for RTM To Provide Respiratory Therapy Technicians; the Hospital Offers, for the First Time, To Negotiate Over the Subcontracting Decision**

On April 7, RTM and the Hospital executed a contract for RTM to provide respiratory therapy technicians to the Hospital. (JA 38; JA 135-43.) RTM and the Hospital agreed, however, that until the Union and Hospital completed negotiations, RTM would only provide staff on a per-diem basis. (JA 37; JA 232, 256.) At that point, the Hospital still maintained that the parties' bargaining was confined to the effects of the Hospital's decision to subcontract. (JA 37; JA 258-59.)

On April 12, the Hospital and the Union held a bargaining session wherein the Hospital, for the first time, acknowledged, based on advice of counsel, that the law required it to negotiate with the Union over both the decision to subcontract the Respiratory Therapy Department and the effects of that decision. (JA 37; JA 258-59.) Given the Hospital's shift in position, Rodriguez told the Union that the Hospital would evaluate any alternatives to subcontracting proposed by the Union. (JA 38; JA 149-52, 315, 316.) On April 14, the Hospital postponed the effective date of its plan to subcontract the Respiratory Therapy Department to April 30, to afford the Union time to review the requested payroll and billing information and privatization studies that the Hospital had provided. (JA 38; JA 156.)

Between mid-April and late May, the parties continued to bargain over the subcontracting issue and the successor agreement. The Union continued to request certain financial information and to question the underlying staffing figures of the privatization studies because the studies were based on the Department having 15 or 11 employees, but the recent departure of three employees left the Department with only eight. (JA 39; JA 158, 160-83.) Due to the ongoing negotiations, the Hospital again postponed the effective date of its subcontracting plan until May 31. (JA 39; JA 159.)

**F. The Parties Begin To Explore Alternatives to Subcontracting the Respiratory Therapy Department**

On May 27, Rodriguez and union representative Echevarria met informally and considered whether, as an alternative to the Hospital's subcontracting plan, the Hospital could save money by reducing the \$55 monthly meal stipend for union employees. (JA 39; 238-40, 297-99.) The Hospital postponed its subcontracting plan until June 20, to allow time for the parties to evaluate the alternative. (JA 39; JA 186.)

On June 17, the Hospital proposed two alternatives related to the monthly meal stipend: reduce the monthly stipend from \$55 to \$15 per employee, saving \$7,400 per month or eliminate the stipend altogether, saving \$10,175 per month. (JA 39; JA 190-91). At this point, the Hospital's studies projected a monthly savings of \$7243 if the Hospital fully subcontracted the work. (JA 39; JA 167-69,

235-36.) Rodriguez added that if the parties agreed to either proposal, the Hospital could retain the Respiratory Therapy Department's eight regular employees, but would continue having RTM provide per-diem therapists and would not assign any of the Hospital's employees to permanent shifts. (JA 39; JA 191.) Rodriguez's letter also postponed the effective date for subcontracting to July 1, "[d]ue to the situation." (JA 39; JA 191.)

On June 28, the parties met again to bargain over the successor agreement and the subcontracting issue. (JA 39; JA 194-98.) In the session, the Union requested that the Hospital correct its cost-savings analysis, because the initial studies failed to account for the Department's staff reduction to eight employees. (JA 39; JA 194-98.) The Union observed that the studies showed that privatization resulted in an annual savings of \$95,000 in 2009 when there were 15 employees and \$86,000 in 2010 when there were 11 employees. (JA 39; JA 196-97.) On the basis of those figures, the Union predicted that the savings should be lower than \$86,000 when only eight employees were considered. (JA 39; JA 196.) The Hospital agreed to prepare and submit a new study and postponed the effective date for its subcontracting plan to the week of July 4 to allow time for further analysis and discussion. (JA 39-40; JA 200-02.)

On July 5, the parties held another bargaining session, and the Hospital gave the Union a new analysis of the subcontracting savings, which evaluated the cost

of subcontracting versus retaining the eight regular employees and using RTM to provide per-diem employees. (JA 40; JA 108, 203, 242, 265-66, 318-19.) The new study reflected a monthly savings of \$4998 (or \$59,976 annually) if the work was privatized. (JA 40; JA 108, 203, 242, 265-66, 318-19.) The parties agreed to meet again on July 8. (JA 40; JA 203.)

**G. The Union Proposes a Meal Stipend Reduction with Conditions; the Hospital Rejects the Offer and Immediately Discharges the Employees in the Respiratory Therapy Department**

On July 8, the parties held another bargaining session with goal of reaching an agreement over the Respiratory Therapy Department. (JA 40; JA 203.) The Union proffered its first substantive proposal to address the Hospital's economic needs. (JA 40; JA 205.) It proposed reducing the monthly meal stipend to \$30, saving the Hospital \$4625 per month. (JA 40; JA 205.) The Union's proposal brought the parties within \$373 of one another in terms of cost savings. The Union's offer also included the following conditions:

- the Hospital would hire union employees to fill any future vacancies that arose in the Respiratory Therapy Department, such that the Department would continue to have eight regular employees;
- the parties would meet every quarter to verify that the savings from the meal stipend reduction were consistent with the parties' calculations;

- the Hospital would increase the meal stipend if it saved more money than projected;
- the reduction would last one year; and
- the Hospital would permanently assign employees Rafael Colon and Mirna Leon, the two most senior employees, to the 7:00 am to 3:00 pm shift.

(JA 40; JA 205, 207-08, 211.)

Rodriguez initially indicated that the Hospital could agree to some of the Union's proposal, but she needed to discuss the offer with Executive Director Benetti. (JA 40; JA 205, 245.) At 2:00 pm that same day, Rodriguez telephoned Echevarria to inform him that the Hospital had decided to reject the proposal in its entirety and would subcontract the entire Respiratory Therapy Department. (JA 41; JA 80.) Rodriguez followed up by letter shortly thereafter, confirming that the Hospital had "made its decision to subcontract the Respiratory [Therapy] Department [and that] employees will be notified today, July 8th and will work no more." (JA 41; JA 205, 245, 303-05.)

Around 2:30 pm, Rodriguez and Diaz began notifying the eight employees of their termination. (JA 41; JA 350-51.) Employees who worked the 7:00 am to 3:00 pm shift were notified at the end of their shift, whereas the Hospital instructed those employees who were scheduled to work from 3:00 pm to 11:00 pm to go to human resources before beginning their shift, when they were told of their

immediate discharge. (JA 41; JA 274-75, 328-30, 362-64.) The Hospital also called in all off-duty employees and terminated them when they arrived at the human resources office as instructed. (JA 41; JA 369-71.) During the termination meetings, the Hospital collected employee hospital keys and identification badges. (JA 41; JA 328-30.) The Hospital gave employees a discharge letter, informing them that the Hospital had decided to subcontract the Department because negotiations had not resulted in an agreement. (JA 41; JA 103, 212.) The letter also advised employees that they were immediately relieved of work obligations and would be paid through July 13. (JA 41; JA 212.) RTM staff covered the vacated shifts. (JA 41; JA 369-71.)

**H. The Union Immediately Responds that It Is Willing To Continue Negotiations; the Hospital Agrees To Meet Later that Evening; the Parties Do Not Reach an Agreement**

Later in the afternoon on July 8, Union President Ana Melendez contacted Rodriguez by telephone and fax to emphasize that the Union was available to continue negotiations until “whatever hour necessary to reach a satisfactory agreement” with the Hospital concerning the Respiratory Therapy Department. (JA 42; JA 211, 305.) Rodriguez, who was finishing her last discharge meetings with respiratory therapy technicians, agreed to meet again with the Union that evening. (JA 42; JA 247, 306, 307.)

At the evening meeting, Rodriguez discussed the Union's proposal. (JA 42; JA 213-20.) Rodriguez explained that the Hospital was amenable to filling future vacancies in the Respiratory Therapy Department with union personnel rather than RTM staff, but wanted to reduce the stipend below \$30 per employee. (JA 42; JA 213-20, 312.) The Hospital opposed the quarterly meetings, an increase in the stipend if the Hospital's savings exceeded projections, the one-year duration, and the permanent shift assignments. (JA 42; JA 213-20.) In response, the Union withdrew the quarterly meeting condition, clarified that it meant only an annual assessment of whether adjustments in the stipend were necessary, and offered to lower the stipend to \$27.50 per employee. (JA 43; JA 213-20.) The Union's meal reduction proposal amounted to a monthly savings to the Hospital of \$5087.50, which exceed the subcontracting savings. (JA 43; JA 213-20.)

The Hospital was largely in agreement with the Union's concessions, but Rodriguez countered that if the Union agreed to reduce the monthly meal stipend to \$25 per employee, the Hospital would ensure that RTM staff covered the 11:00 pm to 7:00 am shift and allow the regular Department employees to rotate between the two other shifts. (JA 43; JA 213-20.) Union President Melendez stated that the Union would not agree to reduce the monthly meal stipend to \$25 unless the Hospital granted permanent shift assignments to Colon and Leon. (JA 43; JA 213-20, 269-70, 344.) Rodriguez reiterated that the Hospital's final position was that

the monthly meal stipend be reduced to \$25 and regular Department employees all rotate between two shifts without any permanent shifts. (JA 43; JA 213-20, 269-70, 344.) The meeting ended around 8:00 pm without an agreement. On July 14, the Hospital modified its agreement with RTM to have RTM provide all staff for the Respiratory Therapy Department. (JA 43; JA 103, 222.)

**I. The Union Attempts To Resume Negotiations over the Decision To Subcontract, But the Hospital Does Not Respond**

On July 11, the Hospital sent the Union a letter restating the parties' positions and notifying the Union that "nothing else is pending to address regarding the [subcontracting] issue." (JA 43; JA 218-20.) The Union replied on the same day, notifying the Hospital that the Union had not, in fact, "closed negotiations" and was willing "to continue negotiations at the moment [the Hospital is] available." (JA 43; JA 221.) On July 19, having received no response, the Union wrote to the Hospital again, emphasizing the narrowness of the parties' disagreement and offering two examples of how the Hospital could assign Colon and Leon to permanent shifts without any adverse effect on the overall schedule for the Department. (JA 43-44; JA 223-25.) The Union invited the Hospital to engage in further discussions. (JA 44; JA 225.) The Hospital never replied to the Union's July 18 letter.

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On April 28, 2016, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued a Decision and Order affirming the judge's rulings and conclusions and adopting the recommended order with modification. (JA 84-87.) The Board agreed with the judge that the Hospital violated Section 8(a)(1) by promulgating, maintaining, and enforcing a rule that prohibits employees from discussing the Hospital's plans to subcontract the work performed by respiratory therapy technicians. (JA 84.) And the Board agreed further that the Hospital violated Section 8(a)(5) and (1) by unilaterally subcontracting work performed by the respiratory therapy technicians to per-diem employees and by unilaterally discharging all of the respiratory therapy technicians and subcontracting their work to RTM. (JA 84.)

The Board's Order, which narrowed the judge's recommended broad cease and desist order, requires the Hospital to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (JA 84.) Affirmatively, the Order requires the Hospital to bargain with the Union, rescind the work rule, discontinue subcontracting the respiratory therapy technicians' work, and rescind its decision to subcontract unit work to per-diem employees. (JA 84-85.) The Order also requires the Hospital to make whole the affected

employees, rescind the discharges, offer the discharged employees reinstatement, and post a remedial notice. (JA 85.)

### **SUMMARY OF ARGUMENT**

1. Before the Court, the Hospital fails to challenge the Board's finding that it violated the Act by promulgating, maintaining, or enforcing a work rule that unlawfully prohibits employees from discussing the Hospital's plan to subcontract certain services. The Board is therefore entitled to summary enforcement of that portion of its Order.

2. Substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting unit work performed by Hospital employees in the Respiratory Therapy Department to non-unit per-diem employees. The Hospital does not claim that it bargained over this change, but, rather, argues that a past practice privileged its unilateral action. The credited evidence, however, establishes that the Hospital was unable to carry its heavy burden of showing that such a past practice existed. The Board relied on the scant record evidence of the Hospital's use of temporary employees during the five years before the unilateral action. Further, the Board rejected the Hospital's claim that the per-diem employees were simply "temporary employees" permitted to do unit work under the parties' collective-bargaining agreement. The unrebutted

testimony of the Hospital's own witness, who unequivocally testified that the per-diem hires were *not* temporary employees, rendered that claim specious.

3. Substantial evidence further supports the Board's finding that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally discharging unit employees and subcontracting their work before reaching a good-faith impasse with the Union. In finding that the parties were not at impasse when the Hospital acted unilaterally, the Board relied on the credited evidence that only three days before discharging the employees, the Union finally received, after repeated urging and requests spanning weeks, an accurate cost savings study relating to the Hospital's proposed subcontracting plan. The Board also observed that once the Union understood the precise amount of savings the Hospital sought to obtain, it offered an opening proposal that substantially moved toward the Hospital's position. Rather than offer a counter-proposal, the Hospital rejected the Union's offer and immediately discharged the entire Respiratory Therapy Department. Several hours later, but after the discharges had been effected, the Hospital and the Union continued bargaining, and both parties made further concessions. The Board reasoned that the Hospital's conduct, both before implementation and immediately after, was not consistent with a true impasse.

Before the Court, the Hospital principally challenges the Board's factual findings and questions the Board's special expertise in evaluating whether the

parties were indeed at a good-faith impasse. The Court should decline the invitation to reweigh the facts and to disregard the Board's special expertise in evaluating the bargaining process. The Hospital's argument ignores the realities of the negotiations as found by the Board, including that the Hospital initially refused to bargain over the decision to subcontract and that it failed to provide accurate financial information to the Union for months.

4. The Hospital's challenge to the Board's Order of reinstatement and backpay is not before the Court. The Hospital never raised this challenge to the Board and, accordingly, the Court is without jurisdiction to consider it. In any event, reinstatement and backpay represent the conventional remedies for unlawful unilateral subcontracting of unit work, and fall well within the Board's broad remedial discretion.

5. The Hospital's challenge to the validity of the complaint is also not properly before the Court. The Hospital never raised any challenge to the complaint based on the Federal Vacancies Reform Act to the Board and offers the Court no extraordinary circumstances to excuse its failure to do so.

### **STANDARD OF REVIEW**

This Court has recognized that "the Board is primarily responsible for developing and applying a coherent national labor policy." *NLRB v. Int'l Bhd. of Teamsters, Local 251*, 691 F.3d 49, 55 (1st Cir. 2012). Therefore, the Court grants

the Board “deference with regard to its interpretation of the Act as long as its interpretation is rational and consistent with the statute.” *Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 6 (1st Cir. 2001). As the Court has stated, a “Board order must be enforced if the Board correctly applied the law and if its factual findings are supported by substantial evidence on the record.” *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 478 (1st Cir. 2011). Under Section 10(e) of the Act, the Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Solutia, Inc.*, 699 F.3d 50, 59-60 (1st Cir. 2012). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Int’l Bhd. of Teamsters*, 691 F.3d at 55 (internal quotations omitted). The Court will not substitute its judgment for the Board’s when the choice is “between two fairly conflicting views [of the facts], even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488; *Ne. Land Servs.*, 645 F.3d at 478. “In particular, the credibility determinations of the Administrative Law Judge who heard and saw the witnesses are entitled to great weight.” *NLRB v. Hosp. San Pablo, Inc.*, 207 F.3d 67, 70 (1st Cir. 2000).

## ARGUMENT

### I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCHALLENGED PORTION OF ITS ORDER

The Board found (JA 84) that the Hospital violated Section 8(a)(1) of the Act by promulgating, maintaining, or enforcing a work rule that unlawfully prohibits employees from having discussions related to the Hospital's plan to subcontract the work performed by the respiratory therapy technicians.<sup>2</sup> 29 U.S.C. § 158(a)(1). In its opening brief, the Hospital does not contest this finding. The Court should summarily enforce this portion of the Board's Order because the Hospital has failed to challenge it. *See E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 41 (1st Cir. 2004) ("It follows inexorably that the Board is entitled to summary enforcement of those portions of its order that are based on the unappealed findings."); *see also* Fed. R. App. Proc. 28(a)(9)(A) (a party must raise all claims in its opening brief). Further, "the unlawful practices underlying these uncontested findings 'do not disappear by not being mentioned in [the Hospital's] brief,' but rather remain to inform [the Court's] consideration of the Board's other findings."

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<sup>2</sup> Section 8(a)(1) of the Act makes it unlawful for an employer to "interfere with, restrain, or coerce employees" in the exercise of rights guaranteed in Section 7 of [the Act]." 29 U.S.C. § 158(a)(1). Section 7 of the Act (29 U.S.C. § 157) grants employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection . . . ."

*McGaw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 8 (1st Cir. 1997) (quoting *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir.1982)).

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY SUBCONTRACTING UNIT WORK PERFORMED BY RESPIRATORY THERAPY TECHNICIANS**

**A. Applicable Principles**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representative of his employees . . . .”<sup>3</sup> 29 U.S.C. § 158(a)(5). Section 8(d) of the Act defines the duty to bargain collectively as the obligation “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .” 29 U.S.C. § 158(d)). It is well settled that an employer violates Section 8(a)(5) and (1) of the Act “if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.” *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *Katz v. NLRB*, 369 U.S. 736 (1962)); *see also NLRB v. Beverly Enters.-Mass, Inc.*, 174 F.3d 13, 25 (1st Cir. 1999). Employees’ terms or conditions of employment, specified in Section 8(d) of the Act and which include subcontracting, are mandatory subjects of bargaining, *Katz*, 369 U.S. at 742-43.

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<sup>3</sup> A violation of Section 8(a)(5) of the Act carries a “derivative” violation of Section 8(a)(1) of the Act. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

The Supreme Court has held that an employer must bargain over a subcontracting decision that does “not alter the [employer’s] basic operation,” but that involves “the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 213 (1964); accord *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 165 (1st Cir. 2005) (hospital violated the Act by failing to bargain over its hiring of subcontractors to perform work that was identical to that of unit employees). As explained below, the Board properly found (D&O 11) that the “Hospital was in precisely that situation when it contracted with RTM to provide per diem respiratory therapy technicians to work in the Respiratory Therapy Department.”

**B. The Hospital Subcontracted the Work of Respiratory Therapy Technicians without Bargaining with the Union**

Substantial evidence supports the Board’s finding that the Hospital unilaterally subcontracted unit work without bargaining with the Union. As the Board observed, “the facts relating to [the subcontracting] allegation are largely undisputed.” (JA 42.) On March 15, the Hospital notified the Union of its intent to subcontract the Respiratory Therapy Department in a letter proclaiming that it “will begin privatizing [respiratory therapy] services,” and that it intended to “negotiate *the impact* of this decision.” (JA 35) (emphasis added.) The parties

held a single negotiating session on March 24, where the parties primarily discussed the Union's information request regarding the Hospital's asserted financial savings. During that meeting, the Hospital maintained its asserted position that it would only discuss the impact of its decision. Then, on March 28, the Hospital, without notifying the Union, agreed to subcontract with RTM to provide nonunion respiratory therapy technicians on a per diem basis. Starting on that date, RTM began providing technicians to cover shifts. That course of events was entirely corroborated at the hearing by Hospital Human Resources Director Rodriguez, who testified that, effective March 28, the Hospital subcontracted with RTM to provide per-diem employees to perform the work of the Hospital's respiratory therapy technicians. (JA 248-49.)

There is no evidence that the parties bargained over the change itself, nor does the Hospital make that claim before the Court. Indeed, union representative Echevarria testified that when he contacted Rodriguez to find out why the Hospital had unilaterally subcontracted the work, Rodriguez did not refute the allegation of unilateral implementation. Instead, she responded that the Hospital needed to cover certain shifts. (JA 249-52, 297.)

The Hospital claims that its unilateral action was lawful because the subcontracted per-diem employees did not "substitute[] or displace[] unit employees" (Br. 39). That position, however, conflicts with the Court's precedent,

which affirmed the principle that the Act does not require a showing of job loss for subcontracting to be a mandatory subject of bargaining. *See Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 469 (2004) (“[F]or the Board has held that an employer must bargain over a decision to subcontract out unit work even when the decision will have no discernible impact on bargaining unit employees.”), *enforced*, 414 F.3d 158 (1st Cir. 2005). As the Court explained, the duty to bargain over subcontracting extends beyond the circumstances involving direct loss of employment because the subcontracted work “provides bargaining unit members with the opportunity to obtain extra shifts (possibly at overtime rates) or to expand the size of the unit through the hiring of new employees.” *Sociedad Espanola*, 414 F.3d at 167. Thus, a “union’s interest in subcontracting decisions is not limited to situations where unit employees are laid off or replaced because of subcontracting.” (JA 48 n.26.) Accordingly, the Hospital’s unilateral change in the unit employees’ conditions of employment, prior to bargaining to impasse with the Union, constitutes a violation of Section 8(a) (5) and (1). *See Katz*, 369 U.S. at 743.

**C. The Hospital Did Not Have a Past Practice of Unilaterally Subcontracting the Work of Its Respiratory Therapy Technicians to Per-Diem Employees**

Before the Court, the Hospital does not claim that it bargained with the Union over the decision to use per-diem employees, nor could it. It argues instead

(Br. 35-40) that its past practice privileged it to bypass bargaining. The Hospital has failed to establish that a past practice existed or that its subcontracting decision was consistent with any prior established conduct.

Section 8(a)(5) of the Act requires that an employer refrain from making unilateral changes and, instead, maintain the status quo until it has bargained to impasse with the employees' exclusive representative. *See Sociedad Espanola*, 414 F.3d at 166. This requirement includes an obligation to adhere to any established past practice, which the Board defines as "an activity that has been satisfactorily established by practice or custom; an established practice or an established condition of employment." *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988) (internal quotations omitted). When an employer asserts a past practice as a defense to a charge that it has refused to bargain, the employer carries the burden of proving that the past practice exists. *See Sociedad Espanola*, 414 F.3d at 166 (observing that the employer must establish it subcontracted consistent with past practice to "benefit from the safe harbor"). The employer must therefore show that its action conformed to an established pattern of activity and was not an act of unfettered discretion. *See id.; see also Adair Standish Corp. v. NLRB*, 912 F.2d 854, 863-64 (6th Cir. 1990) (employer did not establish past practices where its tardiness policy, posted after the union won the election, was not a formal statement of existing standards and the layoff procedure consisted of the

employer's unilateral right to lay off employees on unspecified terms); *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 711-12 (9th Cir. 1986) (employer failed to meet its burden where the layoffs were "unpredictably episodic" and the layoff procedures were "ad hoc and highly discretionary").

The Hospital contends (Br. 38-40) that subcontracting the work to RTM was consistent with its past practice of unilaterally using temporary employees to cover Hospital employee absences. The Board properly rejected that contention as factually unsupported by the record and found that the unilateral decision to use per diem employees constituted an unlawful change in the employees' terms and conditions of employment.

First, the record does not support the Hospital's assertion that it regularly "used professional services to cover absences or shifts that could not be covered by unit employees in the Department." (Br. 38.) Rather, the Board found that "[h]istorically, the Hospital used temporary employees sparingly in the Respiratory Therapy Department, with only two such employees covering shifts in 2010." (JA 36 n.6). The credited evidence shows further that over more than four years, between April 2006 and August 2010, the Hospital hired just 15 temporary employees to cover certain gaps in Department staffing. (Supp. Add. 15.) Similarly, Rodriguez acknowledged, as the Board found, that the Hospital had not used a temporary employee for nearly eight months (since August 12, 2010) before

it subcontracted per-diem work to RTM. (JA 48; Supp. Add. 15.) That evidence demonstrates at best an erratic use of temporary employees to cover staffing gaps, but is not, as the Board found (JA 48 n.27), analogous to the past practice established in *Westinghouse Electric Corporation*, 150 NLRB 1574, 1576 (1964), where the evidence showed the employer's 20-year steady reliance on subcontracting. The Board considered (JA 36 n.6) the stark contrast between the Hospital's historical practice of "sparingly" using temporary employees and the Hospital's actions between March 28 and April 23, 2011, during which the Hospital used eight different per-diem employees provided by RTM to cover various Department shifts. Under those circumstances, the Board properly determined that the Hospital's evidence "falls well short" of showing that it had a past practice of using per-diem employees to perform unit work such that its unilateral subcontracting was lawful under the Act. (JA 48.) *See Sociedad Espanola*, 414 F.3d at 166 (evidence showing only "sporadic use of per diem employees" is insufficient to show a past practice of subcontracting unit work).

Second, the Board reasonably rejected (JA 48) the Hospital's contention that the collective-bargaining agreement permitted the type of subcontracting the Hospital entered into with RTM. As the Board observed, the parties' agreement allows "the Hospital to hire temporary employees if certain criteria are met," but the Hospital's own witness, Human Resources Director Rodriguez, unequivocally

testified that “the per-diem employees that RTM provided were *not* hired temporary employees covered by the collective-bargaining agreement.” (JA 48) (emphasis added). Specifically, Rodriguez testified that the per-diem employees were not temporary, but, rather, “people who are on standby waiting to cover shifts that may come up . . . at a last minute.” (JA 249.)

The Hospital’s attempt to mitigate the impact of Rodriguez’s testimony by asserting that the Board put an “impermissible spin” (Br. 40) on her testimony is wholly unfounded. As the Board noted, Rodriguez initially testified that per-diem employees were temporary employees under the parties’ agreement, but “then interjected to correct herself and emphasize that per-diem employees are not temporary employees.” (JA 36 n.6.) Other than a superficial condemnation (Br. 40) of the Board’s finding – which the Board based on the testimony of the Hospital’s own witness – the Hospital offers no basis to disturb the reasonable determination that the per-diem employees were not temporary employees as contemplated by the parties’ agreement.<sup>4</sup> In short, substantial evidence supports the Board’s finding that the Hospital’s decision to subcontract was “a new development, [] borne out of [its] January 2011 plan to subcontract the entire

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<sup>4</sup> The Hospital likewise does not explain why the collective-bargaining provision that requires the Hospital to grant its own regular employees preference over temporary employees in covering vacant positions does not cover the per-diem employees if they are, indeed, temporary employees. (JA 36 n.6.)

Respiratory Therapy Department, rather than the product of past practice.” (JA 48.)

### **III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE HOSPITAL VIOLATED THE ACT BY UNILATERALLY DISCHARGING THE RESPIRATORY THERAPY TECHNICIANS AND SUBCONTRACTING THE WORK TO RESPIRATORY THERAPY MANAGEMENT**

#### **A. Applicable Principles**

As discussed above (pp. 24-25), an employer must bargain in good faith with the employees’ exclusive representative before making changes to the terms and conditions of employment. Only when a true impasse is reached may the employer undertake any unilateral changes. *See, e.g., NLRB v. Beverly Enters.-Mass., Inc.*, 174 F.3d 13, 27 (1st Cir. 1999); *Mike-Sell’s Potato Chip Co.*, 360 NLRB No. 28 (2014), 2014 WL 180485, at \*14 (Jan. 15, 2014), *enforced*, 807 F.3d 318 (D.C. Cir. 2015). A stalemate in negotiations constitutes a good-faith impasse when “the parties are deadlocked so that any further bargaining would be futile,” *Bolton-Emerson, Inc. v. NLRB*, 899 F.2d 104, 108 (1st Cir. 1990), and when “there [is] no realistic prospect that continuation of discussion at that time would [be] fruitful.” *Beverly Enters.-Mass.*, 174 F.3d at 27 (internal quotations and citation omitted); *see also Beverly Farm Found., Inc. v. NLRB*, 144 F.3d 1048, 1052 (7th Cir. 1998) (“The touchstone for determining whether a genuine ‘impasse’ or ‘deadlock’ existed at the time the employer instituted unilateral changes is the

absence of any realistic possibility that continuation of the negotiations would have been fruitful.”). The burden of proving impasse at the moment of unilateral change rests with the party asserting it. *Ryan Iron Works*, 257 F.3d at 12; *Serramonte Oldsmobile*, 318 NLRB 80, 97 (1995), *enforced in relevant part*, 86 F.3d 227 (D.C. Cir. 1996).

The Board looks at the totality of the circumstances in determining whether impasse exists. *Grinnell Fire Prot. Sys., Co.*, 328 NLRB 585, 586 (1999), *enforced*, 236 F.3d 187 (4th Cir. 2000). In doing so, the Board considers the “bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.” *Ryan Iron Works*, 257 F.3d at 12. There can be no impasse unless “[b]oth parties in good faith believe that they are at the end of their [bargaining] rope.” *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enforced*, 836 F.2d 289 (7th Cir. 1987); *see also Truserv Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001). “If either negotiating party remains willing to move further toward an agreement, an impasse cannot exist: the parties’ perception regarding the progress of the negotiations is of central importance to the Board’s impasse inquiry.” *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991).

As noted above (pp. 21-22), this Court gives great deference to the Board's factual findings. *Visiting Nurse Servs. of W. Mass., Inc. v. NLRB*, 177 F.3d 52, 58 (1st Cir. 1999). The determination of whether an impasse exists is "an intensely fact-driven question." *Id.* Further, this Court has observed that "the particular facts and complexities of the bargaining process are particularly amenable to the expertise of the Board as factfinder." *Bolton-Emerson*, 899 F.2d at 108 (internal quotations omitted). "In fact few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a Board [that] deals constantly with such problems." *Id.* (internal quotations omitted).

**B. Substantial Evidence Supports the Board's Finding that the Hospital Unilaterally Implemented Its Subcontracting Plan Before Reaching a Good-Faith Impasse with the Union**

The Board found that on July 8, 2011, the Hospital unilaterally discharged its respiratory therapy technicians and subcontracted their work without having reached a good-faith impasse. The Board's finding is amply supported by substantial evidence and the cases relied on by the Hospital do not undermine that finding.

**1. The parties' conduct on July 8 did not demonstrate a good-faith impasse**

As the Board initially observed, "viewing the record as a whole" (JA 50), a bargaining impasse did not precipitate the Hospital's actions on July 8 in

discharging the eight respiratory therapy technicians. To the contrary, the Board found that the parties were not at the end of their bargaining rope.

In making that determination, the Board relied on (JA 50) the fact that the Union had offered its first substantive proposal to reduce the monthly meal stipend for unit employees, which was meant to be an alternative to subcontracting, just two hours before the Hospital unilaterally discharged the employees. The parties had spent the bulk of their previous negotiating sessions discussing the Union's information requests and its concerns regarding the Hospital's specific cost-savings calculations. On July 8, three days after the Hospital finally, at the Union's repeated urging, produced a study that accurately reflected staffing levels, the Union offered its first substantive alternative to the Hospital's subcontracting plan. The Union's opening proposal regarding the meal stipend reduction resulted in a savings gap between the parties of only \$373 per month. Rodriguez responded (JA 245) that the Hospital could accept some of the conditions, but she needed to speak to Executive Director Benetti about other conditions. Under those circumstances, the Board, in finding no impasse, reasonably considered that the parties were making progress, and the Union was expressing a willingness to be flexible. *See, e.g., Beverly Farm*, 144 F.3d at 1052-53 ("continued flexible bargaining posture" of the union demonstrated no good-faith impasse); *Grinnell Fire Prot.*, 328 NLRB at 586 (willingness to be flexible mitigated against finding of impasse); *Atlas Tack*

*Corp.*, 226 NLRB 222, 225 (1976) (no impasse found where there was no indication that the parties had bargained over a period of time with the result of little or no progress), *enforced*, 559 F.2d 1201 (1st Cir. 1977).

The Board also relied on (JA 50) the parties' continued course of conduct following the Hospital's rejection of the Union's proposal and unilateral discharge of the eight therapists. The Union immediately contacted the Hospital to express its willingness to continue bargaining. When the parties returned to the bargaining table only hours later, "both the Hospital and the Union offered additional proposals and concessions in an effort to make the monthly meal stipend reduction more attractive as an alternative to subcontracting." (JA 50.) Specifically, the Union quickly reduced its stipend proposal further, to \$27.50 per employee, which resulted in a cost savings that *exceeded* the subcontracting savings, abandoned its quarterly cost-savings-review condition, and clarified, to the Hospital's satisfaction, that its one-year proposal reflected an intent for the parties to revisit, as opposed to sunset, the reduction in one year's time.

That conduct demonstrated that meaningful negotiations had not ended when the Hospital acted. As the Board explained, because "neither party was at the end of its negotiating rope when the parties began the evening negotiations on July 8 (as shown by the multiple offers and counteroffers that the parties made during the evening session), it follows that the parties were not at impasse when the Hospital

discharged its respiratory therapy technicians in the afternoon on July 8.” (JA 50); *see Beverly Enters.*, 174 F.3d at 27-28 (union’s “clear” desire to continue collective bargaining process meant parties were a long way from impasse); *Colfor, Inc.*, 282 NLRB 1173, 1174 (1987) (no impasse where the parties agreed to meet for further negotiations), *enforced*, 838 F.2d 164 (6th Cir. 1988).

While the Union’s conditional offer may have frustrated the Hospital or caused impatience, the relevant inquiry is whether both parties viewed further negotiations as futile. Contrary to the Hospital’s assertion (Br. 51-55), the record does not support a finding that the parties shared a contemporaneous understanding that an impasse existed. The record establishes that the Hospital never communicated to the Union that failure to agree to its proposal would result in deadlock. *See, e.g., Bolton–Emerson*, 899 F.2d at 108 (“There is a strong requirement that impasse be clear . . . in order to insure the integrity of the bargaining process.”); *Ryan Iron Works*, 257 F.3d at 12 (emphasizing the employer’s failure to notify the union clearly that failure to agree would result in impasse); *Hotel Roanoke*, 293 NLRB 182, 185 (1989) (“The failure of a party to communicate to the other party the paramount importance of the proposals presented at the bargaining table or to explain that a failure to achieve concessions would result in a bargaining deadlock evidences the absence of a valid impasse.”). The parties’ behavior when the Union presented its first offer undermines the

Hospital's assertion that they shared an understanding that further bargaining would be futile. Rodriguez's immediate reaction to the Union's July 8 conditional offer was one of optimism. Indeed, that offer brought the parties to within \$373 per month of one another, while its subsequent offer in fact exceeded the subcontracting savings. *See Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1083-84 (D.C. Cir. 1991) (union's position that it still had more movement to make" undermines employer's declaration of impasse). And the parties' post-declaration behavior likewise showed no shared understanding of impasse. *See Ryan Iron Works*, 257 F.3d at 12 (finding no impasse, in part, because bargaining sessions after implementation demonstrated that the parties did not contemporaneously understand the parties to be at impasse).

In sum, the Board determined that, based on the record as a whole, continued bargaining was not futile at the time the Hospital discharged the respiratory therapy technicians on July 8.

**2. The Hospital relies on inapposite case in an attempt to show impasse**

The Hospital misplaces its reliance (Br. 52-54) on *Truserv Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), *Holiday Inn Downtown-New Haven*, 300 NLRB 774 (1990), and *Comau, Inc. v. NLRB*, 671 F.3d 1232 (D.C. Cir. 2012), as supporting an impasse finding. In *Truserv*, the D.C. Circuit faulted the Board for not according sufficient weight to the employer's firm stance that its last offer was,

in fact, its final offer. 254 F.3d at 1116. In the context of the bargaining in that case, the Court determined further that the Board should not have relied on what it characterized as the union's "self-serving statement" that the parties were not at impasse and its "vacuous request" for additional meetings several days later. *Id.* at 1117. The factual scenario presented by *Truserv* readily distinguishes that case from the instant one. Here, the Hospital conveyed no similar final offer, and immediately before declaring impasse, it was the Union that made substantial movement toward the Hospital's cost-saving needs. Moreover, the Union's request here for a meeting *later that night*, coupled with its stated commitment to continue negotiations *that night* until the parties reached an agreement, stands in stark contrast to the union's statement in *Truserv*.

Nor does the Board's decision in *Holiday Inn Downtown-New Haven* compel an impasse finding here. In that case, the union repeatedly rejected the employer's proposal for unlimited subcontracting. *Holiday Inn Downtown-New Haven*, 300 NLRB at 774. The union steadfastly maintained that it would never agree to the employer's position, and the letter wherein the union proposed to continue negotiations and professed a willingness to be flexible, the union also stated that it considered the employer's subcontracting proposal "unreasonable in the extreme." *Id.* The union never conveyed any intention to move off its "never" position, despite repeated requests for those assurances from the employer. The

Board therefore found, “that the record as a whole indicates that the [u]nion continued to oppose the concept of unlimited subcontracting and that it failed to give a sufficient indication of changed circumstances to suggest that future bargaining might be fruitful.” *Id.* at 776. Here, the Union’s request for additional bargaining is markedly different than the situation presented in *Holiday Inn Downtown-New Haven*. The Union was not manifestly opposed to the Hospital’s cost-saving needs, and its most recent proposal demonstrated substantial movement toward the Hospital’s position. Under those circumstances, the Hospital cannot reasonably claim (Br. 53) that the Union’s offer to continue bargaining was similar to the inflexible, steadfast approach displayed by the union in *Holiday Inn Downtown-New Haven*.

The Board’s consideration of the parties’ course of conduct here is, contrary to the Hospital’s position (Br. 43-46), unaffected by the D.C. Circuit’s analysis in *Comau*. In that case, the parties were negotiating health care as part of a master collective-bargaining agreement. After multiple bargaining sessions, the employer submitted to the union its last, best offer concerning the health plan, which the union did not accept. On December 22, 2008, the employer notified the union and its members that it was implementing its last, best offer. Changes to the health care plan required some lead time, so the employer announced that the effective date of the new plan was March 1, 2009. Between December 22 and March 1, the

parties continued to bargain over the health care plan. Ultimately, the plan took effect on March 1, and the Board determined that, because the parties were not at impasse on March 1, the employer acted unlawfully.

On appeal, the D.C. Circuit reversed the Board and determined that implementation effectively occurred on December 22, not March 1. In doing so, the court explained that “[t]he issue here is not *whether* an impasse existed: the Board does not dispute that an impasse existed on December 22, 2008, and [the employer] does not contest the Board’s finding that no impasse existed on March 1, 2009.” *Comau*, 671 F.3d at 1237 (emphasis in original). The precise question presented in this case is one *Comau* expressly declined to address, namely, whether there was substantial evidence to support the Board’s impasse finding. Accordingly, because *Comau* did not address whether substantial evidence supported the Board’s impasse finding, it does not support the Hospital’s contention that such evidence is lacking here.

### **C. The Hospital’s Defenses Are Meritless**

In an attempt to escape liability for its unilateral discharge of eight employees and subcontracting their work to RTM, the Hospital asks this Court to reweigh the evidence, entrenching on the Board’s special expertise in examining the traditional impasse factors. The Hospital argues that these factors show that it bargained in good faith while the Union intentionally delayed bargaining despite

the Hospital's financial crisis. The Hospital's defenses are unavailing and fail to refute the Board's impasse finding.

First, the Hospital points to the parties' bargaining and faults the Union (Br. 46-49) for not presenting a proposal between March 15 and July 8, regarding the subcontracting decision. The Board found, however, that the Hospital did not even recognize its obligation to engage in bargaining over the *decision* to subcontract until April 12.<sup>5</sup> (JA 35.) Moreover, for several months, the Union requested a savings calculation that reflected current staffing levels, but the Hospital failed to provide it until July 5. As the Board explained, once "the Union agreed that the Hospital's calculations were accurate . . . negotiations turned to whether parties could devise an alternative plan [to subcontracting]." (JA 40.) Then, just three days later and armed with accurate figures, the Union proposed a cost savings plan that narrowed the financial gap between the parties to \$373 per month. And, notably, several hours later, the Union proposed savings that exceeded those projected by the subcontracting proposal.

The Hospital's claim of union delay in bargaining also ignores that the Hospital, of its own accord, postponed the effective date for the subcontracting several times so that the Union could review information. The Hospital's position

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<sup>5</sup> The Hospital errantly asserts (Br. 50) that the negotiations lasted over three months. Bargaining over the decision to subcontract (as opposed to its effects) did not begin until April 12, and ended fewer than three months later, on July 8.

also fails to account for the fact that the parties were simultaneously bargaining over a successor agreement, thus their meetings were not limited solely to discussing the subcontracting decision. Therefore, the parties' bargaining shows that the Union remained flexible and continued to make changes and that the parties devoted bargaining time to issues other than subcontracting. Such bargaining is consistent with a finding of no impasse. *See, e.g., Beverly Farm*, 144 F.3d at 1052 (no impasse where parties met for 19 sessions, but devoted only three sessions to economic issues over about two months, and union remained flexible).

Next, the Hospital lauds its good-faith bargaining while contending (Br. 49-50) that the Union bargained in bad-faith.<sup>6</sup> To demonstrate the Union's bad faith, the Hospital must present evidence showing that the Union's behavior "reflected a cast of mind against reaching agreement" and evidenced a "refusal to negotiate."

*Katz*, 369 U.S. at 747. The facts found by the Board do not support the Hospital's

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<sup>6</sup> Far from a picture of clarity, the Hospital's exceptions filed with the Board do not include an obvious challenge to the judge's failure to find that the Union engaged in bad-faith bargaining. The Hospital had an obligation to raise this claim to the Board. *See* 29 C.F.R. § 102.46(b)(2) ("Any exception to a ruling, finding, conclusion, or recommendation which is not *specifically* urged shall be deemed to have been waived.") (emphasis added). Its failure to do so precludes this Court from considering it. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances."); *see also infra*, pp. 46-47. To the extent this argument is preserved, for the reasons discussed above, it is meritless.

The Hospital's exceptions brief is not part of the formal record. Therefore, simultaneously with this filing, the Board has moved to lodge the Hospital's exceptions brief.

claim that the Union engaged in such behavior. The Hospital relies again (Br. 50, 56-58) on the Union's alleged delay by not offering a proposal until July 8. But, as discussed above (pp. 42-43), the timing of the Union's proposal was partly attributable to the Hospital, which had given the Union requested information just three days earlier.

The Hospital's summary assertion of surface bargaining (Br. 50) is likewise unsupported by any factual findings and does not support its impasse claim. The Hospital points to no evidence showing that the Union's was "going through the motions with a predetermined resolve not to budge from an initial position." *Park Manor Nursing Home*, 318 NLRB 1085, 1087-88 (1995) (quoting *NLRB v. Gen. Elec. Co.*, 418 F.2d 736, 762 (2d Cir. 1969)). The Hospital ignores that the Union continually requested accurate calculations and met with the Hospital in an attempt to retain employee jobs. The record also clearly establishes that the Union, contrary to the Hospital's contention (Br. 50-51), fully appreciated the importance of the issue and endeavored to satisfy fully the Hospital stated economic savings. In fact, its first proposal came close to the savings that the Hospital sought and its later proposal surpassed the Hospital's need. Under those circumstances, the Hospital's claim (Br. 52) that the Union engaged in surface bargaining and did not offer the cost savings that the Hospital needed rings hollow.

The Hospital next contends (Br. 55-59) that purported delay tactics by the Union and economic exigencies excused any failure on its part to bargain to impasse. As discussed above (pp. 42-43), however, the record does not support the Hospital's claim that the Union "engaged in dilatory tactics to avoid reaching an agreement." (Br. 58.) The Hospital likewise cannot show (Br. 57-58, 60) that economic exigencies compelled prompt action. Under settled Board law, an employer can justify unilateral action if "extraordinary events which are an unforeseen occurrence, having a major economic effect [require] the company to take immediate action." *RBE Elecs.*, 320 NLRB 80, 81 (1995) (internal quotation marks and citations omitted). The Hospital did not meet its "heavy" burden in proving this defense. *Id.* The Board, after observing that the Hospital had appeared to abandon this claim after the hearing, expressly found that the record did not excuse immediate action without bargaining. (JA 50-51 n.28.) Indeed, the Board emphasized that the Hospital "began its efforts to cut costs in 2009, and thus the ongoing need for cutting costs was foreseeable by the time the Hospital began considering subcontracting the Respiratory Therapy Department in January 2011." (JA 51 n.28.) Before the Court, the Hospital baldly asserts that it faced an "economic exigency" but fails to define that exigency or identify any record evidence showing an emergency that required it to unilaterally discharge all the respiratory technicians and subcontract their work.

In short, the Hospital has offered the Court no reason to disregard the Board's special expertise, and substantial evidence amply supports the Board's finding that the parties were not at impasse. Accordingly, the Hospital violated the Act when it unilaterally discharged the respiratory department technicians and subcontracted out their work.

#### **IV. THE HOSPITAL'S CHALLENGE TO THE BOARD'S REMEDY IS NOT PROPERLY BEFORE THE COURT**

The Hospital challenges (Br. 32-35) for the first time on appeal the portion of the Board's remedial order concerning reinstatement and back pay for the respiratory therapy technicians who were unlawfully discharged on July 8, 2011, claiming that such a remedy will cause it economic harm. The Court, however, lacks jurisdiction to consider the Hospital's challenge and, in any event, the Board properly acted within its broad remedial discretion in ordering reinstatement and backpay.

Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). That statutory prohibition creates a jurisdictional bar against judicial review of issues not raised to the Board. *See Woelke & Romero Framing, Inc.*, 456 U.S. 645, 665 (1982) (stating Section 10(e) precludes court of appeals from reviewing claim not raised to the Board); *Local Union No. 25 v. NLRB*, 831

F.2d 1149, 1155 (1st Cir. 1987) (same). The Court “has described this raise-or-waive rule as creating ‘a win-win situation’ because adhering to it simultaneously enhances the efficacy of the agency, fosters judicial efficiency, and safeguards the integrity of the inter-branch review relationship.” *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 458-59 (1st Cir. 2005) (internal quotations omitted); *see also Edward Street Daycare Center, Inc. v. NLRB*, 189 F.3d 40, 44 (1st Cir. 1999) (pursuant to Section 10(e), a party’s failure to present an issue to the Board before raising it on appeal is an “omission [that is] fatal to the consideration of [that] issue”). Here, the Hospital, failed to file exceptions to the Board regarding the judge’s recommended order awarding reinstatement and backpay. As such, Section 10(e) of the Act precludes this Court from considering the Hospital’s challenge to the remedy.

Further, to the extent that the Hospital contends (Br. 34) that the passage of time affects the enforceability of the Board’s Order, the Hospital likewise failed to file a motion for reconsideration with the Board raising this argument when the Decision and Order issued on April 28, 2016. “There may be circumstances in which a motion for reconsideration is the first opportunity a party has to raise objections . . . .” *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011). In such cases, “the objections will be preserved by a timely motion to reconsider.” *Id.* at 349 (footnote omitted); *see also* NLRB Rules and

Regulations, 29 CFR § 102.48(d)(2) (motions for reconsideration “shall be filed within 28 days . . . after service of the Board’s decision and order”). Here, the Hospital failed to avail itself of the opportunity to present any claim of changed circumstances to the Board; such a motion would have given notice to the Board of the Hospital’s objection and a chance for the Board to fix its alleged mistake. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.”) Nor does the Hospital allege, much less prove, that its failure to do so was due to “extraordinary circumstances.”

Therefore, its assertions that the Board’s Order would force it “to incur [] excessive costs” (Br. 34) and “be punitive in nature due to the economic situation facing the Hospital,” (Br. 35) are not properly before the Court. *See W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345-46 (D.C. Cir. 2008) (party’s failure to file a motion to reconsider contesting Board’s remedy deprives court of jurisdiction to hear challenge).

In any event, the Board’s Order in this case falls well within its broad remedial authority. The Board enjoys wide discretion in crafting appropriate remedies for violations of the Act. *See, e.g., Fibreboard*, 379 U.S. at 216 (Board’s authority to issue remedies is a “broad discretionary one, subject to limited judicial

review”); accord *Pan Am. Grain Co. v. NLRB*, 558 F.3d 22, 28-29 (1st Cir. 2009).

Section 10(c) of the Act directs the Board to order remedies for unfair labor practices. 29 U.S.C. § 160(c). 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 Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). As this Court has recognized, “[t]he customary remedy for an employer’s violation of Section 8(a)(5), reinstatement and full backpay, is presumptively valid; it aims to return the employee to the economic status quo before the employer’s unilateral action.” *Pan Am.*, 558 F.3d at 29; see also *Fibreboard* 379 U.S. at 208, 215-16 (approving reinstatement and make-whole order to remedy unlawful unilateral subcontracting of unit work). Here, the Board ordered its conventional remedy for the Hospital’s violation, and the Hospital has not shown that the Board abused its discretion in putting the unlawfully discharged employees back to where they would have been in the absence of the Hospital’s unilateral actions.

**V. THE HOSPITAL’S CHALLENGE TO THE COMPLAINT’S VALIDITY IS UNTIMELY AND THE COURT, THEREFORE, LACKS JURISDICTION TO CONSIDER IT**

The Hospital argues (Br. 23-32) that Acting General Counsel Lafe Solomon lacked authority to issue the underlying complaint in this case. In making this

argument, the Hospital relies on *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (June 20, 2016), in which the D.C. Circuit held that Solomon was serving in violation of the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 et seq. (FVRA), between January 5, 2011 and November 4, 2013.<sup>7</sup> The operative complaint in this case, which issued on November 17, 2011, falls within the time period identified by *SW General*. As shown below, this Court lacks jurisdiction to consider the challenge to Solomon’s authority because the Hospital failed to timely raise it to the Board.

As outlined above (pp. 46-47), Section 10(e) of the Act prohibits a party from raising issues that were not presented in the first instance to the Board, absent “extraordinary circumstances.” 29 U.S.C. § 160(e). The Hospital never challenged Solomon’s authority during any of the proceedings before the Board—not in its answer to the complaint, during the hearing before the administrative law judge, in its post-hearing brief, or in its exceptions to the administrative law judge

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<sup>7</sup> The Board disagrees with the decision in *SW General*. The Supreme Court heard argument in *SW General* on November 7, 2016. Given that disagreement, the Board cannot be faulted (Br. 31-32) for not acquiescing to the position of the D.C. Circuit. *See, e.g., Ford Motor Co. v. NLRB*, 441 U.S. 488, 493 n.6 (1979) (Supreme Court noted, in affirming a decision of Seventh Circuit, that Board had adhered to its legal position over ten-year period despite adverse decisions in First, Fourth, and Seventh Circuits); *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 639 n.2 (1st Cir. 1982) (recognizing that the Board had not acquiesced to the Court’s *Wright Line* formulation and had “continue[d] to adhere to its own formulation.”)

decision. *See* 29 CFR § 102.46(b)(2) (stating that “[a]ny exceptions to a ruling, finding, conclusion or recommendation which is not specifically urged shall be deemed to have been waived”). Moreover, the Hospital never alerted the Board to any concern regarding Solomon’s authority when the case was before the Board again on remand from this Court. The Hospital’s repeated failure to raise its challenge at any opportune moment is a “fatal omission” that renders this Court without jurisdiction to consider it. *Edward Street Daycare*, 189 F.3d at 44; *see also 1621 Route 22 W. Operating Co. v. NLRB*, 825 F.3d 128, 142-43 (3d Cir. 2016) (rejecting employer’s argument that its FVRA-based claim can be raised at any time).

*SW General*, on which the Hospital relies, supports the Board’s position concerning the Court’s lack of jurisdiction. In *SW General*, the D.C. Circuit explained the “narrowness” of its decision inasmuch as it “address[ed] the FVRA objection in [*SW General*] because the petitioner raised the issue in its exceptions to the ALJ decision.” 796 F.3d at 83 (emphasis added). The Court simultaneously expressed “doubt that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success.” *Id.*; *see also Marquez Bros. Enter., Inc. v. NLRB*, 650 Fed. App’x 25, 27 (D.C. Cir. 2016) (finding that “typical NLRA exhaustion doctrine applies” to FVRA challenges to Solomon’s service as Acting General Counsel);

*1621 Route 22*, 825 F.3d at 142 (observing that rejection of untimely challenge to Solomon’s authority put court “in accord” with *SW General*, “the principal opinion upon which [the employer] relies to support its FVRA defense, in which the D.C. Circuit expressed doubt that the argument then before it, if unpreserved, could be raised in court”). The Hospital has offered no basis for this Court to disregard the D.C. Circuit’s limitation of its *SW General* decision.

As noted, “except in the rare case that presents extraordinary circumstances, a ‘Court of Appeals lacks jurisdiction to review objections that were not urged before the Board.’” *1621 Route 22*, 825 F.3d at 139 (quoting *Woelke*, 456 U.S. at 666; see also *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (U.S. 1961) (collecting cases). The Hospital cannot show any “extraordinary circumstance” justifying its failure to preserve the challenge to Solomon’s authority. Contrary to the Hospital’s claim (Br. 29), its FVRA-based challenge to Solomon’s appointment is not “precisely the type of action that the Supreme Court struck down in *Noel Canning*.” See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (finding that certain Board members were invalidly appointed). Indeed, in *SW General*, the D.C. Circuit rejected any such parallel and cautioned that its holding was “not Son of *Noel Canning*” or intended “to retroactively undermine a host of [Board] decisions.” *SW General*, 796 F.3d at 82-83; see also *Marquez Bros.*, 650 Fed. App’x at 27 (“Because petitioner’s challenge is not ‘based on the agency’s lack of

authority to take any action at all’ . . . but instead attacks the service of a single officer, our typical NLRA exhaustion doctrine applies, as we recognized in *SW General*.”) (quoting *SSC Mystic Operating Co. v. NLRB*, 801 F.3d 302, 308 (D.C. Cir. 2015)).

Moreover, the Hospital offers no explanation for its failure to raise its challenge to the Board. Nor reasonably could it do so given that all of the facts and legal arguments necessary to challenge Solomon’s designation were available as of January 5, 2011, well before Solomon issued the second amended consolidated complaint in this case on November 17, 2011. Further, while the case was pending before the Board on remand, two courts of appeals, the Ninth Circuit in *Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550 (9th Cir. 2016), and the D.C. Circuit in *SW General*, issued decisions that Solomon was improperly serving as Acting General Counsel. But the Hospital never drew the Board’s attention to either case and, again, it offers no reason for its failure to do so.<sup>8</sup> *Cf. Paulsen v. Remington Lodging & Hosp., LLC*, 773 F.3d 462, 468 (2d Cir. 2014) (“Because all of the facts and legal arguments necessary to mount a challenge to

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<sup>8</sup> Further, because the Hospital’s opening brief does not provide any reason for its failure to raise to the Board its FVRA-based complaint challenge and the supporting authority for that challenge, it has waived its right to explain this failure in its reply brief. *See, e.g., NLRB v. Hotel Emps. & Rest. Emps. Int’l Union*, 446 F.3d 200, 206 (1st Cir. 2006) (recognizing waiver of arguments not raised until reply brief).

[Solomon's] appointment were available to [the employer] when the case was before the district court," the circuit court was "not inclined to excuse the forfeiture.")<sup>9</sup>

The Hospital attempts to escape the clear jurisdictional bar of Section 10(e) by relying instead on (Br. 30-32) general judge-made principles that allow consideration of waived issues on appeal only in "exceptional circumstances" when "the equities heavily preponderate in favor of such a step." *In re Net-Velazquez*, 625 F.3d 34, 41 (1st Cir. 2010) (quoting *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 627-29 (1st Cir. 1995)). But such principles are inapposite here where there is a statutory bar. Thus, the cases cited by the Hospital rely on a judicial test, in the absence of a statutory scheme, for allowing certain narrow exceptions to the standard "raise-or-waive" policy. Here, the Court need not invoke any such test because the proscriptions of Section 10(e) govern. *Cf. Pegasus Broad. of San Juan, Inc. v. NLRB*, 82 F.3d 511, 514 (1st Cir. 1996) (recognizing that this Court "lack[s] the same broad right or supervisory power over the Board that [it] might have over a district court on new matter" because Section 10(e) "unequivocally requires that new matter go through the Board").

Accordingly, the Court must evaluate whether, under Section 10(e), the Hospital

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<sup>9</sup> Whether General Counsel Richard Griffin could have ratified the complaint (Br. 29-30) is irrelevant here, where the Hospital's failure to raise its challenge to the Acting General Counsel's authority precludes this Court from considering the issue.

has demonstrated any “extraordinary circumstance” to excuse its failure to raise the issue to the Board during the five years its case was pending before the administrative body. As shown above, the Hospital offers no such explanation for its failure, and the D.C. Circuit explicitly doubted the ability of an employer to make such a showing under the precise circumstances presented here. *See SW General*, 796 F.3d at 83; *1621 Route 22*, 825 F.3d 140-43.

## CONCLUSION

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

s/ Elizabeth Heaney

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National Labor Relations Board

FEBRUARY 2017

# **Supplemental Addendum**

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**Quality Health Services of P.R., Inc. d/b/a Hospital San Cristobal and Unidad Laboral De Enfermeras(os) y Empleados De La Salude.** Cases 24–CA–011782 and 24–CA–011884

July 25, 2012

**DECISION AND ORDER**

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On February 2, 2012, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief and the Acting General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exception and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

**ORDER**

The National Labor Relations Board orders that the Respondent, Quality Health Services of P.R., d/b/a Hospital San Cristobal, Ponce, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Unidad Laboral De Enfermeras(os) y Empleados De La Salude (the Union) as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We shall modify the judge's recommended Order to conform to the Board's standard remedial language and substitute a new notice to conform to the Order as modified.

Unlike his colleagues, Member Hayes would find that the Respondent established that subcontracting unit work to per diem employees starting in March 2011 was consistent with its past practice of using per diem employees, and therefore lawful under *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965).

<sup>2</sup> The judge recommended a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." But because the Respondent's repeated violations of the Act have been primarily unilateral changes to the bargaining unit's terms and conditions of employment, any future unlawful unilateral changes would be in violation of a narrow order and subject to contempt proceedings. See, e.g., *Metta Electric*, 349 NLRB 1088, 1088 (2007). Therefore, we substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979).

Unit B—24–RC–7308: All Licensed Practical Nurses and Respiratory Therapy Technicians, Operating Room and Radiology Technicians employed by the Respondent, at the Hospital located in Cotto Laurel Ward, Ponce, Puerto Rico; excluding all other hospital employees, including Executives, Administrators, Supervisors, Administrative Employees, Managers and Guards as defined by the Act.

(b) Making any changes in wages, hours, or other terms and conditions of employment of the employees represented by the Union without first bargaining with the Union as their exclusive collective-bargaining representative.

(c) Unilaterally changing the terms and conditions of employment of its respiratory therapy technicians by subcontracting their work to per diem employees without first notifying the Union and giving it an opportunity to bargain.

(d) Promulgating, maintaining, or enforcing a rule that unlawfully prohibits employees from having discussions related to the Respondent's plan to subcontract the work performed by its respiratory therapy technicians.

(e) Unilaterally discharging respiratory therapy technicians and subcontracting their work to Respiratory Therapy Management without first notifying the Union about its decision and affording the Union an opportunity to bargain over the decision and effects on the respiratory therapy technicians.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees.

(b) Discontinue subcontracting the work of its respiratory therapy technicians and bargain with the Union as the exclusive bargaining representative of the respiratory therapy technicians over any decision to subcontract.

(c) Rescind and give no effect to the work rule prohibiting employees from having discussions related to the Respondent's plan to subcontract the work of its respiratory therapy technicians.

(d) Rescind the change of subcontracting the work of respiratory therapy technicians to per diem employees unilaterally implemented on March 25, 2011.

(e) Make Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Co-

lon, Enid Ortiz, Ivette Borrero, and German Mercado whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful decision to subcontract the work of the respiratory therapy technicians to per diem employees on or about March 25, 2011, in the manner as set forth in the remedy section of the decision.

(f) Rescind the discharges of the respiratory therapy technicians and the change of subcontracting the work of the respiratory therapy technicians to Respiratory Therapy Management unilaterally implemented on July 8, 2011.

(g) Within 14 days from the date of this Order, offer Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, and Enid Ortiz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(h) Make Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, and Enid Ortiz whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful decision to subcontract the work of the respiratory therapy technicians to Respiratory Therapy Management on or about July 8, 2011, in the manner set forth in the remedy section of the decision.

(i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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

(k) Within 14 days after service by the Region, post at its Ponce, Puerto Rico facility copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice in English and Spanish, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 25, 2011.

(l) Within 21 days after service by the Region, filed with the Regional Director for Region 24 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Unidad Laboral De Enfermeras(os) y Empleados De La Salude (the Union) as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

Unit B—24—RC—7308: All Licensed Practical Nurses and Respiratory Therapy Technicians, Operating Room and Radiology Technicians employed by the Respondent, at the Hospital located in Cotto Laurel Ward, Puerto Rico; excluding all other hospital employees, including Executives, Administrators, Supervisors, Adminis-

trative Employees, Managers and Guards as defined by the Act.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT subcontract the work of our respiratory therapy technicians without first notifying the Union about our decision and affording the Union an opportunity to bargain over the decision and its effects on our respiratory therapy technicians.

WE WILL NOT promulgate, maintain, or enforce rules that unlawfully prohibit employees from having discussions related to plans to subcontract the work performed by our respiratory therapy technicians.

WE WILL NOT unilaterally discharge and subcontract the work of our respiratory therapy technicians without first bargaining with the Union to a good-faith impasse.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our bargaining unit employees.

WE WILL discontinue subcontracting the work of our respiratory therapy technicians and bargain with the Union as the exclusive-bargaining representative of the respiratory therapy technicians over any decision to subcontract.

WE WILL immediately rescind and give no effect to the work rule prohibiting employees from having discussions related to our plan to subcontract the work performed by our respiratory therapy technicians.

WE WILL rescind the change of subcontracting the work of our respiratory therapy technicians to per diem employees unilaterally implemented on March 25, 2011.

WE WILL make Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, Enid Ortiz, Ivette Borrero, and German Mercado whole for any loss of earnings and other benefits resulting from our March 25, 2011 decision to subcontract unit work in the respiratory therapy department, less any net interim earnings, plus interest compounded daily.

WE WILL rescind the discharges of our respiratory therapy technicians and the change of subcontracting their work to Respiratory Therapy Management unilaterally implemented on July 8, 2011.

WE WILL, within 14 days from the date of this Order, offer Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon,

and Enid Ortiz full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, and Enid Ortiz whole for any loss of earnings and other benefits resulting from their discharge on July 8, 2011, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, and Enid Ortiz, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

QUALITY HEALTH SERVICES OF PUERTO RICO  
D/B/A HOSPITAL SAN CRISTOBAL

*Jose Ortiz-Marciales, Esq.*, for the Acting General Counsel.

*Jose Oliveras Gonzalez, Esq.*, for the Respondent.

*Harold Hopkins Jr., Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in San Juan, Puerto Rico on November 17–18 and December 13–15, 2011. The Unidad Laboral de Enfermeras(os) y Empleados de la Salud (the Union) filed the charge in Case 24–CA–11782 on April 12, 2011, and filed an amended charge on August 19, 2011.<sup>1</sup> The Union filed the charge in Case 24–CA–11884 on June 29, 2011, and filed an amended charge on August 19, 2011. The Acting General Counsel issued a consolidated complaint (covering both cases) on August 31, 2011, and amended the complaint on October 20 and November 17, 2011.

The complaint alleges that Quality Health Services of Puerto Rico, Inc., d/b/a Hospital San Cristobal (the Respondent or the Hospital) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by issuing and distributing a memorandum to employees on or about March 31, 2011, that prohibited any discussions between employees related to the Respondent's subcontracting of work performed by its respiratory therapy technicians. The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by: on or about March 28, 2011, unilaterally subcontracting work performed by respiratory therapy technicians; on or about April 4, 2011, unilaterally changing its past practice for scheduling vacation for respiratory therapy department employees by eliminating and/or limiting employee discretion when scheduling vacation leave; and on or about July 9, 2011, unilaterally laying off res-

<sup>1</sup> All dates are in 2011, unless otherwise indicated.

piratory therapy technicians and subcontracting the work that they previously performed. The Respondent filed a timely answer denying each of the alleged violations in the complaint.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a corporation, operates a hospital that provides acute health care services in Ponce, Puerto Rico, where it annually derives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$50,000 directly from points outside of the Commonwealth of Puerto Rico. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. Background Facts

This case is the third case that the Respondent, the Union and the Acting General Counsel have litigated in the past 18 months. See *Hospital San Cristobal*, 356 NLRB 699 (2011) (Case 24–CA–011438); *Hospital San Cristobal*, Case 24–CA–11630, slip op. (July 21, 2011). I have summarized portions of the decisions in the two preceding cases because they provide some useful background information for the complaint allegations at issue in this case, and are also relevant to the Acting General Counsel’s request for a broad remedial order.

###### 1. Overview

Since about March 1, 2002, the Union has served as the exclusive collective-bargaining representative of the following bargaining unit (among others) at the Hospital:

Unit B—24–RC–7308: All Licensed Practical Nurses and Respiratory Therapy Technicians, Operating Room and Radiology Technicians employed by the Respondent, at the Hospital located in Cotto Laurel Ward, Ponce, Puerto Rico; excluding all other hospital employees, including Executives, Administrators, Supervisors, Administrative Employees, Managers and Guards as defined in the Act.

The Union and Respondent have been parties to a series of collective-bargaining agreements since March 1, 2002, though the most recent collective-bargaining agreement expired on February 28, 2010.

In 2009, a decrease in the number of patients led the Hospital to consider and implement various cost-cutting measures. *Hospital San Cristobal*, 356 NLRB at 700. As described below, the

Acting General Counsel alleged (in Cases 24–CA–011438 and 24–CA–011630) that the Hospital ran afoul of Section 8(a)(5) and (1) of the Act because it did not fulfill its duty to bargain with the Union before implementing some of the cost-cutting measures and policy changes that it selected.

###### 2. Decision in *Hospital San Cristobal*, 356 NLRB 699 (Case 24–CA–11438)

In Case 24–CA–011438, the Board affirmed Administrative Law Judge William Cates’ finding that the Respondent violated Section 8(a)(5) and (1) of the Act “by altering its past practice and ceasing to pay holiday pay to employees whose day off fell on a holiday, by eliminating its past practice of allowing employees to use sick leave when receiving workers’ compensation, by eliminating permanent shifts in its respiratory care department thereby implementing rotation shifts for those employees, and by changing and reducing the number of employees’ holidays, all without notice to and bargaining with the Union.” *Hospital San Cristobal*, 356 NLRB at 699, 703 (noting that the violations occurred between late 2009 and early 2010). To remedy those violations, the Board (among other things) ordered the Respondent to rescind the unlawful unilateral changes and make employees whole for any lost wages or benefits, with interest. Id.703–704.

###### 3. Decision in *Hospital San Cristobal*, Case 24–CA–011630

In Case 24–CA–011630, Administrative Law Judge George Aleman found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing (on March 1, 2010) its practice of paying certain nursing employees incentives or bonuses<sup>3</sup> on top of their base salary rate without giving the Union prior notice or an opportunity to bargain over that change in its employees’ terms and conditions of employment. *Hospital San Cristobal*, Case 24–CA–011630, supra at 706. Judge Aleman ordered the Respondent to reinstate the unlawfully discontinued employee compensation practices, and make employees whole for any lost wages (plus interest) caused by the 8(a)(5) violation. Id.at 706–707.

###### B. *Hospital Identifies the Respiratory Therapy Department as an Area for Savings*

In connection with the Hospital’s ongoing efforts to reduce costs, respiratory therapy department Supervisor Carlos Diaz suggested in January 2011 that the Hospital consider subcontracting out the respiratory therapy department. (Tr. 40, 185, 193–195.) After reviewing proposals from various subcontractors, the Hospital identified Respiratory Therapy Management (RTM) as the subcontractor that was offering the most affordable package. (Jt. Exh. 21; GC Exh. 4.) Specifically, the Hospital’s initial studies indicated that it would save approximately \$100,000 per year if it used RTM to provide the Hospital’s respiratory therapy services (instead of continuing to use the

<sup>2</sup> The trial transcripts are generally correct, but I note the following corrections for the record: p. 135, L. 9 (“individual” should be “mind”); and p. 202, LL. 22–23 (“January 14” should be “February 14”). I also note that General Counsel (GC) Exhibit 5 was included in the trial exhibits in error (the exhibit was never offered or admitted into evidence) and is not part of the evidentiary record.

<sup>3</sup> The Respondent paid incentives or bonuses to employees who worked undesirable shifts, worked in high risk departments of the hospital, or completed special courses to improve their knowledge and skills. *Hospital San Cristobal*, Case 24–CA–011630, supra at 700.

respiratory therapy employees that it had on the payroll).<sup>4</sup> (Tr. 377–378; Jt. Exh. 5b at 2.)

*C. Negotiations Regarding the Respiratory Therapy Department*

1. The Hospital offers to bargain about the impact of its decision to subcontract

On March 15, Hospital Executive Director Pedro Benetti sent a letter to the Union to advise that the Hospital planned to subcontract the respiratory therapy department effective April 15, 2011, and to invite the Union to negotiate about the impact of that decision. (Jt. Exh. 3b.) The pertinent part of Benetti’s March 15 letter stated as follows:

As you know, since last year the Hospital has been going through a declining situation that has directly affected the finances of our operations. More so, our negotiations have also been affected, since the hospital does not have the economic capacity to enter into economic commitments.

Due to this situation, the Hospital has been looking for alternatives that would help our finances such as the reorganization of services, the restructuring of departments, the consolidation of positions, not substituting resignations or terminations, not incurring overtime, etc.

One of the alternatives we have evaluated is the subcontracting of services. [Subcontracting is an] alternative that at this moment we see as viable with the Respiratory Care Department, because it represents a savings for the Hospital. We will begin privatizing these services beginning on April 15, 2011. It is because of this, that I invite you to negotiate the impact of this decision, in a meeting set for Thursday, March 24, 2011 at 10:00 a.m. in Conference Room B.

(Jt. Exh. 3b; see also Tr. 41–42, 255–256.)

2. The Hospital agrees to have a subcontractor provide respiratory therapy staff on a per diem basis

In the initial days following the Hospital’s announcement of its plans to subcontract the respiratory therapy department, much of the communication between the Hospital and the Union (including the March 24 meeting attended by hospital and union representatives) focused on the Union’s requests for information to evaluate the Hospital’s financial status and the estimated savings that would result from subcontracting. (See, e.g., Jt. Exhs. 5b, 6b, 7b, 13b, 14b, 17b, 18b.) The Hospital also continued to assert that it was only willing to negotiate about the impact of its decision to subcontract. (Jt. Exh. 8b, par. 1.)

In the same time period, however, significant changes occurred in the respiratory therapy department. First, on March 25, the Hospital agreed to subcontract with RTM to provide nonunion respiratory therapy technicians on a per diem (i.e., as needed) basis.<sup>5</sup> (Tr. 48, 82, 85–86; see also Tr. 226–227; Jt.

Exh. 9b (Union asked Hospital why RTM was providing respiratory therapy technicians to the Hospital when negotiations about that issue were still in progress); Jt. Exh. 30b at 2.) Specifically, beginning on March 28, RTM provided respiratory therapy technicians to cover shifts that, according to the Hospital, could not be staffed by Hospital employees because of vacation time, disability leave under the State Insurance Fund program (a workers’ compensation program), sick leave, the reduced number of full-time staff in the department, and shift assignment restrictions that resulted from prior litigation before the National Labor Relations Board (the Board). (Tr. 83, 124, 226–227; Jt. Exh. A, par. 4; Jt. Exhs. 9b, 18b, 20b.) Although the collective-bargaining agreement permits the Hospital to hire “temporary employees” to work in an emergency or substitute for a regular employee who is absent due to illness, vacation or any similar circumstance (see Jt. Exh. 1b, par. A), Human Resources Director Candie Rodriguez testified that the per diem employees that RTM provided were not temporary employees, but rather “people who are on standby waiting to cover shifts that may come up . . . at a last minute.”<sup>6</sup> (Tr. 83.)

Second, in late March and early April, three respiratory therapy technicians employed by the Hospital resigned, reducing the number of full-time technicians in the respiratory therapy department from 11 to 8.<sup>7</sup> (Jt. Exh. A, pars. 3, 5–6; see also Tr. 89 (Hospital did not attempt to fill the positions that became vacant due to the three resignations).) One of the eight remaining technicians (Felicita Leon) was not available to work be-

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until April 7. (Jt. Exh. 15.) Since the contract contemplated RTM providing staff for the entire respiratory therapy department, the Hospital and RTM agreed by letter that until further notice, RTM would only provide staffing on a per diem basis. (Tr. 48, 103; Jt. Exh. 30b at 2.)

<sup>6</sup> Rodriguez’ testimony that per diem employees are not temporary employees covered by the collective-bargaining agreement was un rebutted. Notably, Rodriguez initially stated that per diem employees were temporary employees, and then interjected to correct herself and emphasize that per diem employees are not temporary employees. (Tr. 83.)

The record does not establish why Rodriguez felt compelled to correct her initial answer, but I note that the collective-bargaining agreement does outline specific conditions that apply when the Hospital uses temporary employees. (See Jt. Exh. 1b, pars. B, F (among other conditions, the collective-bargaining agreement generally allows the Hospital to use temporary employees for a continuous period of work of up to 6 months, and requires the Hospital to give regular employees preference over temporary employees in covering vacant positions for which they are qualified).)

Historically, the Hospital used temporary employees sparingly in the respiratory therapy department, with only two such employees covering shifts in 2010 (up to August 2010), and none in 2011 (up to March 28, 2011). (Jt. Exh. 52.) By contrast, between March 28 and April 23, 2011, the Hospital used eight different per diem employees (provided by RTM) to cover various shifts in the respiratory therapy department. (GC Exh. 2b.)

<sup>7</sup> One respiratory therapy technician (Wanda Batista) resigned with an effective date of March 23, while the other two respiratory therapy technicians (German Mercado and Ivette Borrero) resigned with effective dates of April 15 and 16. (Jt. Exh. A, pars. 3, 5–6.) There is no allegation in this case that any of the three resignations were caused by unfair labor practices.

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<sup>4</sup> Revised studies later showed that the Hospital would save approximately \$60,000 per year if it used RTM to staff the respiratory therapy department. (Tr. 336, 378.)

<sup>5</sup> Although RTM agreed to provide respiratory therapy technicians to the Hospital on March 25, the Hospital and RTM did not sign a contract

cause of ongoing disability leave (under the State Insurance Fund) that began in December 2010. (Tr. 86–87, 187.)

3. The Hospital issues a memorandum prohibiting employees from making certain comments about subcontracting

On March 31, Rodriguez sent a letter to Union Representative Ariel Echevarria to follow up on concerns that she raised in a March 30 meeting with Echevarria and Union Delegate (and Hospital employee) Evelyn Santa about certain incidents at the Hospital. (Jt. Exh. 11b; see also Jt. Exh. 10b (Echevarria letter referencing the meeting).) Rodriguez expressed concern that an unknown individual had left a “menacing note” on Carlos Diaz’ car because Diaz proposed the idea of subcontracting the respiratory therapy department. Rodriguez also asserted that Santa and Union Delegate Rafael Colon were intimidating other hospital employees by warning that their departments could also be targeted for subcontracting. Rodriguez informed Echevarria that she circulated a memo to employees that prohibited the conduct that she described. (Jt. Exh. 11b.) Rodriguez’ memo to employees (dated March 31) stated as follows:

Operational Changes—For several days now, we have been hearing that employees are intimidating other employees with comments that lack truthfulness and which only have the intention of affecting their emotional health. These employees have to desist from making these comments immediately. At this time, the Hospital is in the process of taking a decision that will only affect one (1) department. No other department of the Hospital will be affected nor are we thinking of affecting any other department. This is a product of operational decisions that impact the finances of the Hospital. I have instructed all Supervisors, and I urge everyone, to report to me those employees that are incurring in this conduct in order to take the necessary corrective measures.

(Jt. Exh. 12b.)

4. Rafael Colon’s vacation dates changed

At the start of every year (including 2011), Diaz presented a form to the respiratory therapy technicians and ask them to fill it out with their requested vacation time. (Tr. 177, 294–295; Jt. Exh. 55b.) Employees, however, were not guaranteed their first choices of vacation times. Instead, Diaz would review the requests to ensure that they did not conflict with the requests of other employees, and to ensure that employees did not go past the collective-bargaining agreement’s 16-month limit for accruing (and using) vacation leave. (Tr. 178–179; see also Jt. Exh. 2b, par. F; see also Jt. Exh. 54 (noting that annual vacation programs take into consideration the date of hire of employees, and the needs of the department, Hospital and service).) If a conflict did arise, Diaz would arrange a meeting with the affected employee and attempt to work out an agreement for an alternative vacation time. (Tr. 179–180, 295–296.) Rafael Colon testified that he had never experienced an occasion in the past where he and Diaz could not come to an agreement about an alternative vacation time.<sup>8</sup> (Tr. 307.)

<sup>8</sup> I have not credited Rafael Colon’s testimony that all employees in the respiratory therapy department were given the flexibility to select alternative vacation dates in the event that their first choice could not be

On April 4, Diaz met with Rafael Colon to discuss Colon’s request to take vacation in December 2011. At the meeting, Diaz advised Colon that he would need to take his vacation from April 11 to May 10, 2011, instead of waiting until December 2011. (Tr. 184, 297–298.) Diaz explained (at trial) that under the collective-bargaining agreement, Colon had to take a vacation (or forfeit his vacation leave) every 16 months and generally take vacation in one block of consecutive days.<sup>9</sup> Since Colon’s last vacation ended on February 14, 2010, he was approaching the end of the 16-month timeframe to use his accrued vacation leave.<sup>10</sup> (Tr. 202, 205, 213, 216; Jt. Exh. 2b, pars. F–G.) Colon asked Diaz if perhaps another employee could take vacation in April, but Diaz responded that Colon needed to go on vacation at that time.<sup>11</sup> (Tr. 298.) Diaz then produced a completed vacation leave request form for Colon with the April/May dates, and Colon (believing he had no alternative) signed the form. (Tr. 184–185, 298–299; Jt. Exh. 57b.) Although Colon was familiar with the human resources office and the grievance process, he did not complain to the human resources office about the change to his vacation schedule. (Tr. 305.)

5. The Hospital offers to bargain about whether it should subcontract the respiratory therapy department

On April 7, RTM and the Hospital signed a contract for RTM to provide respiratory therapy technicians to the Hospital. (Jt. Exh. 15b.) However, by letter, RTM and the Hospital agreed that until negotiations with the Union concluded, RTM would only provide staff on a per diem, or as needed, basis. (Tr. 48, 103.)

In this same time period, the Hospital consulted with its attorney and learned that it needed to negotiate with the Union

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granted. (See Tr. 295–296.) No foundation was offered for Colon’s testimony on that point, thus raising questions about the reliability of that portion of Colon’s testimony. Furthermore, although the Acting General Counsel called two other respiratory therapy department employees as witnesses in its rebuttal case, it did not ask either of those employees to present testimony that might have rebutted Diaz’ testimony (and perhaps corroborated Rafael Colon’s testimony) about the Hospital’s vacation leave scheduling practices. (See Tr. 459–464 (Jose Cruz); 464–472 (Catherine Colon).)

<sup>9</sup> Although the collective-bargaining agreement does not limit the number of vacation days that an employee may accrue, Diaz testified that he used the number of accrued vacation days as a benchmark for determining when an employee was approaching the 16-month forfeiture date for vacation leave. (Tr. 198, 212.) Specifically, for an employee (like Colon) who earned 22 vacation days a year (1.83 days per month), Diaz regarded 28–30 days of accrued vacation leave as a signal that such an employee was at risk of forfeiting leave because of the 16-month limitation on accruing leave. (Tr. 198, 212; Jt. Exh. 2b, pars. A(3), F.)

<sup>10</sup> Under the collective-bargaining agreement, Colon had until June 14, 2011 to use or forfeit his vacation leave. The record shows that two other respiratory therapy technicians were scheduled to take vacation leave from May 9 to June 8. (Jt. Exh. 56.)

<sup>11</sup> Colon testified that Diaz became upset during this part of the conversation and that he (Colon) felt intimidated because Diaz spoke to him with a tone of voice he had never heard before. Colon admitted, however, that Diaz did not shout at him, become violent or point his finger at Colon during the discussion. (Tr. 298, 305–306, 311.)

not only about the impact of a decision to subcontract the respiratory therapy department, but also about whether it should make such a decision at all. (Tr. 119–120). Acting on that advice, Candie Rodriguez notified the Union in an April 12 bargaining meeting that the Hospital would evaluate any alternatives to subcontracting that the Union proposed.<sup>12</sup> (Jt. Exh. 19b at 3; Tr. 257, 261.) Further, on April 14, Rodriguez notified the Union that the Hospital was going to postpone the effective date of its plan to subcontract the respiratory therapy department to April 30, to afford the Union time to review information that the Hospital provided and to propose alternatives to subcontracting for the Hospital to consider. (Jt. Exh. 22; Tr. 47.)

6. The parties identify a potential alternative to subcontracting

From mid-April to late May 2011, negotiations between the Hospital and the Union primarily focused on exchanging information about the Hospital's subcontracting plan and questions about the accuracy of the Hospital's calculations of the savings that would result from subcontracting.<sup>13</sup> (See Jt. Exhs. 23b, 25b–32b.) The Hospital also again postponed the effective date of its subcontracting plan. (See Jt. Exh. 24b (effective date postponed to May 31).)

On May 27, a breakthrough of sorts occurred when Rodriguez and Echevarria met informally and came up with the idea that as an alternative to the Hospital's subcontracting plan, the Hospital could save money by reducing the \$55 monthly meal stipend that it was paying to 185 Union employees under the collective-bargaining agreement. (Tr. 62–64, 227–229; see also Jt. Exh. 33b at 2–3 (effective date for subcontracting postponed to June 20).) In a June 17 letter, Rodriguez estimated that the Hospital could save \$7,400 per month if the meal stipend was reduced to \$15 a month per employee, or save \$10,175 per month if the meal stipend was eliminated altogether.<sup>14</sup> Rodriguez added that if the parties agreed to the meal stipend reduction alternative, the Hospital could retain the eight regular employees in the respiratory therapy department, but would need to continue using RTM to provide per diem employees and would not be able to assign any of the regular employees to permanent shifts.<sup>15</sup> (Jt. Exh. 35b (providing analysis of meal

stipend reduction alternative, and postponing the effective date for subcontracting to July 1).)

In late June 2011, the Union renewed its request that the Hospital correct its analysis of the savings that would result from subcontracting the respiratory therapy department, because the Hospital's initial studies failed to account for the reduction in regular staff in the department to eight employees in 2011. (Jt. Exhs. 36b, 37b at 3 (noting that the department had 15 regular employees in 2009, and 11 regular employees in 2010); see also Tr. 123 (explaining why the Hospital needed to do multiple studies of the expected savings from subcontracting).) The Hospital agreed to postpone the effective date for its subcontracting plan to the week of July 4 to allow time for further analysis and discussion. (Jt. Exh. 41b.)

On or about July 5, the Hospital produced an updated study that concluded that the Hospital would save \$4,998 per month if it subcontracted the entire respiratory therapy department (when compared to the status quo of retaining eight regular employees and continuing to use RTM to provide per diem employees). (GC Exh. 3a; Jt. Exh. 43b; Tr. 73, 128–129, 277–278.) The Union agreed that the Hospital's calculations were accurate, and thus the negotiations turned to whether the parties could devise an alternative plan that would produce comparable savings to the Hospital's subcontracting plan.<sup>16</sup> (Tr. 277–278.) The parties agreed to meet on July 8 with the goal of finally reaching an agreement about the respiratory therapy department. (Jt. Exh. 43b.)

7. The Union offers to reduce the monthly meal stipend as an alternative to subcontracting

In the morning on July 8, the Union offered (as an alternative to subcontracting) to reduce the monthly meal stipend per employee from \$55 to \$30, which would produce a savings for the Hospital of \$4,625 per month. However, the Union specified the following conditions for its offer:

- (1) The Hospital would hire Union employees to fill any future vacancies that arose in the Respiratory therapy department, such that the department would continue to have eight regular employees;
- (2) The Union and Hospital would agree to meet every trimester to verify that the Hospital's savings from the meal stipend reduction were consistent with its calculations;
- (3) The Hospital would increase the meal stipend if the Hospital saved more money than projected;

<sup>12</sup> I do not credit Rodriguez' testimony that she told the Union that the Hospital would consider alternatives to subcontracting in the March 24 bargaining meeting. (Tr. 120.) The bargaining minutes that Rodriguez prepared for March 24 do not mention any such offer to consider alternatives. (Jt. Exh. 5b.) By contrast, Rodriguez did mention the Hospital's willingness to consider alternatives in the April 12 meeting. (Jt. Exh. 19b at 3.)

<sup>13</sup> In addition to discussing the Hospital's proposal to subcontract the respiratory therapy department, the parties also devoted some time to negotiating about the terms of a new collective-bargaining agreement. (Jt. Exhs. 30b–32b.)

<sup>14</sup> At the time, the Hospital's calculations were that it would save \$7,243 per month if it subcontracted the respiratory therapy department. (Tr. 59–60.)

<sup>15</sup> Respiratory therapy technicians work in the following shifts: 7 a.m. to 3 p.m.; 3 to 11 p.m.; and 11 p.m. to 7 a.m. Employees with permanent shifts were always assigned to the same shift on the sched-

ule (e.g., always to the morning shift), while employees with rotating shifts could be assigned to any of the three shifts. (Tr. 82, 112.)

<sup>16</sup> At the same time, the Hospital was growing impatient because while negotiations proceeded, it continued to pay the salaries of the eight regular employees in the respiratory therapy department plus the fees that RTM charged for providing staff on a per diem basis. (Jt. Exh. 43b.) Because of that fact, on July 6 the Hospital notified the Union that it planned to withhold meal stipend payments that were due on July 7. (Id.) The Union opposed the Hospital's decision not to pay the meal stipend. (Jt. Exh. 44b.) I infer that the Hospital conceded on this issue, because there is no evidence that the Hospital followed through with withholding the meal stipend as suggested in its July 6 letter.

(4) The reduction to the meal stipend would last for one year;

(5) The Hospital would grant employees Rafael Colon and Mirna Leon permanent shifts from 7:00 am to 3:00 pm.

(Jt. Exhs. 45b, 47b, 48b.)

8. The Hospital rejects the Union's offer and decides to subcontract the respiratory therapy department

After the morning session, Rodriguez discussed the Union's offer with Executive Director Benetti. At approximately 2 p.m., Rodriguez notified the Union that it would not accept any of the proposed conditions. Continuing, Rodriguez notified the Union that the Hospital had decided to subcontract the entire respiratory therapy department (and discharge the regular employees in that department). Specifically, Rodriguez stated:

I am notifying [you] that the hospital has made its decision to subcontract the Respiratory Care Department and conforming to the collective [bargaining] agreement, I am notifying [you] that the effective date will be July 13th[.] The employees will be notified today, July 8th and will work no more. However, they will be paid as worked days until the effective date of end of employment.

(Jt. Exh. 45b at 2; see also Tr. 236–238; Jt. Exh. 49b.)

9. The Hospital discharges the regular employees in the respiratory therapy department

After sending its letter, the Hospital began notifying the eight regular employees in the respiratory therapy department that they were being discharged.<sup>17</sup> Employees who were working the 7 a.m. to 3 p.m. shift that day were instructed to report to the human resources office at the end of their shift, where Rodriguez (assisted by Diaz) informed them of their termination. Similarly, the Hospital directed employees who were arriving to work 3 to 11 p.m. shift to report immediately to the human resources office where they were advised that they were being terminated (the vacated shifts were covered by RTM staff). Finally, the Hospital called all off-duty employees for the department and terminated them when they arrived at the human resources office as instructed. During the termination meetings, the Hospital collected the employees' hospital keys and identification badges, and presented them with a discharge letter that stated (in pertinent part) as follows:

After a reasonable time period has passed in the negotiation process, without [the Union] being able to reach feasible agreements for the Hospital, we regret to have to inform you today that we have made the final decision to subcontract the employee services through the company Respiratory Therapy Management. In conformance with the Collective Bargaining Agreement, I inform you that the effective date is Wednesday, July 13, 2011, although you will work until today. Notwithstanding, you will be paid until July 13, 2011. . . . We will be communicating to you if new opportunities emerge in your specific area, or in another area for which you qualify.

<sup>17</sup> The eight respiratory therapy technicians that the Hospital discharged were: Rafael Colon; Mirna Leon; Jose Cruz; Nancy Gonzalez; Norma Rivera; Felicita Leon; Catherine Colon; and Enid Ortiz. (See Jt. Exhs. 5b at 1–2; 56.)

Should you accept [working] with us again . . . [w]e will then be making arrangements for the company RTM for them to call you for an interview. Notwithstanding, the right to offer you an opportunity for employment lies with the Company.

(Jt. Exhs. A, par. 7, 46b; Tr. 157–158, 300–302, 392–393, 459–461, 465–467.)<sup>18</sup>

10. The parties agree to meet for another bargaining session

Later in the afternoon on July 8, Union President Ana Melendez faxed Rodriguez a letter (and also telephoned Rodriguez) to emphasize that the Union was available to continue negotiations until any hour necessary to reach a satisfactory agreement with the Hospital concerning the respiratory therapy department. (Jt. Exh. 48b; Tr. 238.) Rodriguez, who was finishing up her last couple of discharge meetings with respiratory therapy technicians, agreed to meet again with the Union at the Hospital at 5 p.m. (Tr. 81, 239, 242.) Rodriguez mentioned to two or three respiratory therapy technicians who were still in the human resources office that she would be attending another meeting with the Union, but did not rescind or delay their discharges.<sup>19</sup> (Tr. 466–467; see also Tr. 462.)

In the evening meeting on July 8, Rodriguez began by reviewing the conditions that the Union included with its offer to agree to a lower monthly meal stipend. Rodriguez explained that the Hospital was fine with the proposed condition that it fill any future vacancies in the respiratory therapy department with union personnel (instead of RTM staff), but opposed: (a) having meetings every trimester to verify that the Hospital was meeting its savings targets; (b) reducing the monthly meal stipend to \$30 per employee (the Hospital wanted a larger reduction); (c) increasing the meal stipend if the Hospital reached or exceeded its savings targets; (d) limiting the reduction in the meal stipend to only 1 year;<sup>20</sup> and (e) granting permanent shift assignments to Rafael Colon and Mirna Leon. (R. Exh. 4 at 2.) In response, the Union made the following new proposal:

(1) The Hospital would hire Union employees to fill any future vacancies that arose in the Respiratory therapy depart-

<sup>18</sup> The collective-bargaining agreement requires 3 days advance notice to employees who are being terminated. (Tr. 158, 409.) Diaz admitted that although the employees were paid until July 13, the employees no longer worked for the hospital as of July 8. (Tr. 382–383.)

<sup>19</sup> I do not credit Rodriguez' testimony that she advised employees that they would return to work if the Union and the Hospital reached an agreement in the evening negotiations. (See Tr. 430, 447–448.) Rodriguez was inconsistent when asked about the number of employees that she told about the evening meeting with the Union, and she did not document any change in the status of the employees (regarding their terminations) in the Hospital's records. (Tr. 447–448.) To the contrary, all eight respiratory technicians received discharge letters and were required to turn in their keys and identification badges in the afternoon on July 8, notwithstanding any further negotiations with the Union that were planned for later in the evening. (Jt. Exh. 46b; Tr. 300–302, 392–393, 459–461, 465–467.)

<sup>20</sup> The Union clarified that it only meant that after a 1-year period, the parties should assess whether the meal stipend should return to its original \$55 per month amount, or continue on at the lower amount. Rodriguez indicated that with that clarification, the Hospital found that condition acceptable. (R. Exh. 4 at 2.)

ment, such that the department would continue to have eight regular employees;

(2) The Union and the Hospital agree to reduce the monthly meal stipend from \$55 to \$27.50 per employee, which would produce a monthly savings of \$5,087.50 for the Hospital (a higher amount of savings than subcontracting would have produced);

(3) The Union and the Hospital agree to meet in one year to evaluate the agreement about the monthly meal stipend and assess whether any adjustments should be made;

(R. Exh. 4 at 3; see also Jt. Exh. 49b; Tr. 131–132, 245–246.)<sup>21</sup> Rodriguez countered that if the Union agreed to reduce the monthly meal stipend to \$25 per employee, the Hospital would ensure that only RTM staff covered the 11 to 7 a.m. shift (leaving the regular employees in the department to rotate between the 7 a.m. to 3 p.m. shift and the 3 to 11 p.m. shift). (R. Exh. 4 at 3–4; Tr. 132.) Union President Melendez replied that the Union would not agree to reduce the monthly meal stipend to \$25 unless the Hospital granted permanent shift assignments to Colon and Leon. When Rodriguez reiterated that the Hospital's final position was that the monthly meal stipend be reduced to \$25 and regular department employees all rotate between the first two shifts (with no permanent shifts), the meeting ended at 8:11 p.m. without an agreement.<sup>22</sup> (R. Exh. 4 at 5; see also Jt. Exh. 49b; Tr. 132–133, 247, 348, 422.)<sup>23</sup>

11. The Hospital fully subcontracts the respiratory therapy department, while the Union asserts that it remains available to resume negotiations

On July 11, Rodriguez sent the Union a letter containing her summary of the July 8 evening negotiations. (Jt. Exh. 49b.) Union President Melendez responded the same day, primarily to assert that the Union had not closed negotiations and was available to meet with the Hospital whenever Rodriguez was available. (Jt. Exh. 50b.)

<sup>21</sup> The parties momentarily tabled the question of permanent shifts for employees to discuss the other conditions that the Union proposed. (R. Exh. 4 at 3.)

<sup>22</sup> Some of the respiratory therapy technicians who were discharged in the afternoon were present (outside of the meeting room) when the evening bargaining session ended, presumably because they wished to learn the results of the meeting. (Tr. 430; Jt. Exh. 51b at p. 2.) Rodriguez did not speak to any of the discharged employees at that time. (Tr. 430.)

<sup>23</sup> Because the Union and the Hospital could not agree to a joint set of bargaining minutes for the July 8 evening negotiations, the Union and the Hospital prepared separate bargaining minutes. The Union's minutes are fully consistent with the facts recited here. (See R. Exh. 3.) To the extent that there are differences in the two versions, I find that the differences are not material to my analysis. For these reasons, I reject the Respondent's request that I draw an adverse inference from the Acting General Counsel's failure to call the Union President and Executive Director as witnesses. (See R. Posttrial Br. at 22–23.) No such adverse inference is warranted where the material facts are largely undisputed and are established by other reliable evidence (including admissions from both parties in their respective bargaining minutes from July 8, and joint exhibits that both parties agreed to admit into evidence).

The Hospital modified its agreement with RTM on July 14 to have RTM provide all staff for the respiratory therapy department. (Jt. Exh. A, par. 8; R. Exh. 1.) On July 18, the Union responded in more detail to Rodriguez' summary of the July 8 evening negotiation session by providing its own summary of the parties' negotiations. The Union also provided some example schedules to show that it would be feasible for the Hospital to assign Colon and Leon to permanent shifts without compromising the overall schedule. The Union concluded by asking Rodriguez to engage in further dialogue about these issues. (Jt. Exh. 51b; Tr. 289, 428, 442; see also Union (U.) Exhs. 2–3.)

## Discussion and Analysis

### A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

In this case, the parties stipulated to several joint exhibits that are not disputed and establish many of the relevant facts. Witness credibility, however, was pivotal in certain areas, and in particular was relevant to the events of July 8, when the parties had their most contentious (and disputed) bargaining sessions. I have outlined my credibility findings in the findings of fact above and in the analysis below. However, as a general matter, I found that portions of Candie Rodriguez' testimony lacked credibility because she provided testimony that stretched the facts to bolster the Respondent's theory of the case. (See, e.g., Findings of Fact (FOF) Section II(C)(9) (discussing Rodriguez's testimony about what she told employees when they were discharged).) Unless otherwise noted, I generally credited the testimony of the other witnesses that the parties presented because the testimony was presented in a forthright manner and was corroborated by other evidence (including the joint exhibits).

### B. The March 31 Work Rule Regarding Comments about Subcontracting

#### 1. Complaint allegations and applicable legal standards

The Acting General Counsel alleges that the Hospital violated Section 8(a)(1) of the Act when, on or about March 31, 2011, it issued and distributed a memorandum to employees that prohibited any discussions among employees related to the

Hospital's subcontracting of work performed by its respiratory therapy technicians. (GC Exh. 1(j), par. 8.)

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. See *Brighton Retail, Inc.*, 354 NLRB 441, 447 (2009).

The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *KenMor Electric Co.*, 355 NLRB 1024, 1027 (2010) (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000) (same); see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

The Board has articulated the following standard that specifically applies when it is alleged that an employer's work rule violates Section 8(a)(1):

If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

*NLS Group*, 352 NLRB 744, 745 (2008) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004)), adopted in 355 NLRB 1154 (2010), *enfd.* 645 F.3d 475 (1st Cir. 2011).

## 2. Analysis

The facts concerning the work rule at issue in this case are not in dispute. Briefly, after learning that Union representatives (and employees) Evelyn Santa and Rafael Colon were "intimidating" other hospital employees by warning that their departments could also be targeted for subcontracting, the Hospital issued a memorandum on March 31 that directed employees to "desist from making these comments immediately." (See FOF Section II(C)(3).)

The Hospital's March 31 memorandum was unlawful because employees would reasonably construe the memorandum as a work rule that prohibited Section 7 activity. Simply put, Santa and Colon were engaging in protected union activity when they spoke to coworkers about the Hospital's plan to subcontract the respiratory therapy department. The Hospital's plan directly affected employee working conditions in that department, and also raised a reasonable question about whether the Hospital might (via further subcontracting) alter the working conditions in other departments. A reasonable employee would interpret the Hospital's March 31 memorandum

as prohibiting employees from discussing their concerns about those prospects.<sup>24</sup>

In addition, the March 31 memorandum is unlawful because the Hospital issued it in response to union activity. In her March 31 letter to the Union, Human Resources Director Rodriguez expressly stated that the Hospital would be issuing the March 31 memorandum to employees to prohibit the types of comments that Evelyn Santa and Rafael Colon were making to employees about the subcontracting dispute. Since the Hospital issued its work rule in response to (and to prohibit) protected union activity, the work rule is unlawful.

Finally, I emphasize that the work rule at issue here cannot be construed as a rule aimed solely at prohibiting misconduct that is not protected by the Act. It is well settled that the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited. *Ryder Transportation Services*, 341 NLRB 761, 761 (2004), *enfd.* 401 F.3d 815 (7th Cir. 2005). The Hospital's efforts to prohibit employees from "intimidating" or "affecting the emotional health of" coworkers by discussing the prospect of subcontracting run afoul of those well established principles.<sup>25</sup>

Because the Hospital (via its March 31 memorandum) announced an unlawful work rule that employees would reasonably construe as prohibiting Section 7 activity, and that was issued in response to union activity, I find that the Hospital violated Section 8(a)(1) of the Act.

## C. Unilateral Change Allegations

### 1. Complaint allegations and applicable legal standards

The Acting General Counsel alleges that the Hospital violated Section 8(a)(5) and (1) in the following ways:

(a) by, on or about March 28, 2011, unilaterally subcontracting unit work performed by respiratory therapy technicians (see GC Exh. 1(j), par. 9(a));

<sup>24</sup> Although not alleged in the complaint as a separate violation, I note that a reasonable employee would also interpret the Hospital's memorandum as encouraging employees to submit reports to the Hospital about the protected union activities of their coworkers. (See FOF Section II(C)(3) (memorandum asked employees to report anyone who engaged in the prohibited conduct so Rodriguez could take corrective measures); *Tawas Industries*, 336 NLRB 318, 322 (2001) (noting that an employer that combines a request for reports of harassment during union solicitation with a promise to discipline the individual accused of harassment (or otherwise take care of the problem) violates Section 8(a)(1) because the employer's statement has the potential effects of encouraging employees to identify union supporters based on the employees' subjective view of harassment, discouraging employees from engaging in protected activities, and indicating that the employer intends to take unspecified action against subjectively offensive activity without regard for whether that activity was protected by the Act).)

<sup>25</sup> The Board has held that *knowingly* false statements are malicious and are therefore not protected by the Act. *Central Security Services*, 315 NLRB 239, 243 (1994). The work rule at issue here, however, went well beyond targeting knowingly false statements and also targeted protected union activities such as employee discussions about the Hospital's subcontracting plans.

(b) by, on or about April 4, 2011, unilaterally changing its past practice regarding vacation policy for respiratory therapy department employees by eliminating and/or limiting employee discretion for scheduling vacation leave (see GC Exh. 1(j), par. 9(b)); and

(c) by, on or about July 9, 2011, unilaterally laying off its respiratory therapy technicians and subcontracting the work that they previously performed (see GC Exh. 1(j), par. 9(c)).

“Under the unilateral change doctrine, an employer’s duty to bargain under the Act includes the obligation to refrain from changing its employees’ terms and conditions of employment without first bargaining to impasse with the employees’ collective-bargaining representative concerning the contemplated changes.” *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205 (2011). The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 657 (2011). Notably, an employer’s regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. *Id.*; see also *Palm Beach Metro Transportation, LLC*, 357 NLRB 108, 183–184 (2011) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis).

On the issue of whether the parties bargained to an impasse, the Board defines a bargaining impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile because both parties believe they are at the end of their rope. See *Whitesell Corp.*, 357 NLRB 1119, 1182 (2011); *Daycon Products Co.*, 357 NLRB 1071, 1081 (2011). The question of whether an impasse exists is a matter of judgment based on the following factors: the bargaining history; the good faith of the parties in negotiations; the length of the negotiations; the importance of the issue or issues as to which there is disagreement; and the contemporaneous understanding of the parties as to the state of negotiations. *Id.* The party asserting impasse bears the burden of proof on the issue. *Daycon Products Co.*, 357 NLRB at 1081; *Erie Brush & Mfg. Corp.*, 357 NLRB 363, 364 (2011).

2. Analysis—did the Hospital violate the Act by unilaterally subcontracting unit work performed by respiratory therapy technicians?

As noted above, the Acting General Counsel alleges that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting unit work performed by respiratory therapy technicians on or about March 28, 2011. (GC Exh. 1(j), par. 9(a).)

Initially, I note that the facts relating to this allegation are largely undisputed. The record establishes that on March 15, the Hospital notified the Union that it planned to subcontract the respiratory therapy department. After one bargaining ses-

sion (on March 24) that was limited to discussing the impact of the Hospital’s decision and the Union’s request for information about the Hospital’s plans, the Hospital unilaterally subcontracted work performed by respiratory therapy technicians by subcontracting with RTM to provide per diem employees to work in the respiratory therapy department. (FOF Section II(C)(1–2).)

The law is clear that subcontracting is a mandatory subject of bargaining if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature, and direction of the enterprise.<sup>26</sup> *Daycon Products Co.*, 357 NLRB at 1081. The Hospital was in precisely that situation when it subcontracted with RTM to provide per diem respiratory therapy technicians to work in the respiratory therapy department.

As its defense, the Respondent asserts that it had a past practice of using temporary workers to cover employee absences. (See R. Posttrial Brief at 4) That argument fails. While it is true that the collective-bargaining agreement permits the Hospital to hire temporary employees if certain criteria are met, the Hospital admitted (through Rodriguez) that the per diem employees that RTM provided were *not* hired temporary employees covered by the collective-bargaining agreement. (FOF, Section II(C)(2) (also indicating that the Hospital has not used a temporary employee under the collective-bargaining agreement since August 2010).) Since there was no preexisting procedure or practice for hiring the per diem employees that RTM provided (under the collective-bargaining agreement or otherwise), the Hospital’s decision to subcontract with RTM was a new development (borne out of the Hospital’s January 2011 plan to subcontract the entire respiratory therapy department), rather than the product of a past practice.<sup>27</sup> (FOF, Section II(B); see also *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de*

<sup>26</sup> A union’s interest in subcontracting decisions is not limited to circumstances where unit employees are laid off or replaced because of subcontracting. See *Acme Die Casting*, 315 NLRB 202, 202 fn. 2 (1994). Instead, in addition to the prospect of layoffs, union members have an interest in subcontracting decisions because work identified for subcontracting provides bargaining unit members with the opportunity to obtain extra shifts (possibly at higher wage rates than the employer might pay for overtime or for working undesirable hours), or expand or maintain the size of the bargaining unit with newly hired employees. See *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de Puerto Rico v. NLRB*, 414 F.3d 158, 167 (1st Cir. 2005).

<sup>27</sup> The principal case that the Hospital cited in support of its defense is readily distinguishable. In *Westinghouse Electric Corp.*, 150 NLRB 1574 (1964), the Board found that the respondent did not violate Section 8(a)(5) and (1) when it unilaterally subcontracted some bargaining unit work. As the Board explained, however, the respondent demonstrated that subcontracting was an established practice that the respondent had relied on for over 20 years in conducting its manufacturing operations. *Id.* at 1574, 1576. Since the respondent made the disputed subcontracting decisions in a manner consistent with its past practices, the Board found that the respondent did not violate Section 8(a)(5) or (1) of the Act. *Id.* at 1577.

Here, the Hospital did not present any credible evidence that its decision to subcontract with RTM to provide per diem employees was supported by an established past practice. The decision in *Westinghouse* is therefore inapposite.

*Puerto Rico*, 342 NLRB 458, 458, 468–469 (2004), enfd. 414 F.3d 158, 167 (1st Cir. 2005) (finding that the respondent violated Section 8(a)(5) and (1) by unilaterally subcontracting out the work of X-ray technicians and respiratory therapists where the evidentiary record did not demonstrate a past practice of subcontracting or a compelling economic reason for the respondent’s unilateral decision.)

Based on the foregoing analysis, I find that the Hospital ran afoul of Section 8(a)(5) and (1) when it unilaterally decided to subcontract with RTM on March 25 to provide respiratory therapy technicians to the Hospital on a per diem basis. The Hospital’s past practice defense falls well short for the reasons stated above, and it is undisputed that the parties did not bargain to impasse (to the extent that any bargaining occurred at all) before the Hospital made its decision.

3. Analysis—did the Hospital violate the Act by unilaterally changing its past practice regarding vacation policy?

Next, the Acting General Counsel contends that the Hospital unilaterally changed its past practice regarding vacation policy for respiratory therapy department employees by eliminating and/or limiting employee discretion for scheduling vacation leave. (GC Exh. 1(j), par. 9(b).) The Acting General Counsel’s theory is based on Rafael Colon’s testimony that on April 4, respiratory therapy department Supervisor Carlos Diaz informed him that he would need to take vacation leave for a month, starting on April 11. (FOF sec. II,(C),(4); see also *Rosdev Hospitality, Secaucus, LP*, 349 NLRB 202, 203 (2007) (finding that an employer’s unilateral change to established past practices for leave accrual violated Section 8(a)(5) and (1) of the Act).)

The Acting General Counsel did not meet its burden of proof with this allegation because it did not show that the Hospital (through Diaz) departed from its past practices for vacation leave. At most, Colon’s testimony established that in his experience, when scheduling conflicts arose for vacation leave, Diaz would meet with him and attempt to work out an agreed alternative vacation plan. It does not follow from that past history, however, that the Hospital had a past practice of giving employees discretion in scheduling vacation leave regardless of the circumstances. To the contrary, as Diaz explained (without rebuttal), employees have always been limited in their selection of vacation leave by factors such as the collective-bargaining agreement’s 16-month time limit for accruing vacation leave, and the vacation schedules of other employees. Both of those factors were in play when Colon and Diaz met on April 4, because Colon was running out of time to use his accrued vacation leave (due to the 16-month limitation, which would cause Colon to forfeit leave if not used before June 14), and because two other employees were already scheduled to be on vacation from May 9 to June 8. (FOF Section II(C)(4)) Given those circumstances, both Colon’s and Diaz’ hands were tied, as the only window of opportunity for Colon to use his vacation leave before the 16-month deadline was the April 11 to May 10 timeframe that Diaz offered.

In short, Diaz followed the Hospital’s practice of meeting with employees to reschedule vacation time when conflicts arise with vacation leave requests. To the extent that Diaz pre-

sented Colon with only one timeframe (April to May 2011) for using his vacation leave, he did so based on factors that the Hospital always considers when scheduling vacation leave for employees. Accordingly, I recommend that the allegation in paragraph 9(b) of the complaint be dismissed because the Acting General Counsel did not meet its burden of proof.

4. Analysis—did the Hospital violate the Act by unilaterally laying off its respiratory therapy technicians and subcontracting their work?

Last, the Acting General Counsel alleges that the Hospital violated Section 8(a)(5) and (1) when it unilaterally laid off its respiratory therapy technicians and subcontracted the work that they previously performed. (GC Exh. 1(j), par. 9(c).) In response, the Hospital maintains that it was lawful to take unilateral action because the parties bargained to impasse about the subcontracting issue.

As outlined in the findings of fact, the Hospital first notified the Union on March 15 of its plan to subcontract the respiratory therapy department. After giving that initial notice, the Union and the Hospital participated in 10 bargaining sessions between March 24 and July 8. July 8, however, is the pivotal day in the analysis, because July 8 was the day that the parties finally began discussing formal offers aimed at addressing the Hospital’s efforts to reduce its operating costs, and July 8 was also the day that the Hospital decided to discharge the regular (Union) employees in the respiratory therapy department. (See FOF, secs. II,(C) (1–2, 5–10).)

Viewing the record as a whole, I find that the parties were not at impasse when the Hospital unilaterally discharged its respiratory therapy technicians. In the morning on July 8, the Union offered to agree to reduce the monthly meal stipend from \$55 per employee to \$30, if the Hospital agreed to drop its subcontracting plan and comply with some conditions regarding future hiring in the department, shift assignments for two employees, and future review of the monthly meal stipend amount. After taking a break from negotiations to consider the Union’s offer, the Hospital rejected the Union’s offer in the afternoon on July 8, and then proceeded to discharge the eight respiratory therapy technicians that it still employed. (See FOF, Sections II(C) (7–9).)

The problem with the Hospital’s unilateral decision to discharge its respiratory therapy technicians at that point (in the afternoon on July 8) was that the parties were not yet at impasse. Indeed, when the parties agreed to return to the bargaining table in the evening on July 8 (after the discharges had been completed), both the Hospital and the Union offered additional proposals and concessions in an effort to make the monthly meal stipend reduction more attractive as an alternative to subcontracting. The Union, for example, offered to decrease the monthly meal stipend to \$27.50 per employee, which would have produced a higher savings to the Hospital than the subcontracting alternative. The Union also offered to drop its condition that the parties meet every trimester to review the savings that the reduced stipend was producing for the Hospital. Meanwhile, the Hospital indicated that it would be willing to accept the Union’s proposed hiring restrictions for the respiratory therapy department, and also offered to only assign the

regular employees to the morning or afternoon shifts (with only per diem employees handling the graveyard shift) if the Union agreed to reduce the monthly meal stipend to \$25 per employee. Meaningful negotiations did not end that evening until the Hospital rejected the Union's offer to agree to reduce the monthly meal stipend to \$25 per employee if the Hospital accepted its condition that two employees (Colon and Leon) be assigned to permanent shifts. (See FOF Section II(C)(10)) Since neither party was at the end of its negotiating rope when the parties began the evening negotiations on July 8 (as shown by the multiple offers and counteroffers that the parties made during the evening session), it follows that the parties were not at impasse when the Hospital discharged its respiratory therapy technicians in the afternoon on July 8.<sup>28</sup>

With that background, I turn to the Hospital's final argument—that although it informed employees of their discharges on July 8, the discharges did not take effect until July 13, and thus after negotiations fell apart in the evening on July 8. I do not find the Hospital's argument to be persuasive. The evidentiary record shows that the Hospital went through great lengths to discharge its employees on July 8, including meeting with all eight respiratory technicians (including technicians who were

<sup>28</sup> In its answer to the complaint, the Respondent suggested that its decision to subcontract the respiratory therapy department was justified because economic exigency. (GC Exh. 1(l) at p. 3.) It appears that the Respondent abandoned that theory, however, because it did not raise the economic exigency exception in its posttrial brief.

In any event, the record does not show that the Respondent's unilateral decision to discharge its respiratory therapy technicians and subcontract with RTM was justified due to economic exigency. The Board has explained that when a union and an employer are engaged in negotiations for a collective-bargaining agreement, unilateral changes are generally prohibited unless an impasse develops on bargaining for the agreement as a whole. *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). There are, however, two limited exceptions to that general rule: when a union engages in tactics designed to delay bargaining, and when economic exigencies compel prompt action. *Id.* (noting that the economic exigency exception requires a heavy burden of proof). The Board recognized that bargaining can be excused altogether if there are extraordinary events which are an unforeseen occurrence and have a major economic effect that requires the company to take immediate action. *Id.* In addition, however, the Board recognized that other economic exigencies that are not sufficiently compelling to justify excusing bargaining altogether may warrant unilateral action if the employer first provides adequate notice to the union and an opportunity to bargain, and the subsequent bargaining reaches impasse regarding the matter proposed for change. *Id.* at 81–82 (noting that employer may also take unilateral action if the union waives its right to bargain).

In this case, the Hospital cannot meet either version of the economic exigency exception. There is no evidence that the Hospital faced an extraordinary and unforeseen occurrence that required immediate action. Indeed, the Hospital began its efforts to cut costs in 2009, and thus the ongoing need for cutting costs was foreseeable by the time the Hospital began considering subcontracting the respiratory therapy department in January 2011. Because the Hospital did not face economic exigencies that would warrant excusing all bargaining, the Hospital was required to bargain with the Union to impasse before taking unilateral action regarding subcontracting. As discussed above, the Hospital failed to fulfill that requirement when it unilaterally discharged its respiratory therapy technicians in the afternoon on July 8 despite the fact that the parties were not at impasse.

not on duty and had to be called in), collecting their keys and identification badges, and using RTM employees to cover all work shifts from the afternoon of July 8 onward. The Hospital also gave each of the respiratory therapy technicians a discharge letter stating that it had made a "final decision" to subcontract the respiratory therapy department. To the extent that the Hospital paid employees through July 13, I find that the Hospital did so merely to comply with the notice requirements of the collective-bargaining agreement—the Hospital made it imminently clear that apart from receiving their final paychecks, the respiratory therapy technicians were finished as Hospital employees as of the afternoon of July 8.

Since the parties were not at impasse when the Hospital unilaterally discharged its respiratory therapy technicians in the afternoon on July 8, I find that the Hospital violated Section 8(a)(5) and (1) as alleged in the complaint.

#### CONCLUSIONS OF LAW

1. By issuing and distributing a memorandum on March 31, 2011, that prohibited discussions among employees related to the Respondent's subcontracting of work performed by its respiratory therapy technicians, the Respondent violated Section 8(a)(1) of the Act.

2. By, on or about March 25, 2011, unilaterally subcontracting bargaining unit work performed by respiratory therapy technicians without first giving notice to and bargaining with the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

3. By unilaterally discharging eight respiratory therapy technicians (Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon and Enid Ortiz) on July 8, 2011, and subcontracting the work that they previously performed without first bargaining with the Union to impasse, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. By committing the unfair labor practices stated in Conclusions of Law 1–3 above, the Hospital has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

5. I recommend dismissing the allegation in paragraph 9(b) of the complaint.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully subcontracted unit work on or about March 25, 2011, must make the following employees whole for any loss of earnings and other benefits that resulted from that subcontracting decision: Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, Enid Ortiz, Ivette Borrero and German Mercado. Backpay for this violation shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*,

356 NLRB 6 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

In addition, the Respondent, having unlawfully discharged Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon and Enid Ortiz,<sup>29</sup> must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Acting General Counsel has requested that I issue a broad remedial order in this case because the Respondent “is a recidivist [that] has previously committed unlawful unilateral changes.” (GC Exh. 1(j) at p. 6.) The Board has stated that “a broad cease-and-desist order enjoining a respondent from violating the Section 7 rights of employees ‘in any other manner,’ is warranted ‘when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.’” *Five Star Mfg.*, 348 NLRB 1301, 1302 (2007) (citing *Hickmott Foods*, 242 NLRB 1357, 1357 (1979)), enf. 278 Fed. Appx. 697 (8th Cir. 2008). In either situation, the Board reviews the totality of circumstances to ascertain whether the respondent’s specific unlawful conduct manifests an attitude of opposition to the purposes of the Act to protect the rights of employees generally, which would provide an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights. *Id.*

I find that the Acting General Counsel’s request for a broad remedial order has merit because the Respondent has indeed shown a proclivity to violate the Act. Briefly, the Respondent has been found to have committed the following violations of Section 8(a)(5) and (1) of the Act since November 2009:

(1) November 2009—unilaterally ending its past practice of paying holiday pay to employees whose day off occurred on a holiday;

(2) January 7, 2010—unilaterally eliminating its past practice of allowing employees to use sick leave while receiving workers compensation;

(3) March 1, 2010—unilaterally ending its practice of paying nursing employees incentives and differentials above their base salaries;

(4) May 24, 2010—unilaterally ending all permanent shifts in the Respiratory therapy department; and

(5) May 27, 2010—unilaterally changing and reducing the number of employee holidays.

See *Hospital San Cristobal*, 356 NLRB 699 (2011) (Case 24–CA–011438, finding violations 1–2 and 4–5 above); *Quality Health Services*, Case 24–CA–011630 (2011) (finding violation 3, above). Notably, the Board issued its ruling in Case 24–CA–11438 on February 17, 2011, only a few months before the Respondent took the unlawful unilateral actions that I have addressed in this case. Given this background and the fact that the Respondent’s attorney advised the Respondent that it should bargain with the Union about its contemplated decision to subcontract the respiratory therapy department and the effects of such a decision (see FOF Section II(C)(5)), the Respondent should have been well aware of the requirements of the Act regarding making unilateral changes to the terms and conditions of employment of its employees.

In light of the Respondent’s repeated failure to correct its pattern of making unlawful unilateral changes to working conditions, I find that the Respondent has a proclivity for violating the Act (see, e.g., *Hospital San Cristobal*, 356 NLRB 699 (Case 24–CA–011438); *Quality Health Services*, Case 24–CA–011630 (2011)), and because of the serious nature of the violations, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, supra.

[Recommended Order omitted from publication.]

<sup>29</sup> Ivette Borrero and German Mercado resigned in April 2011, and thus were not affected by the subsequent discharges that occurred on July 8. (Jt. Exh. A, pars. 5–6.)



Hospital San Cristóbal
Departamento de Recursos Humanos

CONTRATOS SERVICIOS PROFESIONALES –
DEPARTAMENTO CUIDADO RESPIRATORIO

Table with 5 columns: NOMBRE EMPLEADO, NÚM. EMP., PUESTO, FECHA COMIENZO, FECHA FINALIZÓ. Contains 15 rows of employee data.

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

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d/b/a HOSPITAL SAN CRISTOBAL	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-1556, 16-1845
v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	24-CA-011782
	)	24-CA-011884
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 12,880 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben  
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Dated at Washington, DC  
this 17th day of February, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 17, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
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Dated at Washington, DC  
this 17th day of February, 2017