Nos. 18-1001, 18-1036

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAYUGA MEDICAL CENTER AT ITHACA, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici:

1. Cayuga Medical Center at Ithaca, Inc. was the respondent before the Board and is the petitioner/cross-respondent before the Court.

2. The Board is the respondent and cross-petitioner before the Court; the Board's General Counsel was a party before the Board.

3. The labor union 1199 Service Employees International Union, United Healthcare Workers East was the charging party before the Board.

B. Rulings Under Review: This case is before the Court on Cayuga's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on December 16, 2017, and reported at 365 NLRB No. 170.

C. Related Cases: This case has not previously been before the Court.

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
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1015 Half Street, SE
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Dated at Washington, D.C.
this 6th day of July 2018

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Individuals and Organizations Involved

Administrative Law Judge	ALJ
Cayuga Medical Center at Ithaca, Inc.	Cayuga
Chief Executive Officer	CEO
Intensive Care Unit	ICU
National Labor Relations Board	the Board
1199 Service Employees International Union, United Healthcare Workers East	the Union

Documents Referred to in the Board's Brief

Board's Decision and Order, reported at 365 NLRB No. 170 (2017)	DO
Cayuga's opening brief	Br.
General Counsel's Exhibits	GCX
National Labor Relations Act	the Act
Respondent's (Cayuga) Exhibits	RX
Transcript of the hearing before the ALJ	Tr.

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This unfair-labor-practice case is before the Court on the petition of Cayuga Medical Center at Ithaca to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued on December 16, 2017, and reported at 365 NLRB No. 170. (DO1-47.)[1] The Board had subject-matter

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[1] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final.

The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which allows petitions for review of Board orders to be filed in this Court, and Section 10(e), which allows the Board to cross-apply for enforcement. 29 U.S.C. § 160(e) and (f). Both Cayuga's petition for review and the Board's cross-application for enforcement were timely filed.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's findings that Cayuga violated Section 8(a)(1) of the Act by:

- Soliciting employees to report or file a complaint against prounion coworkers if they feel harassed or intimidated;
- Directing employees to cease distributing union literature;
- Informing employees that discussing wages is inappropriate;
- Interrogating employees about union activities;
- Threatening employees with reprisals if they did not stop union activities;
- Discriminatorily prohibiting employees from distributing and posting union literature, or from doing so in non-patient care areas on non-working time; and

- Threatening employees with unspecified reprisals and job loss in retaliation for protected, concerted activities.

2. Whether substantial evidence supports the Board's findings that Cayuga violated Section 8(a)(3) and (1) of the Act by disciplining, suspending, adversely evaluating, and demoting Anne Marshall because of her union activities.

3. Whether substantial evidence supports the Board's finding that Cayuga violated Section 8(a)(1) of the Act by disciplining Scott Marsland because of his protected, concerted activities.

4. Whether the Board acted within its broad remedial discretion by ordering rescission of two workplace rules and issuing a notice-reading requirement.

RELEVANT STATUTORY ADDENDUM

The addendum attached to this brief contains all applicable statutory provisions.

STATEMENT OF THE CASE

I. PROCEEDINGS BEFORE THE BOARD

1199 Service Employees International Union, United Healthcare Workers East (the Union) filed an unfair-labor-practice charge alleging that Cayuga's actions in response to the nurses' organizing campaign violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3). The Board's General Counsel issued

an unfair-labor-practice complaint, and an administrative law judge (ALJ) conducted a hearing and issued a recommended decision, finding that Cayuga's conduct violated the Act. (DO43.) After reviewing the parties' exceptions, the Board adopted the ALJ's findings and recommended order as modified. (DO1&nn.1,3.)

II. THE BOARD'S FINDINGS OF FACT

A. Cayuga's Nurses Begin Organizing a Union; Brown Becomes Interim Director of the ICU

Cayuga Medical Center employs 350 nurses, many of whom began organizing for the Union in March 2015. Anne Marshall, a charge nurse and team leader in the intensive care unit (ICU), and Scott Marsland, a nurse in the emergency department, were heavily involved in the campaign. (DO6,10,20,31;Tr.33,142,151,487,1038,GCX30.)

In April, ICU Interim Director Joel Brown screened a "team leading" video for the staff that included a Marilyn Manson song with the lyrics "sex, sex, sex, and don't forget the violence," and "are you motherfuckers ready for the new shit?" Marshall told Brown he should apologize because the video offended some nurses. Based on the video, she also filed a sexual harassment complaint with the New York Human Rights Division. (DO14&nn.18-19;Tr.290-94,298,998,1042-43.)

B. Cayuga Responds to the Organizing Campaign by Soliciting Employee Complaints and Threatening and Interrogating Marshall, "the Ringleader"

Responding to the campaign, Vice President of Human Resources Alan Pedersen began sending nurses letters and emails. In May, he also instructed managers to meet individually with nurses and hand-deliver his first letter warning nurses they would "be asked or more likely pressured to sign a union authorization card." (DO10-11,15;Tr.813,GCX2(a),39-40.) The letter added that they "cannot be forced to sign a card," and had "the right to ask" the Union "to leave you alone." The letter also encouraged them to contact management or security if they felt "harassed or intimidated." (DO11;GCX2(a).)

On May 8, Brown began holding the meetings with ICU staff, starting with Marshall. Suspecting the meeting concerned the Union, Marshall and another nurse asked to meet together, but Brown said no. In his meeting with Marshall, Brown said "he knew [she] was the ringleader" and "the one promoting all this union stuff, and if it didn't stop he was going to get HR involved." (DO15;Tr.193.) Marshall responded that she couldn't discuss the issue with him. (DO15;Tr.194.)

In August, Pedersen sent the nurses an email telling them that if they felt "harassed and pressured to sign a [union authorization] card," they had "every right

to file a complaint in our incident reporting system," and notify their Director "so that we can address the behavior with the individual involved." (DO11;GCX2(f).)

C. Cayuga Removes Union Literature and Prohibits Its Distribution

Cayuga's employees routinely posted nonwork-related information in break rooms and common areas. (DO16;Tr.164-65,453,GCX16,18,20.) As part of the organizing campaign, Marshall and other nurses posted literature about the union in break rooms. (DO16&n.24;Tr.163-64.) Managers repeatedly removed the postings. (DO16&n.24;Tr.59.) Linda Crumb, assistant vice president for patient services, directed house supervisors and security to "remove union material at time clocks and break rooms or anywhere else you find them," asserting that Cayuga had "the right to take [them] down." (DO16&n.24;GCX22.) ICU Interim Director Brown personally removed union postings "many times 'over the course of many days,'" and directed his team to remove union flyers, which he then gave to the human resources department. (DO15;Tr.59,1007,1035-37,GCX44,47.) Karen Ames, the chief patient safety officer, reported that another employee had removed union newsletters posted near the timeclocks, and she would "check other timeclocks." (DO16 n.24;GCX23.) Other managers knew that additional employees had removed union postings. (DO16-17;GCX24,45,46.)

Over the summer, Marshall set up a table in the cafeteria to distribute union material to employees. After about 20 minutes, Pedersen, accompanied by Chief

Executive Officer John Rudd and another manager, told Marshall she "shouldn't really be doing that here" and should leave, which she did. (DO12;Tr.60-61,190-91.)

The next day, Scott Marsland and another nurse set up literature tables in the cafeteria. Pedersen likewise told Marsland they "can't do this" and would "have to leave." (DO12;Tr.61-62,497,GCX43.) After Marsland noted his right to distribute union literature there, Pedersen told them he'd "checked with legal" and they were "not allowed to set up a fixed presence in the cafeteria." (DO12;GCX43.) When Marsland repeated that distributing union literature was "federally protected activity," Pedersen threatened to have security "take this away." (DO12;GCX43.) Pedersen left without calling security, and Marsland remained there for another hour. (DO12;Tr.519.)

Following these incidents, managers didn't attempt to prevent nurses from distributing union literature in the cafeteria, but they never affirmatively told them such distribution was permitted. Nurses continued the distributions through December 2015. (DO12;Tr.64,66,281,519-20.)

D. Cayuga Suspends, Disciplines, Demotes, and Adversely Evaluates Marshall for Engaging in Union Activities

1. Cayuga suspends Marshall

Until 2015, Marshall had received exemplary annual evaluations and had never been disciplined. As a team leader and charge nurse in ICU, which had "chronic[]" staffing shortages, she frequently had to contact nurses to fill the schedule. (DO26-27;Tr.142,151-56,196-97,443,448-49,GCX29(a)-(h),GCX49.) ICU Director Brown also made staffing calls, but unlike the team leaders, he could offer financial incentives. (DO27;Tr.160,444-45.)

On June 24, the ICU experienced a staffing shortage. Marshall, the team leader that day, called and emailed staff, but did not find anyone who agreed to come in. The staffing problem resulted in delayed care for two cardiac patients. (DO27;RX 7.)

On June 26, ICU was again short-staffed, and Marshall called House Supervisor Flo Ogundele to report the problem. Ogundele asked whether she could call anyone to come in, and Marshall told her that "she called everyone and no one called back." (DO28;RX3.) Ogundele went to ICU to discuss staffing with Marshall and Brown. Brown called a nurse and offered him extra pay; he agreed to come in. Ogundele later sent Crumb an email claiming that Marshall initially said she had made staffing calls but later said she hadn't. (DO28&n.42;RX3,

Tr.103,1048-49.) Brown sent Pedersen and Crumb a similar email. (DO28&n.43;RX12,Tr.104.)

After conferring with Pedersen and the CEO about disciplining Marshall, Crumb called her to a meeting with Brown and Ogundele later that day, where Crumb repeated their allegations. Marshall insisted that she did make calls and never said she hadn't. Crumb suspended Marshall for the remainder of her shift and the next. Crumb did so without following Cayuga's progressive disciplinary system, which usually begins with a verbal warning for an employee like Marshall whose record was unblemished. (DO28-29;Tr.35,53-58,102-09,122,196-97,913.)

After Marshall returned to work, she met again with Crumb and Brown. Crumb expressed concern that Marshall had told Brown or Ogundele she was too busy to make phone calls. Marshall said she hadn't told anyone she didn't make calls, and that she'd even come to work on her own time to call nurses. (DO29;GCX21b,p.3.) Crumb observed: "there was obviously a big communication…issue." (DO29;GCX21b,p.4.)

A week later, Crumb met with Marshall again about the suspension, asking her why she believed it should be lifted. Marshall explained that Crumb had said the incident was based on a "miscommunication," which didn't warrant suspension. Crumb denied using the term and said the issue was not just staffing but Marshall's admission "to three different people that [she] had not made phone

calls." (DO29;GCX25b.) Marshall reiterated that she did make calls and hadn't told anyone otherwise. Crumb then criticized Marshall's behavior during the staffing crisis. (DO29;GCX25b.) Marshall countered that she had raised the issue of staffing several times and even made calls on her day off to ensure sufficient staffing. She noted that Brown had approved five nurses to go on vacation at the same time. (DO29;GCX25b.) Crumb agreed the vacations weren't helpful but said Marshall's "less than professional conduct" was "more the reason" for her suspension. (DO29;GCX25b.) With that, Crumb upheld the suspension and gave Marshall a letter stating she was suspended for her team leader performance, "[un]professional" interactions with staff, and "not [being] truthful regarding [contacting] other staff members to determine availability." (DO30;GCX12a-b.)

2. Cayuga disciplines Marshall

On July 3, ICU again faced staffing shortages. Another ICU nurse and then Marshall asked Brown to take an ICU patient for a test, but he refused both requests. Explaining the staffing problem, Marshall asked Brown to "at least" get a ward clerk. As Brown made the call, Marshall stood 3-4 feet away. Brown said she didn't "have to stand there," but she wanted to know "what's going on" before she left to care for patients. (DO33-34;GCX26,Tr.229-31,GCX42pp.5-6.)

Based on this incident, Brown filed an internal complaint against Marshall, claiming she had "entered [his] personal space," and had told him she could stand

where she wanted when he asked her to move. (DO34;GCX42pp.5-6.) Upon receiving an email notifying her of the complaint, Marshall stopped by his office, but Brown said "she needed to leave [his] presence or [he would] call Security and have her removed." (DO34;Tr.1029.) Brown—a six-foot tall athlete—told Crumb "he felt trapped" by Marshall, who is under five feet tall, and repeatedly asked her to leave and stop harassing him. (DO34;Tr.234,GCX42p.1.)

Crumb investigated the incident and interviewed eight staff members on duty that day, none of whom heard the alleged incident. The doctor on call heard Marshall asking Brown whether they could discuss the incident and Brown telling her to stop harassing him. Several interviewees were critical of Brown and complimentary of Marshall. (DO34;GCX41,42.) Based on this investigation, Crumb issued Marshall a verbal warning for invading Brown's personal space and violating the nursing code of conduct, including customer service provisions requiring employees to "interact[]with others in a considerate, patient and courteous manner," and be "honest, truthful, and respectful at all times." (DO2,34;GCX3p.2,15,27b.)

3. Cayuga demotes Marshall

In August, Sandra Beasley replaced Brown as ICU interim director. On August 28, Beasley asked Marshall to stop by before the 8:30 a.m. bed meeting, so they could go together. At 8:25, Marshall looked for Beasley in her office but couldn't find her. Not wanting to be late, she went alone to the meeting. Beasley, who didn't arrive at her office until 8:30, was upset that Marshall hadn't waited. Marshall explained that she'd looked for Beasley, and knowing Beasley had attended such meetings before, proceeded alone to avoid being late. (DO37;Tr.237-39,GCX28b,p.5.)

ICU again encountered staffing shortages that day. Responding to an inquiry from the nurse in charge of scheduling, Marshall said she and Beasley knew there were holes in the schedule. Marshall told the nurse to contact Beasley because Marshall had made calls and no one was willing to come in. Later, Beasley asked Marshall to make additional calls, which she did. (DO37;Tr.363-67.)

Beasley notified Assistant Vice President Crumb that she planned to have a disciplinary meeting with Marshall that day because Marshall had (1) "pretty much flipped me away" that morning; (2) left for the bed meeting without Beasley; (3) responded to a staffing concern by telling a nurse to "take it to Sandra" instead of calling staff herself; and (4) "became argumentative" during a discussion about

staffing levels. In the meeting, Beasley complained about Marshall being "flippant" and about scheduling problems. Believing the complaints involved her union activities rather than her behavior, Marshall left the meeting. (DO37-38;Tr.239-40,779,GCX13.)

Beasley then emailed other managers about Marshall's "behavior and work performance throughout the day," this time accusing her not of flippancy but of "flipp[ing] me off." Based on these accusations, management decided to demote Marshall to staff nurse. (DO38;GCX13,28b,p.5,RX13.)

On August 31, Beasley, Crumb, and a social worker met with Marshall. Beasley told Marshall she was being demoted because of her "lack of professionalism" and "poor job performance" concerning scheduling. (DO38-39; GCX28b,p.4.) Beasley further complained that Marshall's behavior toward her "wasn't customer service friendly at all" because she hadn't accompanied her to the bed meeting and "flipped [her] off," a charge Marshall vehemently denied. (DO39;GCX28b,p.5.) Beasley then demoted Marshall to staff nurse. (DO39;GCX14,28b,pp.4-5.)

4. Cayuga downgrades Marshall's annual evaluation

Cayuga typically evaluates nurses annually on a 5-point scale, using a combination of subjective and objective requirements. The latter are listed under a "personal accountability" section that includes certifications, education, and

attendance. In 2015, Crumb told ICU staff that because the unit had had several interim directors, she would use their 2014 evaluations and only rescore the personal accountability section. (DO40-42;Tr.932-34.)

Marshall's evaluation scores ranged from 4.46 in 2008 to 4.83 in 2011. (DO41;GCX29a-g). In 2014, she received a score of 4.73. (DO41;GCX29g.) In each of those years, she met the requirements of the personal accountability section. (DO42;GCX29a-g.)

In 2015, Crumb prepared Marshall's evaluation, but without using the 2014 form she said she would use, and downgraded her overall score to 3.73. In the personal accountability section, Crumb deducted a point from Marshall's 2014 score for "demonstrates a sense of right and wrong by exhibiting honest, ethical behavior," a question that wasn't on the 2014 evaluation. (DO42;GCX29h.) Marshall's evaluation also included a new section (unscored) called "medical center performance objectives" not found in any of Marshall's prior evaluations. (DO42;GCX29a-g.) No other ICU employee lost a point for "honest, ethical behavior" in 2015. (DO42;Tr.972.)

E. Cayuga Disciplines Marsland for Complaining about Coverage During Breaks

Emergency department nurse Marsland and his coworkers frequently discussed among themselves and with management the recurrent problem of emergency nurses being unable to take breaks due to staffing shortages. Marsland

had also written letters to Cayuga's chief executive officer and filed a complaint with the New York Department of Labor. (DO20;Tr.466-68,471,487,490-92,502,529-30,GCX31.)

Coverage for nurses' breaks is provided by nurses from other departments or from the emergency department "fast track" section, which serves patients with less severe needs. (DO20;Tr.461,489-90,502-03.) Emergency department nurses were concerned that some fast track nurses lacked the skill level to cover breaks for nurses with critically ill patients. Marsland, who frequently worked with those patients, had refused to take a break when Deb Scott, a fast track nurse, was assigned to cover it. (DO20-21;Tr.469,480,489,505,529-30.) Another nurse, Cheryl Durkee, had also discussed with Unit Manager Kevin Harris the issue of fast track nurses covering breaks. (DO20;Tr.530.)

On September 24, Emergency Director Amy Mathews held a regular departmental staff meeting where she expected nurses to discuss "challenges" and provide feedback. Breaks were a recurrent topic, and Mathews raised the issue again that day. She congratulated the nurses for taking more breaks and specifically mentioned two fast track nurses who provided coverage, Scott and Gayle Peck, neither of whom was present. (DO21;Tr.505-06,563-64,587.) Marsland said he wasn't "comfortable" with Scott caring for his patients, and noted that nurses covering breaks "need[ed] to be capable of handling critical unstable

patients." (DO21;Tr.506-08.) Mathews told Marsland the meeting was not the right forum, but he persisted, adding that Peck was "like a nursing student" and didn't know how to prepare an IV bag with vitamins, "one of the first things" emergency nurses learn. (DO21;Tr.507.) Mathews said Marsland's comments were inappropriate and changed the subject. (DO20;Tr.568.)

After consulting with Pedersen, Mathews issued Marsland a verbal written warning, the first step in Cayuga's disciplinary system. (DO22;GCX32,35.) Mathews had never before disciplined someone for raising a legitimate concern at a staff meeting. (DO21;Tr.587.) Additionally, Mathews regularly sent emergency department staff monthly reports of patient surveys that included comments criticizing nurses by name. (DO22;Tr.606-07.)

F. House Supervisor Ogundele Threatens Employees on Facebook

In November 2015, the New York Human Rights Commission held a hearing on Marshall's sexual harassment charge against Brown concerning the Marilyn Manson video. On his Facebook page, Marsland, using a different name, posted a message supporting Marshall and asked nurses to send her "words of encouragement and love" as she "fac[ed] down" House Supervisor Ogundele and others, including Vice President Pedersen and Assistant Vice President Crumb. (DO17;Tr.512-13,GCX7.)

Ogundele was upset by Marsland's post and responded, "you don't want to make me your enemy I can go from nice to a bitch in 20 second[s] flat….This is my advice for you, don't mess with me and tell your disciples the same." (DO17;Tr.68,76,GCX8.) Crumb told Ogundele the post was "not appropriate" and to take it down. (DO18;Tr.734,940-41.) Initially, Ogundele resisted, arguing that she wrote the post from home and had "the right to defend" herself, but she later removed it. (DO18;Tr.729,734,941-42.) Crumb issued Ogundele a verbal warning for "posting inappropriate comments," with the expectation that "there would be no further postings of this nature." (DO18; Tr.729,942-43,RX4.)

The next day, Ogundele wrote a second post encouraging her readers to "look at the people who are sending you email, sending letters to your home and calling you to join[] their cause," and that "you will see that if you follow any one of them it will lead you to unemployment." (DO17-18;GCX9.) Ogundele removed the post after a few hours. (DO18n.27;Tr.85.)

G. Cayuga Tells Employees It Is Inappropriate To Discuss Wages

Cayuga does not have a specific policy prohibiting discussion of wages, but managers "encourage individuals not to do that." (DO13;Tr.47-48,GCX5,6.) In accordance with this unofficial policy, in late 2015 or early 2016, Vice President Pedersen informed a group of nurses, including Marshall, who were talking about their wages, that such talk was "inappropriate." (DO13;Tr.184.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Pearce and McFerran, Chairman Miscimarra dissenting in part) found, in agreement with the ALJ, that Cayuga violated Section 8(a)(1) of the Act through its threats, interrogations, and coercion of employees engaged in protected activity. (DO1,3.) The Board further agreed with the ALJ that Cayuga violated Section 8(a)(1) by disciplining Marsland, and violated Section 8(a)(3) and (1) by disciplining, suspending, adversely evaluating, and demoting Marshall, because of their union or other protected, concerted activities. (DO1,3.) Finally, deciding an issue not reached by the ALJ, the Board found that Cayuga violated Section 8(a)(1) by applying two provisions of its nursing code of conduct to restrict employee exercise of Section 7 activities.[2] (DO2,37n.52.)

To remedy this unlawful conduct, the Board's Order requires Cayuga 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 the rights guaranteed them by Section 7, 29 U.S.C. § 157. Affirmatively, the Order directs Cayuga to rescind the unlawfully applied code of conduct provisions;

[2] The Board severed, and retained for further processing, complaint allegations that Cayuga violated Section 8(a)(1) by maintaining other code of conduct provisions that employees could reasonably construe to prohibit Section 7 activity. (DO1&n.4,6-10.)

rescind the unlawful disciplinary warnings issued to Marsland and Marshall; correct Marshall's adverse performance evaluation; offer Marshall reinstatement to her job as charge nurse and team leader; make her whole for any losses; and post a remedial notice and read it aloud. (DO3-4.)

SUMMARY OF THE ARGUMENT

Among other rights, Section 7 of the Act guarantees employees the right to self-organization, to form, join or assist labor organizations, and to engage in other concerted activities. As the Board found, after Cayuga's nurses exercised their Section 7 rights by participating in a union-organizing campaign, the hospital responded by committing a wide range of unlawful acts. Because substantial evidence supports the Board's findings, they should be affirmed.

1. Cayuga engaged in a broad anti-union campaign that included soliciting employees to report coworkers or file a complaint against them; directing employees to cease distributing union literature; informing them that discussing wages is inappropriate; interrogating them about union activities; threatening them with reprisals if they did not stop those activities; discriminatorily prohibiting them from distributing and posting union literature and removing those postings; and threatening them with unspecified reprisals and job loss in retaliation for their protected, concerted activities. Cayuga's actions clearly violated Section 8(a)(1)'s bar on conduct that would reasonably tend to coerce employees in the exercise of

their Section 7 rights. Cayuga takes issue with the Board's factual findings and its credibility determinations, but the Court will not displace the Board's choice between two fairly conflicting views of the facts or overturn its credibility resolutions unless they are hopelessly incredible. On this record, Cayuga has made no such showing.

2. Cayuga unlawfully suspended, disciplined, and adversely evaluated Marshall because of her union activities. Compelling evidence supports these findings, including Cayuga's failure to follow its customary disciplinary procedures, its skewed investigation of the incidents, and its use of trumped-up charges. Faced with this compelling evidence, Cayuga failed to demonstrate that it would have taken those actions absent Marshall's union activities.

3. Cayuga admittedly disciplined Marsland because of his protected, concerted activity in raising the issue of coverage for breaks at a staff meeting. Cayuga defends its action by claiming his conduct was so egregious that he forfeited the Act's protection. Substantial evidence, however, supports the Board's finding that Marsland did not lose protection when he spoke calmly and nonthreateningly about issues of paramount concern to the nurses at a meeting where employees were expected to raise such issues.

4. The Board has broad discretion to fashion remedies that effectuate the purposes of the Act. Here, the Board ordered Cayuga to rescind two workplace

rules that it unlawfully applied to Marshall and issued a notice-reading requirement. Given Cayuga's failure to challenge those remedies before the Board, those issues are jurisdictionally barred from review under Section 10(e) of the Act. In any event, in its opening brief, Cayuga failed to show any basis for disturbing the Board's longstanding precedent requiring rules rescission. Moreover, given the involvement of all levels of management in its swift response to the nurses' organizing campaign, Cayuga has provided no justification for overturning the Board's notice-reading requirement.

STANDARD OF REVIEW

In reviewing the Board's findings—including its findings here that Cayuga unlawfully interrogated, threatened, and suspended its employees—the Court "must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969). Therefore, the Court's review of the Board's findings "is quite narrow." *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

The Court "'accord[s] a very high degree of deference to administrative adjudications by the [Board]' and [will] reverse its findings 'only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.'" *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016)

(citation omitted). Under that deferential standard, the Court will uphold the Board's findings if they are supported by substantial evidence, and will overturn them only if the Board "acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 646-47 (D.C. Cir. 2013) (internal quotation marks omitted); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *see also* 29 U.S.C. § 160(e).

In particular, determining an employer's motive "invokes the expertise of the Board, and consequently, the court gives 'substantial deference to inferences the Board has drawn from the facts,' including inferences of impermissible motive." *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228-29 (D.C. Cir. 1995) (citation omitted). Thus, the Court's "review of the Board's conclusions as to discriminatory motive is even more deferential, because most evidence of motive is circumstantial." *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. Apr. 12, 2016) (reissued June 17, 2016) (internal quotation marks omitted).

The Court will uphold the Board's credibility determinations unless they are "hopelessly incredible, self-contradictory, or patently insupportable." *Federated Logistics & Operations, a Div. of Federated Corporate Servs., Inc. v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005). The Court reviews Board remedial orders for abuse of discretion. *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT CAYUGA VIOLATED SECTION 8(a)(1) OF THE ACT THROUGH THREATS, DIRECTIVES, INTERROGATION, AND PROHIBITIONS ON UNION ACTIVITIES IN RESPONSE TO THE ORGANIZING CAMPAIGN

A. The Act Prohibits Employers from Interfering with, Restraining, or Coercing Employees Engaged in Protected, Concerted Activity

Section 7 of the Act guarantees employees "the right to self-organization, to form, join or assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…." 29 U.S.C. § 157. Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1). The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer's conduct has a reasonable tendency to coerce or interfere with employee rights. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). Proof of animus or actual coercion is unnecessary. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931-32 (D.C. Cir. 1991).

B. Cayuga Unlawfully Solicited Complaints of Harassment

Responding to the nurses' organizing campaign, Vice President of Human Resources Pedersen, in a series of emails, cautioned them about being "pressured to sign a union authorization card," and told them to contact management or

security if they felt harassed or intimidated. He later advised them they could file a complaint or notify management if they continued to feel harassed. (DO11;GCX2(a),(f).)

The Board and courts have long held that an employer violates the Act by inviting employees to "inform it of protected, albeit unwanted, authorization card solicitations by other employees." *Bloomington-Normal Seating Co*., 339 NLRB 191 (2003), *enforced*, 357 F.3d 692 (7th Cir. 2004). Thus, the Board has found unlawful an employer's letter to employees soliciting them to report co-workers if they "feel threatened or harassed" by those seeking signatures on union authorization cards. *Niblock Excavating, Inc*., 337 NLRB 53, 61 (2001), *enforced*, 59 F. App'x 882 (7th Cir. 2003). *Accord W.F. Hall Printing Co.*, 250 NLRB 803, 804 (1980) (unlawful letter urging employees to report harassment or "pressure" by card solicitors). These communications from employers are unlawful because of their "dual effect of encouraging employees to report to [the employer] the identity of union card solicitors," and "correspondingly discouraging card solicitors in their protected organizational activities." *W.F. Hall Printing*, 250 NLRB at 804.

Applying this well-established precedent, the Board reasonably determined that Pedersen's emails, which "equate[d] a feeling of 'harassment and intimidation' with being 'bother[ed] or 'pressured' to sign a card…increase[d] the likelihood that

employees will understand the employer to be requesting employees to report others for card solicitation activity that is protected by the Act." (DO11.)

Contrary to Cayuga's claims (Br.14), Pedersen's emails had nothing to do with harassment generally, but were " inextricably linked to the process of unionization." *Bloomington-Normal*, 357 F.3d at 697. As the ALJ explained, the impetus for the emails was that a "number of people felt as though they were being pressed to sign a card." (DO11n.11;Tr.799.)

Ithaca Industries, 275 NLRB 1121, 1125 (1985), and *First Student, Inc.*, 341 NLRB 136 (2004), cited by Cayuga (Br.14), are not to the contrary. In neither case did the employer ask employees to report when they "feel" harassed or intimidated. Rather, in *Ithaca Industries*, the employer requested reports only of "threats and intimidation," 275 NLRB at 1125, and in *First Student*, the employer sought reports of attempts to "force you or intimidate you to support the union," 341 NLRB at 137. Although Pedersen's emails used the word "intimidation," which the Board sometimes finds to be a lawful formulation, here, employees were urged to report their subjective feelings of intimidation or harassment. And reporting harassment "has been categorically rejected as overbroad by Board precedent." (DO12.) *Niblock Excavating*, 337 NLRB at 61.

Cayuga claims Pedersen sent the emails in response to complaints of bullying or intimidation because employees "felt as though they were being

pressed to sign a card." (Br.14.) But well-settled Board law "allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited." *Ryder Truck Rental, Inc.*, 341 NLRB 761 (2004), *enforced*, 401 F.3d 815 (7th Cir. 2005). Moreover, Cayuga provided no evidence that employees reported any incidents of bullying or intimidation. (DO11n.11.)

Finally, Section 10(e) of the Act, 29 U.S.C. §160(e), bars review of Cayuga's claims about Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e-2, because Cayuga never presented them to the Board.[3] (Br.15.) Though Cayuga's argument is based on Chairman Miscimarra's dissent, "a party may not rely on arguments raised in a dissent or on a discussion of the relevant issues by the majority to overcome the § 10(e) bar; the Act requires the party to raise its challenges itself." *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016).

[3] Under Section 10(e), "no objection that has not been urged before the Board… shall be considered by the court," absent "extraordinary circumstances" not present here. 29 U.S.C. §160(e). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

C. Cayuga Coercively Interrogated and Threatened Employees about Their Union Activities

1. Coercive interrogation and threats are prohibited by the Act

An employer violates Section 8(a)(1) by coercively interrogating employees about their union activities or sentiments. *Avecor*, 931 F.2d at 931. The test is whether the employer's conduct reasonably tends to coerce, not whether the employee was in fact coerced. *Rossmore House*, 269 NLRB 1176, 1178 n.20 (1984), *enf'd sub nom. Hotel Employees & Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Relevant factors that the Board assesses in making that determination include: the employer's hostility to unionization; the interrogator's position; the circumstances; the information sought; whether a valid purpose for the questioning was communicated; and whether assurances against reprisals were given. *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998). No one criterion is determinative. *Id.*

Similarly, an employer violates Section 8(a)(1) by threatening employees with job loss or other reprisals. *See, e.g.*, *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1176, 1178 (D.C. Cir. 1987). The statements are assessed based on whether employees would "reasonably perceive" them as threats. *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006). A coercive threat may, therefore, be implicit or explicit. *Tasty Baking*, 254 F.2d at 124. In applying this standard, the Board considers "the economic dependence of employees on their employer, and

the necessary tendency of the former…to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

2. Brown unlawfully interrogated and threatened Marshall

Substantial evidence supports the Board's finding that Interim ICU Director Brown unlawfully interrogated and threatened Marshall. (DO14-16.) Indeed, he expressly warned Marshall "that he knew [she] was the ringleader and was the one promoting all this union stuff, and if it didn't stop he was going to get HR involved." (DO15;Tr.193.)

The ALJ considered the circumstances surrounding this meeting and reasonably found Brown's statement to be an unlawful interrogation and threat of reprisal. Brown, a high-ranking manager, made the statement in a formal one-on-one meeting, after denying Marshall's request to have another employee present. Moreover, he directly linked his "ringleader" comment to his threat to "bring in HR" if she did not cease her union activities. In these circumstances, the ALJ reasonably found Brown's statements were unlawful. (DO16.)

Cayuga attempts to challenge the ALJ's credibility resolutions, which the Board adopted, but it fails to surmount the Court's high bar for overturning them. (*See* Br.35-37.) The Court will not disturb the Board's credibility determinations

unless they are "hopelessly incredible, self-contradictory, or patently insupportable." *Federated Logistics*, 400 F.3d at 924.

Cayuga does not point to any extraordinary circumstance here, nor could it on this record. The ALJ explicitly credited Marshall's account of the meeting, as well as the corroborating testimony of another nurse, Terrie Ellis, who testified that Brown asked Ellis if she knew about the union campaign, whether she had been approached at work about the union, and whether she "felt pressured or bullied about the Union in any way." (DO15;Tr.428.) Moreover, the ALJ found Brown's claim—that he didn't interrogate or threaten Marshall because he was indifferent to unionization—"highly misleading" and "inconsistent" with his other anti-union actions. *See* p.34 below. (DO15;Tr.1006-07.)

Finally, the ALJ rejected Cayuga's claim, repeated here (Br.36n.3), that Marshall's testimony should have been discredited because the New York Division of Human Rights denied her harassment claim against Brown. (DO15-16n.22.) A finding that Brown's presentation of an offensive video did not constitute sexual harassment says nothing about Marshall's credibility. As the ALJ further noted, attacking her credibility for engaging in the protected, concerted action of filing the harassment claim "speaks volumes" about Cayuga's animus toward her. (DO15-16n.22.)

In sum, Cayuga argues only that the Board should have credited Brown over Marshall and Ellis, an argument "almost never worth making." *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 829 (7th Cir. 2000). Because Cayuga fails to show that the Board's credibility resolutions are "hopelessly incredible," the Board's findings should be upheld.

3. House Supervisor Ogundele unlawfully threatened employees with job loss and unspecified reprisals in retaliation for their union or other protected activities

The Board reasonably found that House Supervisor Ogundele's Facebook posts constituted threats of job loss and other unspecified reprisals. (DO18-19.) These findings are well supported by the credited evidence and should therefore be upheld.

In response to Marsland's Facebook post seeking expressions of support for Marshall during a state hearing on her sexual harassment claim against Brown, Ogundele made two posts of her own. In the first, she warned Marsland and his "disciples" that she "can go from nice to a bitch in 20 second[s] flat," and that her "advice for you [is] don't mess with me and tell your disciples the same." (DO19.) In the second post, Ogundele, plainly referring to Marsland, cautioned that "people who are sending you email, sending letters to your home and calling to join[] their cause," "will lead you to unemployment." (DO18.) She warned that "[w]hen you

decided to attack me you just opened a can of worm[s] that you [cannot] close. You pick[ed] the wrong girl." (DO18;GCX9.)

The Board correctly found that Ogundele's initial Facebook post was a "not so subtle implied threat of retaliation for Marsland's protected and concerted activity." (DO19.) *Accord Tasty Baking*, 254 F.3d at 124; *F. W. Woolworth Co.*, 310 NLRB 1197, 1200 (1993). Her second post contained an "explicit threat of job loss" for union supporters. (DO19.) Thus, by any account, Ogundele's linking of a union election win to job loss would reasonably tend to coerce employees. *See Progressive Elec.*, 453 F.3d at 544.

The Board found that Marsland's Facebook post, which sought support for Marshall, was protected and concerted activity under the Act. (DO18&n.28.) Cayuga doesn't challenge this conclusion, and instead argues that Ogundele was merely responding to "personal attacks" not in the record; that she never explicitly mentioned the Union in her posts; and that she never expressly said she intended to discipline or take action against employees. (Br.38-39.) As the Board explained, however, Ogundele's intentions and motivations are irrelevant to the analysis. (DO19.) The Board's test is an objective one, which considers only whether "the statement has a reasonable tendency to coerce or to interfere with [employee] rights." *Progressive Elec.*, 453 F.3d at 544.

Moreover, the record is clear that Ogundele was responding to Marsland's protected, concerted activity, including his union activism. As the ALJ explained, Ogundele directed her first post to Marsland, a known union activist, and his "disciples." (DO18.) Her second post explicitly referenced "people sending you email…letters…and calling to join[] their cause." Given the context of the ongoing union campaign, the Board explained that "it would be unreasonable not to conclude[] that Ogundele was referring to union activists." (DO19.)

There is no evidence that Ogundele was responding to extra-record "defamatory and spiritually offensive statements," as Cayuga claims. (Br.39.) The credited testimony shows this was Marsland's only Facebook post about Ogundele's participation in the hearing. (DO18n.28;Tr.516-18.) For her part, "Ogundele was clear in her testimony that she was responding to Marsland and his post." (DO18n.29;Tr.76-80,GCX7-9.)

Given the explicit language of Ogundele's posts and her admission that they responded to Marsland's message of encouragement for Marshall, the Board's findings that her statements constituted unlawful threats in violation of Section 8(a)(1) should be upheld.

D. Cayuga Unlawfully Removed Union Literature and Prohibited Employees from Distributing It

1. An employer cannot discriminate against union literature

Implicit in Section 7 of the Act is the right of employees "effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). *Accord Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). Accordingly, employees have the right to distribute union literature during nonworking time in nonworking areas, unless it interferes with production or discipline. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491-93 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-03 & n.10 (1945). Indeed, employer restrictions on such activity are presumptively unlawful. *Beth Israel*, 437 U.S. at 491-93; *Republic Aviation*, 324 U.S. at 803 & n.10. Moreover, "[o]nce an employer allows employee speech in a specific area of company property, the employer may not selectively censor the employees' union-related speech." *Mid-Mountain Foods, Inc. v. NLRB*, 269 F.3d 1075, 1076 (D.C. Cir. 2001).

2. Cayuga discriminatorily removed union literature and prohibited employees from distributing it in the cafeteria

Substantial evidence supports the Board's finding that Cayuga unlawfully prohibited employees from posting and distributing union literature while allowing them to post and distribute other literature. (DO16.) The Board found that

managers engaged in a "concerted effort" to remove union literature, a finding based on a plethora of record evidence, including Assistant Vice President Crumb's email to managers asserting "the right to take down" such literature. (DO16;GCX22.) In addition, Crumb explicitly directed security and house supervisors to remove union material. (DO16n.24;GCX22.) For his part, Interim ICU Director Brown instructed staff to remove union flyers and testified that he personally removed "many postings…over the course of many days." (DO15&n.21,16;Tr.1007,GCX44,47.) Management also knew that employees removed union literature. (DO16n.24;GCX24,45.) There is no dispute that Cayuga allowed employees to post—and did not remove—nonunion material. (DO16;GCX20.) Given the overwhelming weight of the evidence, the Board's finding that Cayuga discriminatorily removed union literature should be upheld. *Mid-Mountain Foods*, 269 F.3d at 1076.

Cayuga concedes that its managers removed union literature, but contends—incredibly, given the volume of record evidence—that they did so only "occasional[ly]," and did not prevent employees from posting or leaving union literature in the facility. (Br.43-44.) The Court need not be detained by either contention: Cayuga cannot excuse its unlawful interference with employee rights by merely pointing out that it did not always do so.

The Board also found that Cayuga unlawfully prohibited employees from distributing union literature in the cafeteria when Vice President Pedersen twice told them they could not set up literature tables in the cafeteria and even threatened to call security and have the union material removed. (DO12-13.) Before the Board, Cayuga failed to meet its burden to show—nor did it even contend—that a ban on solicitation and distribution in the cafeteria on nonwork time was necessary to avoid disruption of the hospital or patient care. (DO13.)

Cayuga does not dispute these findings. Instead, it argues that the Board erred because Pedersen's actions were de minimis and Cayuga thereafter allowed employees to distribute materials in the cafeteria. (Br.40-43.) Contrary to Cayuga's claim, even a single violation of Section 8(a)(1) warrants remedial action. *See, e.g.*, *Passavant Memorial Area Hosp.*, 237 NLRB 138, 138 n.2, 141 (1978) (interrogation of one employee in a unit of 600 was not isolated and required remedy).

Moreover, because the Board's test for coercive effect is objective, not subjective (see p.31 above), the fact that employees continued to distribute union literature in the cafeteria on subsequent occasions does not undermine the Board's finding that Pedersen, standing with Cayuga's CEO and another manager, violated Section 8(a)(1) by telling employees to stop and threatening to call security. *Cf. NLRB v. Pizza Crust Co. of Penn.*, 862 F.2d 49, 54 (3d Cir. 1988) (rejecting

employer's argument "that the Act is violated only if the employer was successful in its barring of solicitation").

Further, simply allowing employees to distribute literature in the cafeteria after these violations does not effectively cleanse Cayuga's error. Although an employer can repudiate its unlawful conduct, to be effective, "the repudiation must be timely, specific, and unambiguous," and the employer "must admit wrongdoing and refrain from committing future violations." *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003). Cayuga failed to show an effective repudiation. (DO13.)

The cases cited by Cayuga do not help its cause. (Br.42-43.) They involve either an employer's defense to a unlawful discharge allegation (*Avondale Indus.*, 329 NLRB 1064, 1231 (1999)), or an employer's defense to alleged disparate enforcement of an otherwise valid workplace rule (*see, e.g.*, *Albertsons, Inc.*, 289 NLRB 177, 178 n.5 & 190-91 (1988)). Neither circumstance applies here. The ALJ found that employees had a presumptive right to solicit and distribute union literature in the cafeteria on nonworking time, and Cayuga failed to meet its burden of showing that its ban against doing so was necessary to avoid the disruption of patient care. (DO13&n.14.)

E. Cayuga Unlawfully Told Employees that Their Wage Discussions Were Inappropriate

As Vice President Pedersen testified, Cayuga had "a generally accepted practice" against employees discussing their wages, and managers "encourage individuals not to" do so. (DO13;Tr.48,804.) For example, when nurses—but not other employees—received a wage increase, Pedersen sent them letters asking that they "keep [their] salary information confidential." (GCX5,6.)

In keeping with this "generally accepted practice," when Pedersen overheard a group of nurses discussing their wages in late 2015 or early 2016, he told them their discussion was "inappropriate." (DO13;Tr.184.) This admonition "directly interfere[d] with [their] ability to discuss their wages and other terms and conditions of employment with their fellow employees"—"a core Section 7 right." *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 548 (D.C. Cir. 2016).

Cayuga does not contest this basic principle. Instead, it challenges the ALJ's credibility findings, which the Board adopted, arguing that Pedersen should have been credited over Marshall. (Br.16-17.) Once again, however, Cayuga fails to meet its heavy burden needed to overturn such credibility determinations. *See* cases cited above at pp. 22, 29-30. Without citation to the record, Cayuga claims that "Pedersen credibly testified he never made the statement." (Br.17.) In actuality, Pedersen testified that he did "not recall that conversation," and the ALJ found that Pedersen "was unwilling to state that it did not happen." (DO13;Tr.805-

06.) The ALJ therefore reasonably credited Marshall's specific testimony that the conversation occurred, particularly given her "consistent demeanor," and Pedersen's admission that it was "a generally accepted practice" for employees not to discuss their wages. (DO13.) In these circumstances, the Court "has no authority to upset the conclusions reached by the ALJ and the Board." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1368 (D.C. Cir. 1983).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT CAYUGA UNLAWFULLY SUSPENDED, DISCIPLINED, AND ADVERSELY EVALUATED MARSHALL IN RETALIATION FOR HER UNION ACTIVITIES

A. Section 8(a)(3) and (1) Protects Employees' Rights To Engage in Protected Union Activities

Section 8(a)(3) of the Act prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to…discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Accordingly, an employer violates this Section of the Act by disciplining or taking other adverse employment actions against employees for engaging in union activities. *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).[4]

[4] A violation of Section 8(a)(3) results in a "derivative" violation of Section 8(a)(1), which forbids employers from interfering with, restraining, or coercing employees in the exercise of rights protected by the Act. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

The legality of an employer's adverse actions depends on its motivation. If substantial evidence supports the Board's finding that union activities were a motivating factor in the discipline, the employer's action violates the Act unless the employer proves that it would have taken the same action even in the absence of those activities. *Transportation Mgmt.*, 462 U.S. at 395; *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

Unlawful motivation can be inferred from circumstantial as well as direct evidence. *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). Such evidence includes the employer's knowledge of union activities, its hostility toward the union, the timing of its action, and its reliance on implausible or shifting reasons for the action. *Tasty Baking*, 254 F.3d at 126; *Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995). If the Board reasonably concludes that the employer's asserted non-discriminatory justification for its action is non-existent or pretextual, the defense fails. *Wright Line*, 251 NLRB at 1083-84.

B. Cayuga Unlawfully Targeted Marshall for Retaliation Because of Her Union Activities

The record fully supports the Board's finding (DO26-43) that anti-union considerations were a motivating factor in Cayuga's decision—in the midst of the union campaign—to suspend, warn, demote, and adversely evaluate Marshall, a

leading union advocate who had been identified as the campaign's "ringleader," and that Cayuga failed to demonstrate it would have taken those actions absent her union activities. Before the Board, Cayuga did not dispute its knowledge of Marshall's union activities, or that its animus towards the Union was "firmly established" (DO31), nor does it attempt to do so before the Court (*see* Br.27-28). Instead, it contests only the Board's determination that it would not have taken the same actions against Marshall absent her union activities. (Br.28-35.) As shown below, the Board's findings are supported by the credited evidence and should be affirmed.

1. Cayuga unlawfully suspended Marshall

It is undisputed that Interim ICU Director Brown referred to Marshall—an experienced nurse with a spotless disciplinary record—as the union "ringleader." On June 24 and 26, Brown and Assistant Vice President Crumb accused her of misstating whether she had called staff to fill key gaps in the schedule, and immediately suspended her in the midst of a staffing crisis. Overwhelming record evidence supports the Board's finding that Cayuga's proffered explanations for this drastic step did not withstand scrutiny, and therefore that the hospital would not have suspended Marshall absent her union activities.

Thus, as early as June 2, Vice President Pederson asked managers for "specifics regarding" Marshall to "share with Ray [Pascucci]," Cayuga's labor

counsel. (DO27&n.39;GCX48.) The ALJ found that managers then engaged in "a concerted effort to document incidents about Marshall." (DO32.) That effort resulted in "a panoply of emails" to Assistant Vice President Crumb about the events of June 24 and 26, giving contradictory narratives that she made no effort to reconcile. (DO32.)

For example, Jessica Miller, head of the cardiac department, and House Supervisor Cindy Brown provided conflicting versions of the same June 24 event. According to Miller, when asked which nurses she called to fill the shift that day, Marshall said "nobody." By contrast, Cindy Brown acknowledged that Marshall said "all calls had been made and emails sent, no one is coming." (DO27&n.41;RX2,7.) Regarding June 26, ICU Director Brown and House Supervisor Ogundele likewise gave divergent accounts containing unexplained inconsistencies. (DO28 & nn.42-43;Tr.105-09,697-711,1019-24,RX3,GCX36.)

Notwithstanding these discrepancies, Crumb never bothered to interview Marshall or make any effort to verify whether she placed staffing calls as she said she did. (DO31.) Moreover, Crumb's decision to suspend Marshall was "unusually hasty" and the process "shrouded from view." (DO31.) Thus, she suspended Marshall within two hours of receiving Ogundele and Brown's divergent reports about the June 26 staffing problem. (DO28.) Moreover, in the midst of a staffing crisis, Cayuga's top managers, including its CEO and Vice

President Pedersen, somehow found time to convene a highly unusual meeting to discuss immediately suspending Marshall. (DO28,32; Tr.34-35.) Further, the meeting's details were murky: although Pedersen claimed the decision was made there, Crumb testified that she personally made the decision and never mentioned conferring with the CEO or meeting with Pedersen. (DO28.)

In addition, Crumb's decision to suspend Marshall—who "had an unblemished disciplinary record" and "superlative annual reviews"—was particularly unusual because it bypassed the normal progressive disciplinary system. (DO31.) Cayuga provided no explanation for this departure from its established process, a failure that raised an inference of discriminatory treatment. (DO31.) *See Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075 (D.C. Cir. 2016).

Cayuga errs in complaining that the Board failed to consider its proffered evidence purportedly showing that it issued comparable discipline to similarly situated employees. (Br.30.) The ALJ reviewed the evidence and concluded that Marshall's suspension "for a first ever offense stands in stark contrast to the historical record provided by" Cayuga. (DO32;RX14.) Thus, Cayuga's evidence showed that in disciplining other employees, Cayuga actually followed its progressive system, and issued them warnings or performance improvement plans. (RX14.) By contrast, Cayuga ignored the progressive disciplinary system when it came to Marshall. The Board therefore reasonably found that Cayuga's proffered

evidence "strongly undermin[ed]" its argument that it would have taken the same action absent Marshall's union activities. (DO32.)

Cayuga further asserts that Marshall "refused" to make staffing calls and "lied" when asked if she did. (Br.32,33.) But that argument fails to account for Cayuga's burden of proof. Cayuga had to show not only that Marshall engaged in misconduct, "but that the nature of that behavior would have caused her suspension regardless of her protected conduct. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 84 (D.C. Cir. 2015). This it failed to do.

Given the evidence that Cayuga's decision to suspend Marshall was contrary to established practice and included a "zealous effort to 'paper' the record with inconsistent management accounts of Marshall's failings" based on a one-sided investigation, as well as the unusual participation of top managers, the Board reasonably concluded that Cayuga failed to meet its burden of showing that it would have suspended her absent her union activities. (DO33.)

2. Cayuga's stated reasons for disciplining, demoting and adversely evaluating Marshall were pretextual

After Cayuga suspended Marshall, it continued its campaign of retaliation for her union activities by disciplining, demoting, and adversely evaluating her. Substantial evidence supports the Board's findings that Cayuga's stated reasons for these adverse actions were pretextual, and therefore that they were unlawful.

On July 10, Cayuga issued a verbal warning to Marshall for an incident in which it claimed she was "confrontational" and invaded ICU Director Brown's "personal space." (DO34.) Crumb zealously investigated the incident, interviewed staff who witnessed it, and produced a set of typed notes in response to a subpoena. Only at the hearing did it become clear that she also had a set of contemporaneous handwritten notes from the investigation. (DO34;GCX41,42.) As the ALJ noted, the differences between the two versions were "highly suspicious." (DO35.) The typed notes did not include staff members' comments criticizing Brown, their positive comments about Marshall, or Crumb's note that she interviewed eight staff members who said they "did not witness anything." (DO35;GCX41,42.)

Nevertheless, Crumb decided to discipline Marshall based on the accounts of Brown and nurse Cynthia Sullivan, a known anti-union employee whose statements are not in the record. (DO34.) But "[n]one of the notes Crumb took reveal anything remotely resembling Brown's account." (DO34.) And Crumb's testimony that Sullivan "witnessed the whole situation" appears to be untrue. (DO35n.51;Tr.912-13,GCX41,42.) In contrast, Dr. Hannon, who did hear the incident, told Crumb the conversation was brief, with Marshall asking Brown whether they could discuss the staffing issue, and Brown responding, "stop harassing me." (DO34.)

Thus, Cayuga's claim that Crumb disciplined Marshall for "angrily follow[ing] Brown around, violating his personal space, and blocking his movements," is not at all supported by the record evidence. (Br.30.) Rather, the ALJ found that Crumb ignored the statements of staff she interviewed and instead relied on Sullivan's extra-record statements. (DO35.) As the ALJ noted, Crumb conducted her investigation in a "patently suspicious way," with a preordained conclusion, thereby providing convincing evidence that Cayuga's explanations for the warning were pretextual. (DO35-37.) *See Inova*, 795 F.3d at 84.[5]

Similarly, ample evidence supports the Board's finding that Cayuga demoted Marshall for pretextual reasons. As the Board noted, Cayuga's stated reasons for demoting her were "particularly trumped up," as illustrated by the frivolous complaint about her not escorting Beasley, the new unit director, to a meeting. (DO40.) Even more damaging to Cayuga's case was its "invention of and reliance on the claim that Marshall 'flipped off' Beasley." (DO40.) Beasley initially told Crumb only that Marshall had been "flippant," but "[l]ike a plant grows when watered, the fabrication that Marshall 'flipped off' Beasley took root over the course of the demotion." (DO38 n.55;GCX13,Tr.779.) By the time

[5] Cayuga complains that the Board did not consider the comparator evidence in assessing Marshall's warning. (Br.30.) That evidence is irrelevant because the Board found the Cayuga's explanations for her warning were pretextual. A finding of pretext is a "conclusive rejection of [Cayuga's] affirmative defense." *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 32 (D.C. Cir. 1998).

Beasley met with Marshall to announce the demotion, she was accusing Marshall of an obscene gesture. (DO39;GCX28b,p.5.) The Board reasonably determined that Cayuga's reliance on this false accusation was mere pretext. *See Ozburn-Hessey*, 833 F.3d at 220.

Finally, Cayuga further violated the Act by downgrading Marshall's evaluation based on pretextual reasons. Crumb had assured the nurses that the prior year's evaluations would be used for ICU staff. Yet Crumb, without explanation, used a new form for Marshall, and downgraded her a full point based on criteria not present in the prior year's evaluation ("demonstrates a sense of right and wrong by exhibiting honest, ethical behavior"). (DO42.) Moreover, no other ICU nurse lost points for this subjective factor. (DO42.) Cayuga failed to explain why Crumb singled out Marshall by applying different criteria to her. In addition, Crumb downgraded Marshall's evaluation based on the unlawful disciplinary incidents outlined above (pp. 40-45). Given Cayuga's failure to comply with the promised evaluation process in Marshall's case, the pretextual nature of its actions is "transparent." (DO43.)

Faced with this powerful evidence that Marshall's union activities were a motivating factor in the actions taken against her, Cayuga needed to show it would have taken the same actions absent those activities. But because Cayuga's reasons for warning, demoting, and downgrading Marshall were pretextual, Cayuga

necessarily failed to meet its burden, as the Board reasonably found. (DO36-37,40,43.)

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT CAYUGA UNLAWFULLY DISCIPLINED MARSLAND IN RETALIATION FOR HIS PROTECTED, CONCERTED ACTIVITY

A. Employees Engage in Protected, Concerted Activity When They Discuss Working Conditions and Complain To Management

Section 7's broad protection for employees who engage in concerted activities applies with particular force to unorganized employees who lack a collective-bargaining representative and must "speak for themselves as best they [can]." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14, 17 (1962). Concerted activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus.*, 281 NLRB 882, 885 (1986) (quoting *Meyers Indus.*, 268 NLRB 493, 497 (1984)), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987)). It includes employee comments that arise as a "logical outgrowth of concerns expressed by the employees collectively." *Five Star Transp., Inc.*, 349 NLRB 42, 43-44, 59 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008).

B. Cayuga Unlawfully Disciplined Marsland Because of His Protected, Concerted Activity

1. Substantial evidence supports the Board's finding that Marsland's comments were protected and concerted

The record amply supports the Board's conclusion that Marsland was engaged in protected, concerted activity when he expressed his dissatisfaction with the level of care provided by two nurses who covered breaks for emergency department nurses. (DO23.) His comments addressed staffing shortages and patient care—collective concerns that are protected by Section 7 because they are "intimately related to the conditions under which the employees work[]." *Brockton Hosp.*, 333 NLRB 1367, 1374-75 (2001), *enf'd. in relevant part*, 294 F.3d 100 (D.C. Cir. 2002). Accordingly, his remarks were protected and concerted.

Indeed, as Marsland observed, "the discussion of not getting breaks is part of the air that we breathe" at Cayuga. (DO20;Tr.502.) Management itself acknowledged the issue, noting that "[o]ne of the major complaints by staff in the [emergency department] is their inability to take meal breaks," and moved to address the problem "[i]n light of the union activity." (DO20;GCX31.) In addition, nurses routinely discussed the specific issue Marsland raised at the staff meeting: whether two particular "fast track" nurses were sufficiently skilled to care for the critically ill patients of emergency nurses when they needed breaks.

Not only did Marsland testify that nurses routinely discussed the issue, nurse Cheryl Durkee testified that she discussed it with other nurses "several times a week" and raised it with a manager.[6] (DO20;Tr.504,530.)

Contrary to Cayuga's claim, the fact that other nurses did not join in Marsland's comments during the staff meeting is irrelevant. (Br.18.) Concerted activity includes "those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Medco Health Solutions of Las Vegas, Inc. v. NLRB*, 701 F.3d 710, 715 (D.C. Cir. 2012) (quotation marks omitted). Here, there can be no dispute that the issue of staffing and coverage for breaks was a continuing concern of emergency department nurses.

2. The Board reasonably determined that Marsland's comments did not lose the protection of the Act

An employer violates Section 8(a)(1) of the Act by disciplining an employee for concerted activity, unless the employee engages in "opprobrious conduct" in the course of that activity. *Inova*, 795 F.3d at 86. On this record, the Board had ample grounds for finding that Cayuga violated Section 8(a)(1) by disciplining

[6] Cayuga's contention that no nurse other than Marsland ever "subsequently" questioned the competency of certain nurses is irrelevant and ignores the overwhelming evidence that nurses were concerned enough to discuss the issue "several times a week" among themselves and raise it with managers. (Br.20.)

Marsland for his protected, concerted remarks. (DO23-24.) Cayuga argues that he lost the Act's protection because he engaged in "opprobrious conduct" while making those statements. (Br.21.) In addressing this claim, the Board applied the test set forth in *Atlantic Steel Company*, which considers the place and subject matter of the remarks, the nature of the outburst, if any, and whether it was provoked by an unfair labor practice. 245 NLRB 814, 816 (1979). *Accord Inova*, 795 F.3d at 86.

The Board found that Cayuga failed to establish that Marsland's remarks forfeited his protection under *Atlantic Steel*. As the Board explained, the first three factors weighed in favor of protection, while the fourth did not because his comments were not provoked by an unfair labor practice. (DO24-25.) In its exceptions to the ALJ's decision, Cayuga never mentioned *Atlantic Steel* or discussed the ALJ's analysis of the relevant factors. (Excs., pp.27-34.) Section 10(e) of the Act therefore bars any challenge to those findings. 29 U.S.C. §160(e); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 419 (D.C. Cir. 1996).

In any event, the record fully supports the Board's reasonable findings. Applying the first *Atlantic Steel* factor, the Board found that the place of the discussion weighed in favor of protection because Marsland made his comment during an employee meeting where Director Mathews "'expect[ed] feedback' and 'dialogue.'" (DO24;Tr.587.) *See Datwyler Rubber & Plastics, Inc.*, 350 NLRB

669, 669-70 (2007) (employee who voiced common concerns at staff meeting and threatened divine judgment did not lose protection).

The subject matter of Marsland's remarks also weighed in favor of protection. They concerned coverage for employee breaks, an undisputed concern of emergency department nurses. (DO24.) Even if his voicing of common concerns included "personal attacks," as Cayuga asserts, that wouldn't have caused him to lose the Act's protection. (Br.23.) *See NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 124 (2d Cir. 2017) (comments protected though "dominated by vulgar attacks" on supervisor and his family).

The Board further found that the nature of the supposed outburst weighed in favor of protection. As the Board noted, although Marsland "might have been 'out of line' to persist over Mathews's objections," his comments "fall far short of the type of 'opprobrious conduct' that would weigh against continued protection." (DO25, quoting *Atlantic Steel*, 245 NLRB at 816.) He used no profanity, did not yell, and made his comments "in the context of a meeting where employees were encouraged to speak up." (DO25.) Thus, weighing the totality of the circumstances, the Board was entirely reasonable to find that he retained the Act's protections despite his "brief, nonthreatening, nonprofane" remarks. (DO25.) *See Inova*, 795 F.3d at 86 (recognizing that "labor relations often involve heated disputes likely to engender ill feelings and strong responses," and employees are

"permit[ted] some leeway for impulsive behavior").

Cayuga's arguments to the contrary fail. (Br.22-23.) As an initial matter, Cayuga never argued to the Board that the comments "likely qualif[y] as defamation" under state law (Br.22), and therefore that argument is not properly before the Court on review. *See* 29 U.S.C. §160(e) and cases cited at pp. 26, 50. Cayuga's further suggestion that Marsland's comments "could likely lead to a refusal to work with the nurses" (Br.22) is purely speculative and not a basis for overturning the Board's findings. *See Int'l Bhd. of Teamsters v. I.C.C.*, 818 F.2d 87, 94 (D.C. Cir. 1987).

Moreover, Cayuga's claim (Br.23) that Marsland's comments prompted one of the nurses to "becom[e] emotionally distraught" ignores that they were not made in her presence, the nurse's response was not the basis for his discipline, and managers routinely sent out patient surveys criticizing nurses by name. (DO22.) Finally, Cayuga's argument that he was "insubordinate" (Br.10,22-23) fails to account for the Board's finding that Marsland's brief, nonthreatening, and nonprofane comments were made in the context of a meeting where employees were expected and encouraged to speak up. (DO25.) In sum, Cayuga's arguments provide no basis for disturbing the Board's conclusion, and its unfair-labor-practice finding should be upheld.

IV. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ORDERING RESCISSION OF TWO RULES AND ISSUING A NOTICE-READING REQUIREMENT

A. The Board Has Broad Authority To Remedy Unfair Labor Practices

Section 10(c) of the Act, 29 U.S.C. § 160(e), confers upon the Board "broad discretionary" authority to remedy unfair labor practices. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Moreover, the Board's exercise of this authority is "subject to limited judicial review," and courts must enforce Board remedial orders unless they are "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Id.* (quotation marks omitted). *Accord Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 738 (D.C. Cir. 2015).

B. Section 10(e) Bars Review of Cayuga's Challenges to the Board's Remedial Order

Cayuga challenges two portions of the Board's remedial order: one directing it to rescind two rules unlawfully used to discipline Marshall, and another directing a management official or Board agent to read the remedial notice to employees. Neither challenge is properly before the Court because Cayuga failed to raise them in the first instance to the Board, as required by Section 10(e) of the Act, and it makes no argument that this failure is excused by extraordinary

circumstances. *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982).

Here, after the ALJ declined to find the two rules unlawful as applied to Marshall, and to grant the General Counsel's request for a notice-reading remedy, the General Counsel filed exceptions objecting to those rulings. Cayuga could have filed an answering brief opposing those exceptions, but failed to do so. Even after the Board reversed the ALJ and ordered the remedies, Cayuga failed to file a motion for reconsideration to contest them. *See Marquez Bros. Enters., Inc. v. NLRB*, 650 F. App'x 25, 27 (D.C. Cir. 2016) (employer forfeited claims where it failed to respond to General Counsel's exceptions or file a motion for reconsideration). Thus, Cayuga had every opportunity to present its arguments to the Board, and its failure to avail itself of these opportunities does not constitute an extraordinary circumstance. *See HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016).[7]

[7] Cayuga cannot rely on Chairman Miscimarra's dissent to excuse its failure to challenge the Board's notice-reading remedy. (Br.45n.5.) As the Court has held, a challenging party must raise the issue itself. *HTH*, 823 F.3d at 673.

C. In Any Event, Cayuga Fails To Show that the Board's Remedial Order Is An Abuse of Discretion

1. The Board did not abuse its discretion by ordering Cayuga to rescind two rules unlawfully applied to Marshall

As shown above at pp. 11,13, Cayuga applied two rules in the nursing code of conduct when it unlawfully disciplined and demoted Marshall.[8] (DO2,39; GCX14,15.) The Board ordered Cayuga to rescind those rules—which is the standard remedy for unlawfully applying otherwise facially valid rules. *See, e.g.*, *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, 2016 WL 4582495, at *10; *Hitachi Capital Am. Corp*., 361 NLRB No. 19, 2014 WL 3897175, at *4, *appeal dismissed*, No. 14-1161, 2015 WL 653271 (D.C. Cir. 2015); *Albertsons, Inc.*, 351 NLRB 254, 259 & n.31 (2007).

Cayuga fails to even argue that the Board's rescission requirement constituted an abuse of discretion. Instead, Cayuga argues that under the Board's recent decision in *The Boeing Company*, 365 NLRB No. 15, 2017 WL 6403495, those rules and Marshall's discipline should be found lawful. In *Boeing*, the Board overruled the "reasonably construe" standard for determining the legality of facially neutral workplace rules which had been announced in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Here, however, the Board did not apply

[8] The two rules are: "Interacts with others in a considerate, patient, and courteous manner;" and "Is honest truthful, and respectful at all times." (DO2.)

the "reasonably construe" standard to find the two rules unlawful. Rather, the Board simply found that Cayuga *applied* those otherwise valid rules to unlawfully restrict protected activity. (DO2.) Thus, *Boeing* has no application to the Board's analysis regarding the two rules. Indeed, *Boeing* explicitly contemplated that a facially valid rule could be found to have been unlawfully applied against employees engaged in protected activities.[9] 2017 WL 6403495, at *17. *Cf. Aroostook Cty. Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996).

2. The Board acted within its broad discretion in directing a notice reading

The Board orders special remedies when unfair labor practices are "so numerous, pervasive, and outrageous that such remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found." *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003) (quotation marks omitted), *enforced*, 400 F.3d 920 (D.C. Cir. 2005). One such remedy is that the Board's remedial notice be read by a Board agent or company official. This measure helps ensure that employees "fully perceive that [the employer] *and its managers* are bound by

[9] In a footnote, Cayuga claims the ALJ's finding that Marsland was unlawfully disciplined under an unlawful rule cannot be upheld under *Boeing*. (Br.24n.1.) But the Board did not pass on this finding. (DO1n.1.) It is, therefore, not an issue before the Court.

the requirements of the [NLRA]." *Federated Logistics*, 400 F.3d at 930 (emphasis in original) (quotation marks omitted).

The Board acted well within its remedial discretion by requiring a notice reading. (DO2.) Cayuga's response to the union's nascent organizing campaign was swift and involved all levels of management. Thus, Cayuga "repeatedly targeted" Marshall and identified her as the "ringleader" of the organizing campaign. (DO 2,31.) Moreover, managers repeatedly and enthusiastically removed union literature from nonwork areas, interrogated employees about their union activities, encouraged them to report union supporters or file complaints against them, threatened them with reprisals and job loss, and disciplined another nurse, Marsland, for engaging in protected concerted activity. (DO3.) In these circumstances, the Board reasonably concluded that Cayuga's conduct warranted a notice-reading remedy to "dissipate as much as possible any lingering effects" of its extensive unlawful conduct. (DO2, quoting *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), *enf'd mem*. 273 F. App'x 32 (2d Cir. 2008)). The Court has repeatedly recognized that such actions justify a notice reading. *See Federated Logistics*, 400 F.3d at 923-28, 930.

Cayuga consigns its challenge to the notice-reading remedy to a footnote on the last page of its brief, where it argues only that its conduct was "not so egregious" as to warrant this remedy. (Br.45 n.5.) Under the Court's

jurisprudence, this cursory argument "in a single footnote…is not enough to raise an issue for [the Court's] review." *NSTAR Elec. & Gas Corp. v. F.E.R.C.*, 481 F.3d 794, 799–800 (D.C. Cir. 2007). In any event, contrary to Cayuga's claim that the Court has only approved notice-reading remedies "in cases with far more egregious circumstances," the Board has granted—and the Court has enforced—this remedy in similar circumstances. (Br.45 n.5.) *See Marquez Bros. Enters., Inc.*, 361 NLRB No. 150, 2014 WL 7223196, at *1, *enforced*, 650 F. App'x 25, 27 (D.C. Cir. 2016) (employer threatened, coerced, interrogated, and discharged two employees); *Federated Logistics*, 400 F.3d at 929 (employer threatened, surveilled, disciplined, interrogated, withheld benefits, enforced overbroad rule, asked employees to spy on union activities, solicited grievances, and promised unspecified benefits). *Accord Mid-Atl. Reg'l Council of Carpenters v. NLRB*, 135 F. App'x 598, 600 (4th Cir. 2005) (employer surveilled, intimidated, threatened, and interrogated employees). Cayuga has made no showing that the Board abused its discretion in ordering this remedy.

Conair, cited by Cayuga, is not to the contrary. (Br.45n.5.) In that case, the Court upheld the Board's "unusual remedy" of ordering a management official to read the notice because the Court found "uniquely appropriate circumstances to warrant it." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1385 (D.C. Cir. 1983). The same "uniquely appropriate circumstances" need not be found here because the

Board's Order gives Cayuga the option of having a Board agent read the notice instead. *HTH*, 823 F.3d at 678.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Cayuga's petition for review and enforce the Board's Order in full.

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July 2018

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAYUGA MEDICAL CENTER AT ITHACA, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 18-1001, 18-1036
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12, 236 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 6th day of July 2018

STATUTORY ADDENDUM

STATUTORY ADDENDUM

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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

***

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other

members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * *

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair

labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the

record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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	)	
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	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Linda Dreeben

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Dated at Washington, DC
this 6th day of July 2018