

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**CALIFORNIA NURSES ASSOCIATION,
NATIONAL NURSES ORGANIZING
COMMITTEE**

and

Case 31–CB–012913

**HENRY MAYO NEWHALL MEMORIAL
HOSPITAL**

**MOTION TO REMAND CASE TO THE
REGIONAL DIRECTOR FOR DISMISSAL OF ALLEGATION**

Counsel for the General Counsel respectfully submits this motion to the Division of Judges respectfully requesting that the outstanding Section 8(b)(1)(A) allegation be remanded to Region 31 of the National Labor Relations Board (the Board) for the allegation to be withdrawn from the Complaint and dismissed. The parties have been notified of this motion. Respondent California Nurses Association, National Nurses Organizing Committee (Respondent) supports this motion, and Charging Party Henry Mayo Newhall Memorial Hospital (Charging Party) opposes this motion; attached hereto as Attachment A is a letter dated March 20, 2019 from the Charging Party detailing its opposition to the motion (Charging Party’s opposition).

I. Procedural History

On November 14, 2018, the Board issued a Supplemental Decision, Order, and Notice to Show Cause why the allegation that “The *Weingarten* Rights” statement violated Section 8(b)(1)(A) of the Act should not be remanded to the Administrative Law Judge (ALJ) for further proceedings in light of *The Boeing Co.*, 365 NLRB No. 154 (2017), including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision. On

December 12, 2018, Counsel for the General Counsel filed her response to the Supplemental Decision, Order, and Notice to Show Cause requesting that the matter be remanded to Region 31 of the Board for the outstanding Section 8(b)(1)(A) allegation to be dismissed. On March 4, 2019, the Board issued an Order Remanding the case “to the Chief Administrative Law Judge for assignment to an administrative law judge for the purpose of reopening the record, if necessary, and the preparation of a supplemental decision addressing the Section 8(b)(1)(A) complaint allegation, whether and to what extent it is affected by *Boeing*, and setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order.”

II. The Remedy for the Section 8(b)(1)(A) Allegation Is Duplicative of the Remedy for the Section 8(b)(3) Allegation Already Found Meritorious By the Board

Simply stated, it is the General Counsel’s position that the remedy for the alleged Section 8(b)(1)(A) violation, should the Board find merit to the allegation, would be duplicative since the existing remedy to the Section 8(b)(3) violation provided in the Board’s Supplemental Decision, Order, and Notice to Show Cause already requires a notice posting and for the offending “*The Weingarten Rights*” statement to be removed from the cover of the collective-bargaining agreement, which essentially substantively remedies the alleged Section 8(b)(1)(A) violation as well.

The Charging Party, in essence argues, that the remedy of the alleged Section 8(b)(1)(A) violation is not duplicative simply because the recommended remedy and notice in the underlying original ALJ decision provides,

WE WILL NOT print and maintain language on the back cover of our collective-bargaining agreement with Henry Mayo Newhall Memorial Hospital, or any other employer, a *Weingarten Rights* Statement implying that employees must request a Union representative during investigatory meetings and, therefore, employees are not free to exercise their Section 7 right to avoid union activity altogether.

(see Charging Party's opposition at 3; emphasis in original), while the remedy and notice ordered by the Board in its November 14, 2018 Supplemental Decision, Order, and Notice to Show Cause with respect to the Section 8(b)(3) violation provides,

WE WILL NOT print and maintain copies of the collective-bargaining agreement containing additional language contrary to the agreement of the parties (e.g., including on the back cover a statement entitled "The *Weingarten Rights*") without the consent of the Hospital.

In other words, the Charging Party argues that the remedy is not duplicative simply because the underlined language above is missing from the Board's ordered remedy for the Section 8(b)(3) violation above. That the underlined language is missing from the Board's remedy for the Section 8(b)(3) allegation is true. However, that does not change the fact that the Board's remedy for the Section 8(b)(3) violation effectively cures the alleged Section 8(b)(1)(A) violation by, consistent with the remedy pointed out by the Charging Party for the alleged Section 8(b)(1)(A) violation, requiring Respondent to refrain from maintaining the offending "The *Weingarten Rights*" language. Thus, although the Section 8(b)(3) remedy omits the language underlined above explaining how the "The *Weingarten Rights*" language is offensive, the Section 8(b)(3) remedy nonetheless cures the alleged Section 8(b)(1)(A) violation by requiring the removal of the offending language.

Accordingly, the General Counsel maintains that the remedy for the alleged Section 8(b)(1)(A) violation would be duplicative of the remedy for the Section 8(b)(3) violation already ordered by the Board, and it would not effectuate the purposes of the Act to continue prosecuting the alleged Section 8(b)(1)(A) violation.

III. The Board Did Not Reject the General Counsel's Argument

Charging Party argues that the Board already rejected the General Counsel's argument by not granting the request to remand the case to the Region and, instead, remanding the case to the

Division of Judges for further processing; see Charging Party's opposition at 4. Charging Party's argument in this regard is wholly without merit. This is so because although the Board denied the General Counsel's request, it specifically stated, "We ... leave it to the judge who is assigned this case to consider any motion by the General Counsel to modify or withdraw, or by the Respondent to dismiss, the complaint." Thus, the Board clearly did not pass or make a decision on the merits of the General Counsel's request.

IV. Conclusion

For the foregoing reasons, Counsel for the General Counsel respectfully requests that the Division of Judges remand the outstanding Section 8(b)(1)(A) allegation to Region 31 of the Board for the allegation to be withdrawn from the Complaint and dismissed.

Dated: March 29, 2019

/s/ Nikki N. Cheaney
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March 20, 2019

VIA EMAIL

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**Re: Inappropriate Dismissal of Adjudicated 8(b)(1)(A) Allegation
NLRB Case No. 31-CB-012913**

Dear Cheaney:

As you know, the Board recently ordered the above-referenced proceeding to be remanded to an administrative law judge (“ALJ”) for the purposes of adjudicating the Section 8(b)(1)(A) allegation in light of *The Boeing Co.*, 365 NLRB No. 154 (2017). You recently informed me the Region is considering dismissal of the 8(b)(1)(A) allegation because it believes any remedy would be duplicative of the existing 8(b)(3) remedy. Per your request, the Charging Party hereby submits its position that such a dismissal would be inappropriate.

As detailed below, any contention that the remedies for the 8(b)(1)(A) allegation (as charged and alleged in the Complaint and originally found by the ALJ) would be duplicative is gravely erroneous. Dismissal on this ground would be a flagrant violation of the Board’s recent Order Remanding and, more egregiously, the Section 7 rights of Henry Mayo’s employees as well as all the others who have been or are subject to the Respondent’s unlawfully overbroad “Weingarten Statement.” Thus, to comply with the Board’s Order Remanding, and to vindicate fundamental rights guaranteed by the National Labor Relations Act, the 8(b)(1)(A) allegation must be submitted to an ALJ for adjudication.

The Remedies for 8(b)(1)(A) and 8(b)(3) Violations are Not Duplicative

It is well established that the remedy for an 8(b)(1)(A) violation and the remedy for an 8(b)(3) violation are not duplicative. More specifically, the remedy for an 8(b)(1)(A) violation warrants a broad injunctive cease and desist order (*i.e.*, to cease and desist from “in any like or related manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act”) whereas the remedy for an 8(b)(3) violation does not. *California Nurses*

Association (Henry Mayo Newhall Memorial Hospital), 360 NLRB 83, 83 (2014). This is an important remedial distinction because the general injunctive language in an 8(b)(1)(A) remedy aims to prevent similar coercive conduct in the future, whereas the 8(b)(3) remedy only remediates the discrete unlawful act at issue in the case and does not specifically enjoin similar future violations. Indeed, what the Region is proposing is akin to ordering an employer who unilaterally promulgated an unlawfully coercive workplace policy to bargain with the union over the policy but not to rescind the policy and refrain from similar violations in the future.

In fact, it was the material distinction between these two remedies that prompted the Board to modify its initial order (issued by an unconstitutionally constituted Board) in this matter by removing the general injunctive cease and desist language after it (erroneously) overturned the ALJ's finding of merit for the 8(b)(1)(A) allegation. See *California Nurses Association (Henry Mayo Newhall Memorial Hospital)*, 360 NLRB at 83. Obviously, if the 8(b)(1)(A) and 8(b)(3) remedies were merely duplicative of one another, the Union would not have filed a motion to have this language removed, and the Board would not have granted that motion.

The fact that the remedy would not be duplicative can be readily observed by merely comparing the ALJ's original decision with the ordered remedies which properly found a violation¹ of Section 8(b)(1)(A) with the current Section 8(b)(3)-only remedies. Compare ALJ Decision in NLRB Case No. 31-CB-012913 (July 9, 2012) with *California Nurses Association (Henry Mayo Newhall Memorial Hospital)*, 360 NLRB 83 (2014).

Specifically, the ALJ found the Union's Weingarten Statement, unlawful and ordered the Union to "Cease and desists from":

(b) Maintaining collective bargaining agreements with 42 additional health care institutions which contain or contained within the agreement themselves or on the back cover of the agreement, a Weingarten Rights Statement identical to the statement on the back cover of the agreement with the Employer implying that employees must request a Union representative during investigatory meetings and, therefore, employees are not free to exercise their Section 7 right to avoid union activity altogether...)

(c) Unilaterally altering the agreed upon terms and conditions of the collective bargaining agreement with the Employer by printing and maintaining the collective-bargaining agreement that contained on the back cover a statement entitled "The Weingarten Rights"

¹ Though beyond your request, we note that, if anything, *Boeing* actually further establishes the Union's Weingarten Statement is unlawfully overbroad and violates Section 8(b)(1)(A) as the statement is affirmatively directed at Section 7 protected activity and, even if it were not, the Union can present no legitimate justification for its wording in light of the underlying facts. See *Boeing*, supra 365 NLRB No. 154, 3-4; see also CNA/NNOC's Response to the Board's November 14, 2018 Order to Show Cause (December 12, 2018).

implying that employees must request a Union representative during investigatory meetings and, therefore, employees are not free to exercise their Section 7 rights to avoid union activity altogether.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act” and to post a notice that informs employees, “WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.”

ALJ Decision in NLRB Case No. 31-CB-012913 (July 9, 2012) (red font and underline added for emphasis).

Additionally, the notice that the ALJ ordered the Union to post included the following language:

WE WILL NOT print and maintain language on the back cover of our collective-bargaining agreement with Henry Mayo Newhall Memorial Hospital, or any other employer, a Weingarten Rights Statement implying that employees must request a Union representative during investigatory meetings and, therefore, employees are not free to exercise their Section 7 right to avoid union activity altogether.

WE WILL NOT unilaterally alter our agreed-upon terms and conditions of the collective-bargaining agreement with Henry Mayo Newhall Memorial Hospital by printing and distributing to unit employees a copy of the collective-bargaining agreement that contains on the back cover a statement entitled “The Weingarten Rights” implying that employees must request a Union representative during investigatory meetings and, therefore, employees are not free to exercise their Section 7 right to avoid union activity altogether.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ALJ Decision in NLRB Case No. 31-CB-012913 (July 9, 2012) (bold in original, red font and underline added for emphasis).

This remedial language does not exist in the current ordered remedies. *See California Nurses Association (Henry Mayo Newhall Memorial Hospital)*, 360 NLRB 83. In order to effectuate the purposes of the Act and vindicate the interests of those involved, the Complaint

allegation must stand and further proceedings should commence to confirm the Section 8(b)(1)(A) allegation.

The Board Has Already Rejected the Contention that the 8(b)(1)(A) Allegation Should be Dismissed Because its Remedy is Duplicative of the Existing 8(b)(3) Remedy.

Most importantly, the Board has already considered and *rejected* the contention that the 8(b)(1)(A) allegation need not be adjudicated because its remedy is duplicative of the existing 8(b)(3) remedy. On December 12, 2018, after the Board issued its Notice to Show Cause in this matter, the Counsel for the General Counsel filed its Response to the Board's Notice to Show Cause Opposing Remand and made the exact same argument the Region is making here—*i.e.*, that dismissal of the 8(b)(1)(A) allegation is warranted because its remedy would be duplicative of the existing 8(b)(3) remedy. Accordingly, the Counsel for the General Counsel asked the Board to “remand the [8(b)(1)(A)] allegation to Region 31 for it to be dismissed.” The Board did not do this. Instead, the Board specifically and purposefully remanded the matter “to the Chief Administrative Law Judge for assignment to an administrative law judge for the purpose of reopening the record, if necessary, and the preparation of a supplemental decision addressing the Section 8(b)(1)(A) complaint allegation...” Thus, the Board has already considered and specifically rejected the Region's position.

To dismiss the allegation now based on the erroneous duplicative remedies contention would be a direct and flagrant violation of the Board's unequivocal order to remand the allegation to an administrative law judge for “the preparation of a supplemental decision addressing the Section 8(b)(1)(A) allegation.” This is particularly true given that the duplicative remedy argument was already presented to, considered, and rejected by the Board.

For the reasons detailed above, both extant Board law and the recent Order Remanding preclude dismissal of the 8(b)(1)(A) allegation on the grounds that the remedy would be duplicative of the existing 8(b)(3) remedy. However, while the Hospital vigorously opposes dismissal of the 8(b)(1)(A) allegation, the Hospital is amenable to discussing settlement of this matter. If the Counsel for the General Counsel and Respondent are likewise amenable to settlement discussions, please contact me to discuss.

Very truly yours,



Adam C. Abrahms