

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

HURON VALLEY-SINAI HOSPITAL

Respondent

and

**Cases 07-CA-201332
07-CA-205971
07-CA-213556
07-CA-217647**

MICHIGAN NURSES ASSOCIATION (MNA)

Charging Union

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Counsel for the General Counsel Donna M. Nixon files this Answering Brief pursuant to Section 102.46 (b)(1) of the Board's Rules and Regulations in response to Respondent's Exceptions to the Administrative Law Judge's (ALJ) decision (ALJD).

Table of Contents

I. <u>STATEMENT OF FACTS RELEVANT TO EXCEPTIONS</u>	1
A. <i>Changes to Meal and Break Policy</i>	2
1. Unilateral Change Loss of Unit Work	2
2. Loss of one-hour Lunch	3
3. Unilateral Change - Threat of Discipline.....	4
B. <i>Information Requests</i>	6
II. <u>ARGUMENT</u>	7
A. <i>The Loss of a One-Hour Lunch Violates Section 8(a)(3) and (5) of the Act</i>	7
1. <u>The Unilateral change</u>	8
2. <u>The Discriminatory action</u>	11
B. <i>Other Unilateral Changes to the Meal Policy</i>	12
1. <u>Unilateral change to Relief of bargaining unit nurses</u>	14
2. <u>New 2018 Meal Policy</u>	16
C. <i>Information Requests</i>	17
III. <u>CONCLUSION</u>	26

TABLE OF AUTHORITIES

Advoserv of New Jersey, Inc., 363 NLRB No. 143 (Mar. 11, 2016)..... 12, 24

Borgess Med. Ctr. And Michigan Nurses Ass’n, 342 NLRB 1105 (2004)..... 25, 26

Bottom Line Enterprises, 302 NLRB 373, 374 (1991) enfd. 15 F. 3d 1087 (9th Cir. 1991). 11, 16

Brooklyn Union Gas Co., 220 NLRB 189 (1975) 21

Bryant & Stratton Business Institute, 321 NLRB 1007 (1996) 21, 25

Century Buffet Restaurants, Inc., 358 NLRB 143 (2012) 10

CSC Holdings, LLC, 365 NLRB No. 68 (May 11, 2017)..... 12

Curtiss-Wright Corp., 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d Cir. 1965) 21

Daily News of Los Angeles, 315 NLRB 1236 (1994) 10

Day Automotive Group, 348 NLRB 1257 (2006) 20

Detroit Edison v. NLRB, 440 US 301, 315 (1979) 21

Detroit Newspaper Agency, 317 NLRB 1071 (1995) 25

Eastex, Inc. v. NLRB, 437 U.S. 556, 563-568 and 567 n.17 (1978) 11

Flambeau Arnold, 334 NLRB 165 (2001)..... 9, 14

Formosa Plastics Corp., 320 NLRB 631 (1996) 10

Gerig’s Dump Trucking, 320 NLRB 1017, 1024 (1996)..... 12, 24

Golub Brothers Concessions, 146 NLRB 120 (1962) 12

Gulf States Mfg. V. NLRB, 704 F.2d 1390, 1397 (5th Cir. 1983)..... 16

Hedison Mfg. Co., 249 NLRB 791, 794 (1980)..... 12

Hialeah Hospital, 343 NLRB 341, 393 fn. 20 (2004)..... 12, 24

House of Good Samaritan Medical Facility, 319 NLRB 392, 397, (1995)..... 21

Hyatt Regency Memphis, 296 NLRB 259, 263 (1989) 9

International Automated Machines, 285 NLRB 1122, 123 (1987), enfd. 851 F.2d 720 (6th Cir. 1988) 12, 24

Intersystems Design and Technology Corp., 278 NLRB 759, 759 (1986) 16

Keller Construction, Inc., 362 NLRB 1246, 1255 (2015) 12

Mary Thompson Hospital, 296 NLRB 1245, n.1 (1989)..... 21, 23

Meyers Industries, 268 NLRB 493, 497 (1984)..... 11

Minnesota Mining & Mfg. Co., 261 NLRB 27, 30 (1982)..... 22

N.L.R.B. v. Agawam Food Mart, Inc., 386 F.2d 192 (1st Cir 1967)..... 15

NLRB v. Acme Industrial Co., 385 U.S. 432 (1967)..... 20

NLRB v. Associated General Contractors of California, 633 F.2d 766 (9th Cir. 1980) 22

NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 835 (1984)..... 11

NLRB v. Jaggars-Chiles-Stovall, Inc., 639 F.2d 1344, 1346–1347 (5th Cir. 1981)..... 22

NLRB v. Katz, 369 U.S. 736, 743 (1962) 9, 11, 16

NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1966)..... 23

NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962)..... 11

Oil Workers Local 6-418 v. NLRB, 711 F.2d 348, 360 (D.C. Cir. 1983)..... 22

Overnite Transportation, 330 NLRB 1275 (2000) 24

Pfizer, Inc., 268 NLRB 916 (1984)..... 22

PJAX, 307 NLRB 1201, 1203-05 (1992) enfd. 993 F.3d 378 (3d Cir 1993) 12

Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985) 11

Priority One Service, Inc., 331 NLRB 1527, 1527 (2000) 9

Providence Hospital, 320 NLRB 790, 794 (1996)..... 25

Radisson Plaza Minneapolis, 307 NLRB 94, 95 (1992) 25

S & I Transportation, Inc., 311 NLRB 1388 (1993)..... 15

<i>SKD Jonesville Division L.P.</i> , 340 NLRB 101, 103 (2003)	11
<i>Somerville Mills</i> , 308 NLRB 425 (1992).....	21
<i>Technology Instrument Corporation</i> , 187 NLRB 830, 843 fn. 13 (1971).....	15
<i>U.S. Testing Co., Inc. v. NLRB</i> , 160 F.3d 14 (D.C. Cir 1998).....	26
<i>United States Postal Service</i> , 360 NLRB 659 (2014)	10

Counsels for the General Counsel respectfully requests that the Board affirm the ALJ's decision, and in support of said request states as follows:

On April 29, 2019, Administrative Law Judge Arthur J. Amchan issued his decision (ALJD) in the above entitled proceeding. He found that Respondent violated the 8(a)(1), (3) and (5) of the Act in several aspects.

On May 28, 2019, Respondent served upon the Board Exceptions to the ALJD and a Brief in support of those Exceptions. Respondent excepted to 22 credibility findings, conclusions of law, and remedies. Respondent also requested oral arguments before the Board which Counsel for the General Counsel deems unnecessary to resolve these issues. Thus, Respondent's request for oral argument should be denied.

General Counsel now files this Answering Brief in opposition to Respondent's Exceptions.

I. STATEMENT OF FACTS RELEVANT TO EXCEPTIONS¹

Respondent is an acute care hospital located in Commerce Township, Michigan which provides inpatient and outpatient medical care. (ALJD p 2, L 20; GC 1(hh) p2.) On March 24, 2016, the Charging Union was certified as the exclusive representative of all full-time, part-time and contingent registered nurses. (ALJD p 2, L 30-1; Tr 11, GC 2) This certification was later modified to include language and case managers. (ALJD p 2, L 32-3; Tr 14)

After certification, the parties began negotiations for a collective bargaining agreement, which they reached a year and a half later in November 2018; (ALJD p 2-3, L 35, 1; Tr 11); however, during the negotiations for that agreement, several issues arose which led to the instant Second Amended Consolidated Complaint.

¹ Throughout this brief the following references will be used: Administrative Law Judge Decision: ALJD (followed by page number); Transcript: Tr (followed by page number), General Counsel Exhibit: GC (followed by exhibit number), Respondent Exhibit: R (followed by exhibit number).

A. Changes to Meal and Break Policy

1. Unilateral Change Loss of Unit Work

Tina Grossman, an emergency room nurse, Charging Union Steward, and member of the bargaining team testified that she received her weekly emergency room update at the end of March 2018 as an email that included an attachment. The Respondent document was titled Lunch and Breaks and stated:

- To efficiently provide the best care for our patients, we need to maximize the use of our resources in the department during all hours.
- Beginning April 09, 2018, the clinical coordinators will assign and cover the 30-minute uninterrupted meal period provided for rejuvenation in accordance with policy 1HR313.
- This will increase the coordinators' s availability to assist within the department focusing on customer service, quality, and throughout
- As a team, we will need to work together to assure appropriate floor coverage during all times.
- Please keep this in mind when planning 25-minute break periods which will be covered by assignment mates as the workload/department activity allows.
- Coordination with all team members (RN, EDT, UC) in an assignment is crucial to the success of break coverage (GC 12)

Grossman testified and the ALJ found that that prior to receiving this document, other nurses covered for nurses who were taking their 30-minute break. (ALJD p 4, L 26-8; Tr 67) She testified that this has been the past practice for as long as she has been employed at Respondent, which is at least since 2007. She testified that float nurses are in the bargaining unit and clinical coordinators are not. (Tr 68) In fact, clinical coordinators are specifically excluded from the Unit as evidenced by the certification described above. (ALJD p 2, L 34; GC 2) Further, Respondent in its Answer to the Second Amended Consolidated Complaint, admitted that Clinical Coordinator Smades was a supervisor. (ALJD p 7, Fn 5; GC 1(jj)) Respondent did not provide the Charging Union with notice or an opportunity to bargain about this change. (ALJD p 4, L 2-4; Tr 36)

2. Loss of one-hour Lunch

Grossman testified that the change related to meal break coverage was also discussed in a staff meeting in March 2018 that was held on the Ground floor C. (ALJD p 4, L19-21; Tr 68) She stated that present for this meeting was Emergency Room Unit Manager Julie Calley, Rob Gerard, Emergency Room Clinical Coordinator Rachel Mexicott, Scheduler Karen Burkda, other clinical coordinators and about 20 nurses. (Tr 68) She testified that managers told employees that they may or may not get their 15-minute breaks and that nurses could no longer combine their breaks with their meals. Although the policies required approval for combining meal time with breaks, Grossman testified that it has been the past practice that employees get a 30-minute meal, and (2)15-minute breaks. She testified that she had been combining her meal and breaks into an hour lunch since she had been on her schedule, which had been since 2012. (ALJD p 4, L 28-9; Tr 69) The various meal and rest period policies also address a 30-minute meal and a 15-minute break for every four hours worked. (GC 7, 8, and 11)

Grossman testified that after this notice, emergency room nurses signed a petition protesting the loss of the hour lunch, which was presented to Manager Angie Castro on April 2, 2018. (ALJD p 4, L 21-4; Tr 72) The petition read:

We, the nurses of the Professional Nursing Association of Huron Valley-Sinai Hospital respectfully request that the length of our breaks not be changed from their current duration of one hour per 12-hour shift. The reduction by 15-30 minutes that management is considering is a significant reduction in a long-standing past practice of allotted break time. We request that you Cease and Desist from making the change until you bargain with the nurses as a union, and we come to a mutual agreement. Since we are currently in contract negotiations on mandatory subjects of bargaining, at this time changes cannot be unilaterally made by Tenet to wages, hours and working conditions. (GC 17)

The petition was signed by 20 nurses/unit employees.

Grossman testified that the policy disallowing one-hour lunches was implemented sporadically, as was the policy that clinical coordinators would cover their breaks. Grossman testified that on April 14 or 15, 2018, Clinical Coordinator Steve Smades informed her and other

nurses that they were only getting a 30-minute lunch break that night because of his surprise in the break room. (ALJD p 4, L 34-6; Tr 75-76) When Grossman entered the breakroom, she found Charging Union Bargaining Representative and contract negotiator Liz Riley. (Tr 76) Riley entered Respondent's facility under an interim access agreement, which allowed Union representatives access to non-work areas to discuss issues with employees during contract negotiations between the parties. (Tr 22-23) Grossman later had a conversation with Smades and he apologized for retaliating against her and the other nurses by reducing their break time to 30 minutes, because of Riley being in the break room. He said that he just didn't like Riley being in the break room. (Tr 78) He also accused Riley of calling him an asshole. Grossman testified that she informed him that Riley didn't call him an asshole, someone else did. (ALJD p 4, L 37-9; Tr 79)

Liz Riley had been at the facility that weekend to discuss ongoing negotiations and Charging Union business. (Tr 22) That weekend, she was banned from the facility "for speaking to employees during work time and interfering with operations." (GC 6) When Charging Union Labor Relations Representative Vincent Schraub asked Director of Employee and Labor Relations Richard Martwick for elaboration on exactly what Riley allegedly did, he received no response. (GC 6, Tr 22-26) Judge Amchan stated in a footnote that the complaint for barring Riley from the premises has been settled between the parties. (ALJD p 4, Fn 4)

3. Unilateral Change - Threat of Discipline

Schraub testified that on March 30, 2018, after receiving notification from nurses about the changes to the meal periods and breaks, he received an email from Chief Human Resources Officer Allison Demarais. (ALJD p 4, L 17-9; Tr 31) Demarais stated that the current break and lunch period policy was not being adhered to, especially in the emergency department (ED). "She stated that management would be focusing on adherence to the policy going forward." (GC 13) In response, Schraub requested a copy of the then current meal and break policy. Demarais

sent him a copy of the new meal and break policy that became effective on January 2, 2018. (GC 13) When asked at trial if the Charging Union bargained over this new policy, Schraub testified and admitted that the issue had been raised in negotiations, but no agreement had been reached and the record evidence does not show that the parties were at impasse regarding this issue. (Tr 32) Further, although this email was issued while the parties were in the midst of negotiations for a collective bargaining agreement, Respondent did not provide notice or an opportunity to bargain about this new 2018 version of the policy to the Charging Union. (Tr 32) When compared with Respondent's previous meal and break policy, this new 2018 policy had the following sentence "If an employee consistently misses meals without the authorization of the department management, disciplinary action may occur up to and including termination." (ALJD p 4, L 9-10; Tr 28-29, GC 7,8 and 11)

On April 2, 2018, Demarais notified Schraub that she sent him the wrong policy, and included a copy of the 2014 policy. (Tr 39, GC 14, GC 8) Schraub responded to Demarais' email on April 3, and asked her about the new 2018 policy. Schraub told Demarais that nurses had forwarded the new 2018 policy to him and that it was on Respondent's intranet. Schraub asked Demarais in what ways the status quo meals and rest period policy were not being adhered to and what will be done differently. (Tr 40, GC 14) Demarais responded by email on April 4, stating that the existing meals and rest period policy were being adhered to and there was little change between the 2014 policy (GC 8) and the 2018 policy. (GC 11) Demarais said that the 2018 policy applies to non-union employees. She said that in both versions of the policy, the hospital can approve combining breaks and lunches at its discretion and she stated that in order to attempt to address the Charging Union's staffing concerns, they were no longer combining breaks and lunches. (GC 14) In response, Schraub requested access to Respondent's intranet so that he could access the most recent policy. (GC 14, Tr 40) Both Schraub and Grossman testified

that Respondent's policies were kept on its intranet. (Tr 40, 74) On April 5, Martwick denied Schraub's request for access to their intranet. (Tr 40, GC 14)

In response, Schraub had several nurses go to Respondent's intranet to access any meal and rest period policies. (Tr 41) Schraub testified that he was sent only the new 2018 policy. (Tr 41) Grossman testified that the only meal and break policy on the intranet is the new 2018 policy. (Tr 74)

The new 2018 policy itself, it states:

This policy applies to all hourly employees (excluding joint ventures / affiliates and other DMC entities as may from time to time be deemed appropriate). Employees covered by a union contract should refer to the collective bargaining agreement. This policy applies to union employees except to the extent the policy conflicts with the applicable collective bargaining agreement, in which case the provisions of the collective bargaining agreement on that subject will control. (GC 11)

Respondent witness Demarais testified that it was clear that this policy did not apply to employees in the bargaining unit. (Tr 85) However, on cross examination Demarais admitted that at the time that this policy was created, the bargaining unit employees were not covered by a collective bargaining agreement because this was a newly certified unit at the time, there was no collective bargaining agreement. (Tr 93)

B. Information Requests

During one of the bargaining sessions between the parties in June 2017, the issue of staffing arose. The Charging Union argued that staffing and retention were issues for employees. (ALJD p 3, L 1-2; Tr 12-12) Respondent responded that exit interviews that they administered when employees were leaving employment do not bear that out. (Tr 13) Respondent did not deny this conversation during testimony. As a result of that conversation, on June 6, 2017, the Charging Union submitted a written request for information to Respondent, which it admits. It requested: 1. A list of all bargaining unit registered nurses who have resigned from their position in the previous twelve (12) months, including the registered nurse's name, department, HVSH

(Huron Valley Sinai Hospital) start date and HVSH end date. 2. Copies of exit-interview records for all registered nurses who have resigned from their positions in the previous twelve (12) months. (ALJD p 3, L 6-8, 11-2; Tr 12, GC 3)

Instead of providing the requested information, on July 11, 2017, Respondent provided a summary of the exit interviews (ALJD p 3. L 12-3; GC4) which the Charging Union found to be vague and not useful. (Tr 15-16) Charging Union representative Vincent Schraub informed Respondent of its dissatisfaction with its response at a bargaining session on July 18, 2017. (ALJD p 3. L 15-6; GC18, Tr 18, Tr 103, R 3) During this meeting, Respondent presented a copy of a blank exit interview form (ALJD p 3 L 18-9; R 2), but only allowed the Charging Union to look at it while its representatives were present at the bargaining session. The Charging Union was not allowed to leave with this form or keep it. (ALJD p 3 L 18-9; GC 18, Tr 19) In response, John Karebian, the Executive Director of the Charging Union made a verbal request for a copy of the blank interview form. (Tr 19) Respondent then requested that the Charging Union enter into a confidentiality agreement in order to receive the blank exit interview form. (ALJD p 3 L 21-2; Tr 19) Respondent asserted that one of the questions on the blank form was confidential. (ALJD p 3, L 23-32; Tr 20) The Charging Union refused to sign a confidentiality agreement for the blank form. (ALJD p 3, L 34; Tr 20) In the end, the Charging Union did not get the Exit Interviews for the period requested, nor did it get a copy of the blank exit interview form. (Tr 13)

II. ARGUMENT

A. The Loss of a One-Hour Lunch Violates Section 8(a)(3) and (5) of the Act

Exception 9: The Respondent excepts to the ALJ's factual conclusion that "clinical coordinator Steve Smades admitted...that he limited emergency room nurses to a 30-minute break on April 14-15 due to his anger at union representative Liz Riley," and the ALJ's legal conclusion that "[t]his constitutes retaliation against the nurses because they were unit members represented by the Union." In addition, the Respondent excepts to the ALJ's legal conclusion that "[Grossman] was discriminated against due to her status as a unit member and union member." The ALJ erred because both conclusions are

contrary to the trial record and binding precedent. First, Ms. Grossman testified as follows regarding her conversation with Ms. Smades:

A. It was either Sunday or Monday, so the 15th or 16th. He apologized for retaliating to her being in the break room by giving me a 30-minute break.

Q. What exactly did he say if you can recall?

A. He apologized. I don't know his exact words, but he just didn't like the fact that Liz was in the break room.

Q. Okay. With respect to your conversation with Mr. Spade [sic], do you recall him saying anything about an interaction with Ms. Riley or accusing her of anything?

He accused her of calling him an asshole.

Therefore, in full context, Mr. Smades allegedly admitted to retaliating against Ms. Grossman because Ms. Riley was in the break room and he believed she called him an "asshole." There is no evidence in the record that union activity was a factor in Ms. Smades decision.

Exception 17: The Respondent excepts to the ALJ's legal conclusion that it violated Section 8(a)(5) and (1) during collective bargaining negotiations by commencing to strictly enforce its prohibition against combining breaks when it had not done so previously." The ALJ erred because his conclusion is contrary to the trial record and binding precedent. The policy at issue was long-standing and has never been "strictly enforced." Moreover, the trial record reflects that clinical managers, in their discretion, allowed nurses to combine meals and breaks between 2015 and 2018.

Exception 21: The Respondent excepts to the ALJ's legal conclusion that it violated Section 8(a)(5) and (1) by "denying unit employees breaks on April 14-15, 2018 in retaliation for the conduct of a union representative." The ALJ erred because his conclusion is contrary to the trial record and binding precedent. The record reflects that Mr. Smades allegedly admitted to retaliating against Ms. Grossman because Ms. Riley was in the break room and he believed she called him an "asshole." There is no evidence in the record that union activity or membership motivated Mr. Smades.

1. The Unilateral change

The ALJ found that Respondent violated section 8(a)(5) of the Act with respect to a unilateral change in the lunch/meal period:

Respondent's strict enforcement of its rule against combining meal and rest breaks was a clear departure from the status quo and therefore violates

Section 8(a)(5) and (1) of the Act, *Flambeau Arnold*, 334 NLRB 165 (2001); *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989). The testimony of Respondent's own witness, Human Resource Director, Allison Demarais and her emails to union representative Schraub establish that Respondent's rule was not strictly enforced until bargaining was well under way.

Regardless of whether or not Respondent's written rule prohibited or allowed management to use its discretion in combining meal and rest breaks, its actual practice prior to March 2018 was to allow such combinations. A change in practice, even when not a change in stated policy, during collective bargaining negotiations, violates Section 8(a)(5) and (1), *Flambeau Arnold*, 334 NLRB 165, 166 (2001). Thus, Respondent's enforcement of the rule prohibiting meal and break combinations and the policy mandating meal break coverage by non-unit clinical coordinators violated the Act. The latter practice was not consistent prior to March 2018, nor for a while March/April 2018, but then was strictly adhered to while collective bargaining negotiations were ongoing.

The ALJ also found that Respondent violated section 8(a)(3) with respect to this policy when Clinical Coordinator and admitted supervisor Steve Smades informed a nurse that he retaliated against unit nurses by strictly enforcing this policy because of the union activity of Charging Union representative Liz Riley.

It is well established that an employer commits an unfair labor practice when it makes a unilateral change in a mandatory subject of bargaining such as wages, hours or benefits and fails to bargain with the bargaining representative. *NLRB v. Katz*, 369 U.S. 736, 743 (1962) As explained by the Board,

A unilateral change not only violates the plain requirement that the parties bargain over wages, hours and other terms and conditions, but also injures the process of collective bargaining itself. (citation omitted) It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees. (citation omitted) This is so because unilateral action by an employer detracts from the legitimacy of the collective bargaining process by impairing the union's ability to function effectively, and by giving the impression to members that a union is powerless. (citations omitted) *Priority One Service, Inc.*, 331 NLRB 1527, 1527 (2000).

Respondent announced the change in the meal and rest period policy at a staff meeting in March 2018, while negotiations for an initial contract were ongoing. Nurse Grossman testified that managers stated that employees may possibly no longer get their 15-minute break and they could no longer combine their two fifteen-minute breaks with their 30-minute meal period. The practice of creating an hour lunch had been in practice since at least 2012. Grossman testified that after this policy was implemented, 20 nurses signed a petition protesting the change in policy. This petition was presented to manager Angie Castro on April 2, 2018. Grossman testified that after this petition, enforcement of the change was sporadic, and sometimes they were allowed a one hour-lunch.

Further evidence of Respondents unilateral change can be found in the email Respondent sent to the Charging Union about the changes. After receiving notification of this and other changes (to be discussed below) from nurses, Charging Union representative Vincent Schraub received notification from Respondent's Human Resources Manager Allison Demarais on March 30, that the Respondent was going to be strictly adhering to the meal and rest period policy because the Charging Union had notified Respondent that "nurses are unhappy with our staffing levels."(GC 13) Thus, in retaliation for concerted complaints and union activity, Respondent was well aware that it was changing past practice. *Century Buffet Restaurants, Inc.*, 358 NLRB 143 (2012); *United States Postal Service*, 360 NLRB 659 (2014); *Formosa Plastics Corp.*, 320 NLRB 631 (1996).

As the ALJ correctly found, this change in past practice occurred during negotiations for an initial contract and it is an employer's obligation while bargaining to maintain the status quo. *Daily News of Los Angeles*, 315 NLRB 1236 (1994). "During negotiations, Respondent's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain, it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole, *NLRB v.*

Katz, 369 U.S. 736, 743 (1962), *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) enfd. 15 F. 3d 1087 (9th Cir. 1991).” (ALJD p 6)

2. The Discriminatory action

Section 7 of the Act guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act implements the guarantees of Section 7 by prohibiting adverse actions against employees for engaging in concerted activity that is protected by Section 7 of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *SKD Jonesville Division L.P.*, 340 NLRB 101, 103 (2003).

The Supreme Court has indicated that the statutory phrase "mutual aid or protection" should be liberally construed to protect concerted activities directed at a broad range of employee concerns. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-568 and 567 n.17 (1978). Thus, concerted actions of employees are protected under Section 7 if they might reasonably be expected to affect terms or conditions of employment. *Meyers Industries*, 268 NLRB 493, 497 (1984) ("*Meyers I*"), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), reaffirmed on remand, (1986) ("*Meyers II*"), affirmed sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Accord *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984).

A few days into the implementation of this unilateral change, Grossman testified that Clinical Coordinator/supervisor Smades told a group of nurses, which included nurse Grossman that they were not getting their one-hour break that day because Charging Union representative Liz Riley was in the breakroom performing Charging Union business, such as meeting with employees to discuss contract negotiations and other terms and conditions of employment. Smades later explained to Grossman that he did not like Riley when she came to the breakroom (to do Union work) and he apologized for retaliating against Grossman and the other nurses by shortening their break. Smades also thought that Riley called him an asshole, which Grossman explained that she did not. Riley was thereafter banned from the facility for her supposed actions

during that weekend which was “for speaking to employees during work time and interfering with operations.” (GC 6) When the Charging Union asked for specifics as to what she did, there was no response from Respondent. Since Riley only came to the facility to discuss contract negotiations and other bargaining unit issue with employees, it is reasonable to believe that Smades retaliated against Grossman and the other nurses that day because they were in the bargaining unit represented by Riley, and she was engaged in union activity representing the employees. Smades demonstrated animus towards the Charging Union and the protected concerted activity of the employees. *CSC Holdings, LLC*, 365 NLRB No. 68 (May 11, 2017); *Hedison Mfg. Co.*, 249 NLRB 791, 794 (1980).

It is immaterial whether Grossman or the other nurses were engaged in union activities. As the ALJ correctly notes, it has been a long-held standard that “retaliation against one employee for the protected activities of another violates the Act.” *Keller Construction, Inc.*, 362 NLRB 1246, 1255 (2015); *Golub Brothers Concessions*, 146 NLRB 120 (1962); *PJAX*, 307 NLRB 1201, 1203-05 (1992) enfd. 993 F.3d 378 (3d Cir 1993)

It is probative that Respondent did not call Smades to testify so as to deny or refute that he retaliated against these nurses because of union activity. Such failure should lead to an adverse inference that he would have testified adversely to Respondent if he had been called to testify. *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (Mar. 11, 2016), *Hialeah Hospital*, 343 NLRB 341, 393 fn. 20 (2004); *Gerig's Dump Trucking*, 320 NLRB 1017, 1024 (1996); *International Automated Machines*, 285 NLRB 1122, 123 (1987), enfd. 851 F.2d 720 (6th Cir. 1988). Respondent’s assertion that Smades retaliated against the nurses because he believed that Riley called him an asshole is without support given that Smades was not called to testify.

B. Other Unilateral Changes to the Meal Policy

Exception 1: The Respondent excepts to the ALJ’s factual conclusion that it unilaterally promulgated a meal and break policy to members of the Charging Party Michigan Nurses Association (“MNA”) because it is untrue. There is no

dispute in the trial record that the Hospital applied its status quo meal and break policy to all bargaining unit members. On April 2, 2018, Chief HR Officer Allison Demarais clearly informed MNA Labor Representative Vincent Schraub of this fact. And on April 3, 2018, Mr. Schraub acknowledged his understanding of it.

- Exception 2:** The Respondent excepts to the ALJ’s factual conclusion that it unilaterally promulgated a meal and break policy to MNA members which authorized disciplinary action for consistent refusals to take meal breaks without approval because it is untrue. The Hospital applied its status quo meal and break policy to all bargaining unit members.⁶ Ms. Demarais clearly informed Mr. Schraub of this fact, and Mr. Schraub acknowledged his understanding of it.
- Exception 3:** The Respondent excepts to the ALJ’s factual conclusion that its nurses—rather than non-unit clinical coordinators—covered for other nurses during meals and breaks prior to April 9, 2018 because it is untrue. MNA Steward Tina Grossman testified that the clinical coordinator on her shift occasionally covered her lunches and breaks before and after April 9, 2018.
- Exception 6:** The Respondent excepts to the ALJ’s legal conclusion that its “policy mandating meal break coverage by non-unit clinical coordinators violate[s] the Act” because it was not enforced until April 2018. The ALJ erred because his conclusion is contrary to the trial record and binding precedent. Ms. Grossman admitted that her clinical coordinator occasionally covered her meal and breaks before and after April 2018.
- Exception 7:** The Respondent excepts to the ALJ’s legal conclusion that its 2018 meal and break policy “threatening disciplinary action if nurses miss breaks” was a “material change of employee working conditions.” The ALJ erred because his conclusion is contrary to binding precedent and the trial record, which is undisputed that the Hospital applied the status quo policy to MNA members. Ms. Demarais clearly informed Mr. Schraub of this fact, and Mr. Schraub acknowledged his understanding of it.
- Exception 8:** The Respondent excepts to the ALJ’s legal conclusion that “Respondent violated Section 8(a)(5) and (1) in altering its established practice of having nurses cover for each other during meal breaks while collective bargaining negotiations were in progress. This was a material change in that it directly affected the nurses’ concerns regarding staffing.” It also excepts to the ALJ’s factual conclusion that “[t]he new practice eliminated the work opportunities as a float nurse and thus affected employee wages.” The ALJ erred because both conclusions are contrary to the trial record and binding precedent. First, Ms. Grossman admitted that her clinical coordinator occasionally covered her meal and breaks before and after April 2018. Therefore, there was no evidence of an “established practice of having nurses cover for each other during meal breaks.” And because there was no established practice regarding coverage by staff nurses, the ALJ further

erred in finding that the “new practice” affected the wages of MNA members.

Exception 18: The Respondent excepts to the ALJ’s legal conclusion that it violated Section 8(a)(5) and (1) during collective bargaining negotiations by regularly covering nurses’ meals breaks with clinical coordinators instead of bargaining unit nurses when it had only done so sporadically prior to the beginning of collective bargaining negotiations.” The ALJ erred because his conclusion is contrary to the trial record and binding precedent. Ms. Grossman admitted that her clinical coordinator occasionally covered her meal and breaks before and after April 2018.

Exception 19: The Respondent excepts to the ALJ’s legal conclusion that it violated Section 8(a)(5) and (1) during collective bargaining negotiations by promulgating a rule threatening unit employees with disciplinary action if they missed paid breaks.” The ALJ erred because his conclusion is contrary to the trial record and binding precedent. The Hospital applied the 2014 “status quo” meal and break policy to all bargaining unit members. Ms. Demarais clearly informed Mr. Schraub of this fact, and Mr. Schraub acknowledged his understanding of it.

The ALJ found that Respondent violated section 8(a)(5) of the Act with respect to other unilateral changes in the lunch/meal period:

Thus, Respondent’s enforcement of the rule prohibiting meal and break combinations and the policy mandating meal break coverage by non-unit clinical coordinators violated the Act. The latter practice was not consistent prior to March 2018, nor for a while March/April 2018, but then was strictly adhered to while collective bargaining negotiations were ongoing.

Huron Valley’s new (January 2018) policy threatening disciplinary action if nurses miss breaks also violates Section 8(a)(5) and (1). This is a material change of employee working conditions. The fact that no employee may have disciplined pursuant to this unilateral change is irrelevant to whether it violates Section 8(a)(5). *Flambeau Arnold*, 334 NLRB 165 (2001).

Finally, Respondent violated Section 8(a)(5) and (1) in altering its established practice of having nurses cover for each other during meal breaks while collective bargaining negotiations were in progress. This was a material change in that it directly affected the nurses’ concerns regarding staffing. The new practice eliminated the work opportunities as a float nurse and thus affected employee wages, Tr. 68.

1. Unilateral change to Relief of bargaining unit nurses

At the end of March 2018, Respondent notified nurses of a policy change. Bargaining

unit nurses were told in writing and in a meeting, that effective April 9, clinical coordinators would relieve nurses for their lunch period. This was a unilateral change as described by Grossman given that in the past, other nurses covered for nurses when they were on break. Clinical coordinators are not in the unit, so such a change took work away from bargaining unit personnel. Such a change cuts at the core of union representation in that before a collective bargaining agreement could even be reached, Respondent was making unilateral changes which removed work from the bargaining unit.

The Charging Union was not notified of this change before it occurred, and learned of it from the nurses. The Board has held that where an employer notifies employees of a unilateral change prior to notifying a union, this may be evidence of overall bad-faith bargaining.

Technology Instrument Corporation, 187 NLRB 830, 843 fn. 13 (1971) citing *N.L.R.B. v. Agawam Food Mart, Inc.*, 386 F.2d 192 (1st Cir 1967).

On March 30, after it notified the nurses of the change, Respondent sent an email to Schraub about the change. Respondent's Human Resources Director Allison Demarrais stated:

Hi Vince,

In reviewing our practices, we noted that the current break and lunch period policy was not being adhered to which was creating some angst among RNs and clinical coordinators, especially in the ED. We know the union has indicated the nurses are unhappy with our staffing levels and as such I want to communicate to you that we will be focusing on adherence to this policy going forward in order to alleviate that angst and help with patient care. By following the policy staffing in the ED will be more consistent, lending to a goal of better satisfaction among both RNs and our patients. If you wish to discuss further, let us know. I hope you have a happy holiday weekend.

Allison Demarrais

Notifying Schraub after the employees had already been told about the change does not constitute valid notice and afford the Charging Union a meaningful opportunity to bargain. This was a notice that a *fait accompli* had occurred. In *S & I Transportation, Inc.*, 311 NLRB 1388 (1993), the Board held similar factors, such as notifying employees directly of a unilateral change and demonstrating a fixed position to implement the changes as announced, as indicative

of a *fait accompli*, and thus evidence of an unlawful unilateral change. “An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals.” *Intersystems Design and Technology Corp.*, 278 NLRB 759, 759 (1986) citing *Gulf States Mfg. V. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).

This email evidences animus and an unwillingness to bargain given that this vague email was sent on Friday at the end of the day (3:12 pm) with no intent to discuss it that day, or at any point before the following Monday on April 2. Demarais testified that she wasn’t even in the office when the email was sent (Tr 86).

Upon receiving the email, Schraub had to decipher what was being changed. He sent follow-up emails asking about the proposed changes. He was assured by Damaris that “no changes to the status quo” had occurred. (GC14) However, as the ALJ found, “Respondent practice with respect to coverage for breaks and meals was not consistent prior to March 2018, ...but then was strictly adhered to while collective bargaining negotiations were ongoing.” Further, this email was sent while the parties were negotiating for an initial collective bargaining agreement. Respondent should have raised any potential change in policy at the bargaining table, and not implemented any changes unless a valid impasse was reached. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) enfd. 15 F. 3d 1087 (9th Cir. 1991).

2. New 2018 Meal Policy

The email from Demarais also included a new meal and rest period policy that went into effect on January 2, 2018. This policy was provided to the Charging Union in March 2018, for the first time. Schraub testified that he had nurses go to Respondent’s internal intranet and search for the meal and rest period policy, and was told by bargaining unit nurses that the only policy on the site was the new 2018 policy.

Schraub was informed by Demarais that the 2018 policy did not apply to bargaining unit employees. Yet it was clear that this was not truthful. The 2018 policy states on its face that it applied to employees not covered by a union contract, which included all bargaining unit employees because this was a newly certified unit without a contract. This was a change in policy. It threatened discipline up to termination to employees who consistently missed meals. As with the other policy changes, this change was not negotiated with the Charging Union or agreed to during ongoing contract negotiations.

C. Information Requests

Exception 4: The Respondent excepts to the ALJ's factual conclusion that its legal counsel, Shaun Ayer, "proposed the Union agree that names and responses...be redacted, but that Respondent would provide the Union with the contact information for the nurses who completed the forms." This conclusion is contrary to the trial record. Mr. Ayer testified that he initially communicated confidentiality interests in the unredacted exit interview forms and provided Mr. Schraub with a list identifying every resignation reason identified by exiting nurses for the previous year. The MNA rejected this accommodation. Mr. Ayer then offered "several" additional accommodations. He testified that "[o]ne was for the parties to enter into a confidentiality agreement. We discussed redactions." However, Mr. Ayer did not propose redacting responses to the following question: "What prompted you to seek alternative employment?" Rather, Mr. Ayer proposed redacting only those responses regarding whether exiting nurses were aware of any "illegal conduct, unethical conduct, or fraudulent behavior" in the Hospital. In addition, Mr. Ayer offered to provide the MNA with the contact information for nurses who had resigned so that it could inquire if allegedly low staffing factored into their decisions.

Exception 5: The Respondent excepts to the ALJ's factual conclusion that its bargaining session notes "are not a verbatim account of what transpired...the notes consist of less than three pages for a meeting that lasted from 9:28 a.m. to 2:00 p.m." While there was no court reporter creating a "verbatim" record, the ALJ misleadingly implies that the three pages of notes were unreliable given the "meeting lasted from 9:28 a.m. to 2:00 p.m." The undisputed trial record reflects that the meeting lasted for approximately an hour. It started at 9:28 am and stopped for caucus at 9:41 am. It resumed at 10:23 am and stopped for caucus at 10:38 am. Then, the meeting did not resume until 1:16 pm and stopped for caucus at 1:24 pm. At 2:00 pm, the meeting ended. Therefore, the ALJ's implied attack on the reliability of the notes is entirely unsupported by the trial record.

Exception 10: The Respondent excepts to the ALJ's legal conclusion that its

confidentiality interest in the completed exit interview forms was “insubstantial.” The ALJ erred because his conclusion is contrary to the trial record and binding precedent. The ALJ summarized the facts as follows:

Respondent did not provide departing nurses assurance that their responses would in any way be limited in their dissemination to management and supervisors. One of the justifications for Respondent’s confidentiality claim...is that the reports may involve...[those] who may later be asked to provide an employment reference. However, Respondent did not tell the departing nurses that their completed exit interview forms would be unavailable to their former managers, the individuals most likely to be asked for an employment reference.

This factual recitation by the ALJ is inaccurate. First, at the top of each exit interview form is the following bolded language: “Your responses are confidential and *will not become part of your personnel file.*” In other words, exiting nurses need not fear retaliation. Second, Mr. Ayer further testified that the Hospital’s assertion of confidentiality was based on its concern that the responses, if disclosed, “could subject [it] to exposure,” i.e., liability.

Exception 11: The Respondent excepts to the ALJ’s legal conclusion that “[a]ssuming that Respondent has a legitimate confidentiality interest in the completed exit forms, it did not offer a reasonable accommodation to the Union under the circumstances.” The ALJ erred because his conclusion is contrary to the trial record and binding precedent. The MNA requested completed nurse exit interview forms because it believed nurses were resigning from the Hospital because of low staffing. The exit interview responses would, the MNA believed, support its position. The Hospital asserted confidentiality interests in the completed forms and, initially, provided the MNA with a spreadsheet disclosing the stated reason for resignation in each exit interview as an accommodation. The MNA rejected this accommodation. The Hospital then offered the interview responses subject to a confidentiality agreement, which would include the redaction of confidential responses entirely unrelated to the MNA’s request. In addition, the Hospital offered the contact information for former nurses to the MNA so that it could discuss the role of staffing levels, if at all, in their decisions to resign.

Exception 12: The Respondent excepts to the ALJ’s factual and legal conclusions that “Respondent’s offer to provide the Union the contact information of former nurses is not a reasonable accommodation. That the Union might be able to contact the nurses and do its own survey, is not a sufficient response.... The barebones summary of reasons that nurses left Respondent’s employ is an obviously inadequate response to the Union’s request for the exit interviews.” The ALJ erred because his conclusions are contrary to the trial record and binding precedent. First, the ALJ omitted

the fact that the Hospital offered to provide the MNA with redacted exit interview forms with information responsive to its request. Second, there is no evidence to support the ALJ's conclusion that the Employer's chart was a "barebones summary of reasons that nurses left." The MNA's witness speculated that the exit interviews contained more detailed information regarding reasons for resignation. Indeed, there is no evidence in the record that the exiting nurses provided more elaborate details in their exit interview forms. Third, the record is undisputed that the redacted information demanded by the MNA—answers to inquiries as to whether exiting nurses "were aware of any illegal conduct, unethical conduct, or fraudulent behavior"—had no relevance as to whether allegedly low staffing was a factor in nurse turnover.

Exception 13: The Respondent excepts to the ALJ's factual conclusion that "neither the notes nor Ayer's testimony provides much evidence as to the specifics of Respondent's suggested accommodation." The ALJ erred because his conclusion is contrary to the trial record. There are sixteen pages of testimony by Mr. Ayer regarding the accommodation process. And there are there pages of notes from a bargaining meeting lasting approximately an hour.

Exception 14: The Respondent excepts to the ALJ's factual and legal conclusion that "a reasonable accommodation to the confidentiality concerns raised by Respondent would have redacted only the names and employee ID number from the completed exit form and the names of persons to whom an unflattering reference was made. Apart from this, the Union's interest in the requested information far outweighs any purported confidentiality interest of Respondent." The ALJ erred because his conclusions are contrary to the trial record and binding precedent. First, the ALJ's legal conclusion is clearly erroneous because it fails to credit Mr. Ayer's testimony—which the ALJ purports to have done—regarding the Hospital's interests in (1) obtaining candid responses to take self-corrective actions and (2) managing legal liability. Second, the ALJ erred in finding that the MNA had an interest in information unrelated to the role of allegedly low staffing in nurse resignations, namely, responses to inquiries about whether exiting nurses "were aware of any illegal conduct, unethical conduct, or fraudulent behavior."

Exception 15: The Respondent excepts to the ALJ's factual and legal conclusions that it "did not raise the argument that the exit interviews were privileged under Michigan state law until it filed its post-trial brief... This argument was not timely raised; thus, I decline to consider it..." In other words, according to the ALJ, because Mr. Ayer did not specifically identify MCL § 333.21515 and MCL § 333.20175(8) in his testimony regarding the Hospital's confidentiality interests, the Hospital reliance on these provisions in its Post-Hearing Brief was untimely and a waiver of its argument. The ALJ erred because his conclusions are contrary to the trial record and binding precedent. The Hospital identified confidentiality as an affirmative defense in this matter. In addition, Mr. Ayer repeatedly

testified that one of the Hospital's confidentiality interests pertained to legal compliance.

Exception 16: The Respondent excepts to the ALJ's legal conclusion that "Respondent violated the Act in failing to provide to the Union those responses from each exit interview that touched upon the reason for which the nurse was leaving Respondent's employment." The ALJ erred because his conclusion is contrary to the trial record and binding precedent. Mr. Ayer offered the MNA "to enter into a confidentiality agreement. We discussed redactions." However, Mr. Ayer did not propose redacting responses to the following question: "What prompted you to seek alternative employment?" These responses satisfy the MNA's request in full. Instead, Mr. Ayer proposed redacting only those responses regarding whether exiting nurses were aware of any "illegal conduct, unethical conduct, or fraudulent behavior" in the Hospital. In addition, Mr. Ayer offered to provide the MNA with the contact information for former nurses so that it could inquire as to whether allegedly low nurse staffing factored into their decisions.

Exception 20: The Respondent excepts to the ALJ's legal conclusion that it violated Section 8(a)(5) and (1) by "failing to offer the Union a reasonable accommodation to address its confidentiality concerns with regard to the Union's request for completed exit interview forms." The ALJ erred because his conclusion is contrary to the trial record and binding precedent. The MNA requested complete nurse exit interview forms because it believed nurses were resigning from the Hospital because of allegedly low staffing. The exit interview responses would, the MNA believed, support its position. And there is no dispute that the Hospital provided the MNA with a spreadsheet that disclosed the stated reason for resignation in each exit interview. The MNA rejected this accommodation. In response, the Hospital offered the interview responses subject to a confidentiality agreement, which would include the redaction of confidential responses unrelated to the MNA's request. In fact, the Hospital offered the contact information for former nurses to the MNA so that it could inquire as to whether allegedly low nurse staffing factored into their decisions.

In its role as collective bargaining representative, a union is entitled under the Act to such information as may be relevant to it in the performance of its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This includes information relevant to contract negotiations. *Day Automotive Group*, 348 NLRB 1257 (2006). "Where the requested information concerns employees . . . within the bargaining unit, this information is presumptively relevant and the employer has the burden of proving lack of relevance. *Bryant & Stratton Business Institute*, 321

NLRB 1007 (1996); *Brooklyn Union Gas Co.*, 220 NLRB 189 (1975); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d Cir. 1965). The Board applies a liberal discovery standard when determining whether requested information is relevant. *Id.* When information “has been demonstrated to be relevant, the burden shifts to the respondent to establish that the information is not relevant, does not exist, or for some other valid and acceptable reason cannot be furnished to the requesting party.” *House of Good Samaritan Medical Facility*, 319 NLRB 392, 397, (1995) citing *Somerville Mills*, 308 NLRB 425 (1992).

It is undisputed that the Charging Union representative Schraub sent an information request to Shaun Ayer, the Attorney for Respondent on June 6, 2017, requesting “ 1. A list all bargaining unit Registered Nurses who have resigned from their position in the previous twelve (12) months, including the Registered Nurse’s name, department, HVSH start date and HVSH end date. 2. Copies of exit-interview records for all Registered Nurses who have resigned from their positions in the previous twelve (12) months.” Schraub never received the information. Instead, he received a summary of the Exit Interviews that the Charging Union deemed non-responsive and insufficient to answer the request. According to Schraub, the information was insufficient because it was vague and did not provide sufficient information as to why employees were leaving their job. The Charging Union notified Respondent that the summaries were vague and insufficient and Respondent was unwilling to cure the issue.

The burden is on the party making the confidentiality claim to prove such interest and that it is of such significance as to outweigh the union’s need for the information. *Mary Thompson Hospital*, 296 NLRB 1245, n.1 (1989); *Jacksonville Area Association for Retarded Citizens*, 316 NLRB 338, 340 (1995). In resolving issues of asserted confidentiality, the Board first determines if the employer has established any legitimate and substantial confidentiality interest and then balances that interest against the union’s need for the information. *Detroit Edison v. NLRB*, 440 US 301, 315 (1979); *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30

(1982); *Pfizer, Inc.*, 268 NLRB 916 (1984). However, where the employer fails to demonstrate a legitimate and substantial confidentiality interest, the union's right to the information is effectively unchallenged, and the employer is under a duty to furnish the information. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983); *NLRB v. Jaggars-Chiles-Stovall, Inc.*, 639 F.2d 1344, 1346–1347 (5th Cir. 1981); *NLRB v. Associated General Contractors of California*, 633 F.2d 766 (9th Cir. 1980). In this case, Respondent did not meet its burden of showing confidentiality.

The exit interviews are presumptively relevant because the information provided by the departing nurses concern terms and conditions of employment and is relevant to the ongoing experiences of current bargaining unit employees. The issue of the exit interviews arose during negotiations for an initial collective bargaining agreement with respect to staffing, which is a primary concern of the Charging Union. The continuing relevance of the information pertains to the Charging Union's duty to represent employees in the Unit. The exit interviews will contain information about terms and conditions of employment that concern Unit employees and that potentially led to employees leaving. Whether that information be about staffing, fraud, discrimination, harassment, or other issues, that information would be vitally important to the Charging Union in its role as the exclusive representative of the employees.

However, even if the exit interviews are not presumptively relevant, the record evidence demonstrates, as the ALJ found, that the issue was raised during negotiations and became relevant because of the context and subject matter of the discussion. Respondent and the Charging Union disagreed as to why some nurses left employment with Respondent.

Respondent informed the Charging Union that it was not aware of staffing issues as the cause of nurses leaving, and it stated that this was borne out by exit interviews. Obviously staffing is an important issue to the Charging Union and ensuring that members are employed and that enough staff are present to do the work of Respondent is of vital importance to the Charging Union. The

Charging Union was evaluating the veracity of Respondent's claim that lack of staffing was not an issue. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1966). Further, as the ALJ pointed out, Respondent was well aware of the Charging Union's concern about staffing as it was raised in Labor Relations Director Demarais' email to the Charging Union as reasons for strict enforcement of Respondent's meal policy.

Respondent did not challenge the need for the Charging Union to have this information, rather it asserted that their exit interviews were confidential, that some questions on the form were confidential and that they represented to employees that their responses would be kept confidential. (Tr 98-99) Respondent's witness Shaun Ayer testified at trial that that some of the questions on the Exit Interview Form were considered by Respondent to be highly sensitive, such as whether they are aware of any illegal conduct, unethical conduct or fraudulent behavior." (Tr 99) He didn't say why such information, if disclosed by employees, could not be disclosed to the Charging Union. The inference at trial was that the release of such information might harm Respondent. Although the potential harm was never explained. Respondent asserted that the actual comments and the form itself were confidential. However, this defense, as held by the ALJ, is belied by the fact that Respondent entered the Exit Interview Form as an exhibit at trial, without a protective order. If it was indeed so confidential that it could not be provided to the Charging Union, Respondent would not have admitted it at trial of its own accord or sought a protective order protecting the document. Respondent had the burden to show why the information on the exit interviews and the form are confidential, and it failed to meet this burden. *Mary Thompson Hospital*, 296 NLRB 1245, n.1 (1989); *Jacksonville Area Association for Retarded Citizens*, 316 NLRB 338, 340 (1995).

Even if Respondent can show that the exit interviews are confidential, Respondent failed to show that it attempted to bargain with the Charging Union over an accommodation. In response to the request, Respondent provided a vague summary that did not meet the needs of

the Charging Union. Respondent then stood fast to the confidential assertion without any further discussion. At trial, Respondent's witness asserted that it offered to provide the actual exit interviews if the Charging Union signed a confidentiality agreement. However, Charging Union witness Schraub testified credibly that such an accommodation was not offered. Instead, Respondent offered a confidentiality agreement merely related to the form itself, which clearly did not require such an accommodation. *Overnite Transportation*, 330 NLRB 1275 (2000).

In support of its contention that it offered the Charging Union a confidentiality agreement, Respondent provided notes of the meeting that were submitted as an exhibit at trial. The person who took the notes did not testify, and these notes clearly did not encompass the entire meeting, as they were cryptic and incomplete. Further, the Charging Union did not approve these notes, as they were written for and by Respondent. Respondent excepts to the ALJ's factual conclusion that the notes are not a "verbatim account of what transpired" in the meeting, but this exception is absurd. Regardless of the actual time spent in the meeting whether it be four or two hours, the notes do not indicate who said what or what the response was. There is no reasonable way that anyone can say that these notes are a verbatim account of what was said in the meeting. Further, an adverse inference should be taken with respect to the author of the notes. Nicole Williams, the person who Ayer's testified wrote the notes never testified about how she took the notes, whether they were verbatim and what she meant by each statement. Such failure should lead to an adverse inference that she would have testified adversely to Respondent assertions about the notes if she had been called to testify. *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (Mar. 11, 2016), *Hialeah Hospital*, 343 NLRB 341, 393 fn. 20 (2004); *Gerig's Dump Trucking*, 320 NLRB 1017, 1024 (1996); *International Automated Machines*, 285 NLRB 1122, 123 (1987), enfd. 851 F.2d 720 (6th Cir. 1988).

However, regardless of this exception, there is nothing in the notes that state that Respondent requested a confidentiality agreement for the exit interview forms. The notes states

that “HVSH proposing confidentiality of Exit w/redacted info; however, Emp has provided spreadsheet for reason” This does not state that Respondent was proposing a confidentiality agreement, just that Respondent felt that the information was confidential, and it provided the (insufficient) spreadsheet for that reason.

Respondent also implied through questions during the trial that the Charging Union could have obtained the information from an alternative source. (Tr 60-61) However, the fact remains that this defense is meritless. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995). Whether the Charging Union could have conducted its own exit interviews or contacted the nurses on its own, is irrelevant to the question of whether Respondent provided the requested information.

An employer’s refusal to provide requested information without undue delay relevant to the union’s efforts at negotiating a contract is an indicium of not bargaining in good faith. *Providence Hospital*, 320 NLRB 790, 794 (1996); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996); *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993). In this case, Respondent hid behind a veil of confidentiality without explanation, and did not provide the relevant information that was requested by the Charging Union.

Respondent also excepts to the ALJ’s failure to credit its concern about Michigan law. Respondent cites *Borgess Med. Ctr. And Michigan Nurses Ass’n*, 342 NLRB 1105 (2004) as holding that the Board has held that since Michigan law protects health care self-review documents from disclosure, and asserts that this exception establishes a legitimate confidentiality interest in the exit interviews. However, the Board in *Borgess* in finding that hospital incident reports are confidential is addressing the confidential interest in improving patient care, “so as to reduce the likelihood that a patient will suffer serious injury or death as a result of a treatment error” not like here where Respondent is

concerned with incidents of fraud, unethical or illegal conduct, or where the Charging Union is concerned about the behavior of supervisors or lack of staffing. Merely providing the cite for the law is not adequate. There has to be a discussion on whether there is a legitimate confidentiality interest in the exit interviews. Something that Respondent did not do at trial and has relied on its brief to revive the issue that it ignored at trial.

Further, once it is established that there is a legitimate confidentiality interest, Respondent must still propose accommodations to address both its concerns and its bargaining obligations, such as by limiting its use or redactions of names. *Borgess*, supra; *U.S. Testing Co., Inc. v. NLRB*, 160 F.3d 14 (D.C. Cir 1998)

III. CONCLUSION

For the reasons set forth above and in ALJ Amchan's Decision and Recommended Order, it is urged that Respondent's Exceptions be denied in their entirety and the Board affirm the findings of fact, conclusions of law, and recommended remedy of ALJ Amchan in his Decision and Recommended Order in this matter, except with respect to the General Counsel's cross-exceptions.

Respectfully submitted this 28th day of June, 2019.



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