UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

NORTHSTAR MEMORIAL GROUP, d/b/a SKYLAWN MEMORIAL PARK, Respondent/Employer and CEMETERY WORKERS, GOLF COURSES AND GREEN ATTENDANTS, SEIU LOCAL 265. Charging Party/Union	Case Nos. 20-CA-227245, 20-CA-229015 **RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS** [Hearing Date: May 14 and 15, 2019]

TABLE OF CONTENTS

I. ALJ ERRED IN CONCLUDING THAT INACTION MODIFIES EXPRESS, BARGAINED-FOR TERMS OF THE COLLECTIVE BARGAINING AGREEMENT..1

A. Respondent acted in accordance with the express terms of the CBA.....1

B. Alleged inaction does not modify express, bargained-for terms of the CBA. 2

II. THE ALJ ERRED IN CONCLUDING THAT SECTION 11.2 IS AN EXPIRED WAIVER WHEN SECTION 11.2 OF THE CBA SURVIVES CONTRACT EXPIRATION AS THE STATUS QUO DURING NEGOTIATIONS.....4

A. The status quo must be maintained after contract expiration. 4

B. The substantive terms of the CBA define the "status quo" after expiration, with one limited exception, inapplicable to these facts. 4

C. As Respondent acted in accordance with the substantive terms of the CBA, which survive expiration as the status quo, it did not violate the unilateral change doctrine. 5

D. Even if the language was a management-rights clause subject to expiration, Raytheon controls. 6

E. MV Transportation principles control the analysis.....7

III. GENERAL COUNSEL WAIVED ITS RIGHT TO PURSUE CONTRACT EXPIRATION.....7

IV. THE ALJ ERRED IN FINDING INTERFERENCE OR COERCION BY RESPONDENT RELATED TO MR. STRUBE'S PRO-UNION SIGN.....8

A. General Counsel's opposition misstates the evidence and at most, Mr. Molina's conduct is de minimis.....8

V. THE ALJ ERRED IN FAILING TO ISSUE APPROPRIATE SANCTIONS FOR SUBPOENA NONCOMPLIANCE.....9

VI. CONCLUSION.....10

TABLE OF AUTHORITIES

Cases **Pages**

Bloomfield Health Care Center,
352 NLRB 252 (2008), enfd. 372 Fed. Appx 118 (2nd Cir. 2010) 2

Finch, Pruyn & Co.,
349 NLRB 271 (2007) 2

Green Apple Supermarket of Jamaica, Inc.,
366 NLRB No. 124 (2018) 2

Intermountain Rural Electric Assn.,
984 F.2d 1562, reh'g denied (10th Cir. 1993) 3

MV Transportation,
368 N.L.R.B. No. 66, slip. op. (September 10, 2019) 7

N.L.R.B. v. Majestic Weaving Co.,
355 F.2d 854 (2d Cir. 1966).....8

Plumbers & Steamfitters Local 290 (McMinnville Heating & Refrig. & Air Conditioning),
Case No. 36-CC-1009 (Jan. 25, 2001).....3

Post Tribune Co.,
337 NLRB 1279 (2002) 2

Prime Healthcare Services-Encino LLC v. NLRB,
890 F.3d 286 (DC Cir.2018).....4, 5

Raytheon Network Centric Systems,
365 NLRB No. 161 (2017) 6

Sunrise Mountainview Hospital, Inc.,
357 NLRB 1406 (2011) 2

Twin City Garage Door Co.,
297 NLRB 119 (1989) 3

Wilkes-Barre Hospital Co., LLC v. N.L.R.B.,
857 F.3d 364 (DC Cir.2017) (2015) 5

WKYC-TV,
359 NLRB 286 (2012) 5, 6

Statutes

National Labor Relations Act, 29 U.S.C. § 158..... *passim*

Other Authorities

NLRB Board Rules and Regulations (effective March 6, 2018) §§102.31(d); 102.46(e) 1, 10

Pursuant to Section 102.46(e) of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), Respondent Northstar Memorial Group, LLC d/b/a Skylawn Funeral Home, Crematory and Memorial Park ("Respondent" or "Employer") submits this Reply Brief in Support of its Exceptions to Administrative Law Judge Sharon Levinson Steckler's Decision in the above-captioned matters. Respondent respectfully requests that the Board refuse to adopt the ALJ's recommended remedy and Order, and dismiss the Complaint.[1]

I. ALJ ERRED IN CONCLUDING THAT INACTION MODIFIES EXPRESS, BARGAINED-FOR TERMS OF THE COLLECTIVE BARGAINING AGREEMENT.

A. Respondent acted in accordance with the express terms of the CBA.

The ALJ and the General Counsel do not dispute that the express language in Section 11.2 of Union and Respondent's negotiated collective bargaining agreement allows Respondent to schedule the unit caretakers' workweek. The language clearly allows Respondent to select five consecutive days beginning Sunday, Monday, or Tuesday, using the bargained-for process of seeking volunteers and then assigning by seniority. *See* CBA G.C. Ex. 2 at 7; Dec. 27 at 11.

General Counsel also does not dispute that at all times relevant to the Complaint, Respondent did in fact select schedules of five consecutive days beginning Sunday, Monday, or Tuesday. However, General Counsel inaccurately frames Respondent's weekly scheduling explicitly contemplated by the CBA as a "unilateral change." The CBA establishes that, to allow for limited flexibility in staffing, the Employer may issue one of three possible schedules. *See* CBA G.C. Ex. 2 at 7; Tr. 233: 19-234:1. Respondent did exactly so. Thus, Respondent did not implement a "unilateral change."

[1] The ALJ Decision pages and lines are cited "Dec. [page] at [line]"; transcript pages are cited "Tr. at [page]"; Respondent's exhibits are cited "R. Ex. __"; General Counsel's exhibits are cited "G.C. Ex"; Joint exhibits are cited "J. Ex. __;" General Counsel's Answering Brief is cited "Ans. Br. at [page]."

B. <u>Alleged inaction does not modify express, bargained-for terms of the CBA.</u>

General Counsel argues that, because scheduling is a mandatory term and condition of employment, Respondent was required to bargain with the Union prior to implementing a schedule expressly permitted by the CBA. In support, General Counsel cites to several inapplicable decisions, and cites no authority wherein an employer violated the Act by implementing a schedule expressly allowed by the CBA. *Cf. Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124 (2018) (employer violated Section 8(a)(5) when it implemented new schedules and modified from unwritten to written); *Sunrise Mountainview Hospital, Inc.*, 357 NLRB 1406 (2011) (employer violated written policy by scheduling additional staff on a holiday); *Bloomfield Health Care Center*, 352 NLRB 252 (2008), enfd. 372 Fed. Appx 118 (2nd Cir. 2010) (employer transferred employees to new positions with new schedules). Each of the cases cited by the General Counsel is irrelevant because here, the Employer scheduled employees in accord with the specific options outlined in the CBA.

General Counsel then argues terms and conditions established by past practice are also subject to the rule against unilateral changes. In support, General Counsel cites two cases, both of which involve a contract *silent* on an issue which the Board held became established by past practice. *Finch, Pruyn & Co.,* 349 NLRB 271, 277 n. 31 (2007) (holding transferred position became a term and condition of employment); *Post Tribune Co.,* 337 NLRB 1279, 1280 (2002) (employer's annual 80/20 allocation of premiums became a past practice; thus employer did not alter status quo when premiums increased as still allocated 80/20). Here, however, the contract is not silent, and Respondent conformed to the explicit contractual terms.

General Counsel asserts that *Intermountain Rural Electric Assn.* supports its conclusion that the Monday to Friday schedule became an established term and condition of employment.

984 F.2d 1562, reh'g denied (10th Cir. 1993). *Intermountain Rural*, however, is not analogous to these facts. There, employer acted inconsistently with contractual terms for years. Here, Respondent acted in accordance with the terms. Selecting one of three contractual options available on the basis of employer's discretion or necessity is not acting inconsistently with contractual terms.

Even if Respondent did not recently elect to implement two of the three possible workweeks outlined in the CBA, such inaction does not modify the terms of a collective bargaining agreement, nor waive the right of a party to enforce its express terms. *See e.g.*, *Twin City Garage Door Co.*, 297 NLRB 119, 125-28 (1989) (parties bound to terms of CBA; union did not waive its right to enforce CBA, even with approximately 20 years of inaction); *Plumbers & Steamfitters Local 290 (McMinnville Heating & Refrigeration & Air Conditioning)*, Case No. 36-CC-1009, at *6 (Jan. 25, 2001) ("Union's inaction in enforcing the terms of [the CBA] for approximately two years … does not constitute a waiver of its right to enforce the agreement").

General Counsel's allegation about employees being deprived of premium pay outside the workweek is both misguided and irrelevant. *See* Ans. Brief at 2. By its express language, Section 13, the premium pay provision of the CBA, depends entirely on the "workweek" as defined by Employer's selection of five consecutive days per Section 11. *See* CBA, G.C. Ex. 2 at 9. Thus, Respondent has not deprived any employees of premium pay for work performed outside of their respective assigned workweeks, beginning on Sunday, Monday, or Tuesday.

II. THE ALJ ERRED IN CONCLUDING THAT SECTION 11.2 IS AN EXPIRED WAIVER WHEN SECTION 11.2 OF THE CBA SURVIVES CONTRACT EXPIRATION AS THE STATUS QUO DURING NEGOTIATIONS.

A. The status quo must be maintained after contract expiration.

As an initial matter, General Counsel waived its right to argue this theory, which is discussed further in Section 3 below. Respondent, however, does not dispute the authority General Counsel cites to establish that "[t]o avoid running afoul of the unilateral change doctrine, an employer must maintain the status quo as to terms and conditions of employment after the expiration of a collective bargaining agreement." *Prime Healthcare Services-Encino LLC v. NLRB*, 890 F.3d 286, 293 (DC Cir.2018).

B. The substantive terms of the CBA define the "status quo" after expiration, with one limited exception, inapplicable to these facts.

In her decision, the ALJ held that Section 11.2 unquestionably permitted the employer to select one of three possible schedules, and that the union had waived its right to bargain over this selection, but that the term was silent on its applicability post-expiration, and, thus, it expired with the CBA. *See* Dec. 27 at 21. This interpretation of expiration, however, is not the law. Unlike standard contracts, terms of collective bargaining agreements do not simply expire. The authority cited by General Counsel and ALJ Steckler instructs that, not only must the status quo be maintained post-expiration, but also instructs *how* the status quo is determined: "It is well established that, pursuant to the duty to bargain under the NLRA, many terms of an expired collective bargaining agreement extend beyond the contract's termination date and continue to 'define the status quo.'" *Prime Healthcare Services-Encino LLC*, 890 F.3d at 294, citing *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 205 (1991).

There is a limited exception to the rule that negotiated terms of a contract do not survive to define the status quo. That exception is narrowly tailored only to waivers of "rights that [the

parties] otherwise would enjoy in the interest of concluding an agreement" including "arbitration provisions, no-strike provisions, and management-rights clauses." *WKYC-TV,* 359 NLRB at 286.Section 11.2, allowing Employer's selection of one of several scheduling options, is not a "waiver" by the union of a right it would "enjoy in the interest" of finalizing the negotiations. It is a negotiated term and condition of employment.

The *WKYC-TV* Board further emphasized the limited the "waiver" exception: "the status quo [on expiration] must be viewed as a collective whole. In the give-and-take of bargaining, a union presumably will make concessions in certain terms and conditions to achieve improvements in others. Preserving the status quo facilitates bargaining by ensuring that the tradeoffs made by the parties in earlier bargaining remain in place. Just as the employer continues to enjoy prior union concessions after the contract expires, as part of the status quo, so too the union continues to enjoy its bargained-for improvements." *Id*. at 287 (citations omitted).

The General Counsel and the ALJ advocate for an untenable position, one in which the supposedly limited exception of "waivers" would swallow the rule that the terms of the CBA survive expiration to establish the "status quo." If all bargained-for provisions, like Section 11.2 are "waivers," then few, if any, terms would survive to define the status quo.

C. <u>As Respondent acted in accordance with the substantive terms of the CBA, which survive expiration as the status quo, it did not violate the unilateral change doctrine.</u>

Notwithstanding the limited exception discussed above, "[i]n defining the post-expiration status quo in this case, therefore, we look to the substantive terms of the [expired] CBA." The Board has consistently held that "the unilateral change doctrine requires employers 'to honor the terms and conditions of an expired collective-bargaining agreement.'" *Wilkes-Barre Hospital Co., LLC v. N.L.R.B.*, 857 F.3d 364, 374 (DC Cir.2017) *enfg*. 362 NLRB 1212 (2015) (internal

citations omitted). *E.g.*, *WKYC-TV*, 359 NLRB 286, 287 (2012) ("[A]n employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining, until the parties either negotiate a new agreement or bargain to a lawful impasse.").

Here, Respondent issued schedules consisting of five consecutive days, beginning on Sunday to Tuesday for its unit employees, first with volunteers, then by seniority, as explicitly contemplated by a negotiated term and condition of employment which survives the CBA's expiration. By so doing, Employer "honored the terms and conditions" of the expired CBA and maintained the status quo with no obligation to bargain to impasse about these schedules.

D. Even if the language was a management-rights clause subject to expiration, *Raytheon* controls.

As demonstrated above, Section 11.2 is bargained-for contractual term which survives the expiration of the CBA as part of the status quo. If, however, the Board determines that Section 11.2 did not survive expiration, the Board's decision in *Raytheon Network Centric Systems* established that unilateral action by an employer after CBA expiration does not violate the Act if it is "consistent" with previous practice between the parties, even if the action involved employer "discretion." 365 NLRB No. 161 (2017).

In *Raytheon*, the Board held generally that unilateral modifications to the employee insurance premiums, deductibles, copayments, and benefits were "consistent" with past practice because modifications to these occurred annually for a decade and "the changes were typical of the changes one regularly sees from year to year in cafeteria-style benefit plans." *Id*.

The alleged "unilateral" action issuing schedules over a two week period is certainly less impactful than the "discretion" involved in modifying insurance benefits. Here, pursuant to the contractual language, Respondent unilaterally implemented one of three schedules every week, for

the entire duration of the CBA. Thus, its right to do so continues to the present as the status quo, as a past practice specifically allowed under Raytheon.

E. ***MV Transportation* principles control the analysis.**

As discussed above, Respondent did not make a unilateral change by continuing the status quo contractual terms. However, if the Board determines that it did, the logic of *MV Transportation* further strengthens the conclusion that the terms survive. The ALJ agreed with Respondent that the express terms of Section 11.2 allow Employer to select unit employees' workweek and that the Union waived its right to bargain over that scheduling. Dec. 27 at 11. General Counsel admits that the same result is reached whether Section 11.2 is analyzed through a "clear and unmistakable" waiver lens, or the newly-adopted "contract coverage" test. Ans. Brief. at 6. *See MV Transportation*, 368 N.L.R.B. No. 66, slip. op. (September 10, 2019).

While *MV Transportation* may have refrained from holding outright that its analysis applies to expired CBAs,[2] there is no reason to limit its principles to changes that occur during a contract's tenor. To do so would belie the underlying policy analysis of honoring the parties' negotiated agreement. These same principles are in accord with the logic of why the Board has repeatedly held that the substantive terms of the contract survive expiration as the status quo: If the ability of either party to rely on negotiated agreements expires, it would be at the expense of stability and repose during negotiations.

III. GENERAL COUNSEL WAIVED ITS RIGHT TO PURSUE CONTRACT EXPIRATION.

General Counsel does not dispute that it made representations to Respondent pre-hearing that it did not intend to pursue a theory that Section 11.2 expired at CBA expiration. Nor does

[2] As is regular practice by courts when an issue is not before it.

General Counsel dispute that it litigated in accordance with that representation until the post-hearing briefing. The Complaint issued by General Counsel clearly alleges facts about conduct in violation of an agreement, not the agreement's expiration. Compl. ¶ 13(a)-(b). Had Respondent been provided notice of this theory prior to the close of evidence, it would have altered its litigation strategy in a number of ways, including, but not limited to, propounding other subpoena requests related to the parties' intentions on Section 11.2's expiration, or the current status of negotiations on Section 11.2 or calling alternate witnesses to testify regarding same.

General Counsel and the ALJ claim that Respondent's due process arguments fail because it did not re-open the evidence and, therefore, "consent to the belated amendment of the Complaint." *See N.L.R.B. v. Majestic Weaving Co.*, 355 F.2d 854, 862 (2d Cir. 1966). This argument impermissibly shifts the burden to Respondent to expend additional time and resources to reopen the case as a result of General Counsel's failure to follow the rules and places the burden on Respondent to remedy the prejudice caused by General Counsel's litigation tactics. However, the burden of seeking a reopening rests "on the General Counsel who sought to raise the new issue." *Id*.

IV. THE ALJ ERRED IN FINDING INTERFERENCE OR COERCION BY RESPONDENT RELATED TO MR. STRUBE'S PRO-UNION SIGN.

A. General Counsel's opposition misstates the evidence and at most, Mr. Molina's conduct is *de minimis*.

First, General Counsel misstates the evidence. Namely, General Counsel claims that that Mr. Molina parked in front of Mr. Strube's sign *after* he requested Mr. Strube relocate his sign. In fact, the testimony clearly demonstrates the sequence as: (1) Mr. Molina drove to a parking lot; (2) parked next to Mr. Strube's motorcycle as it was an available space; (3) spoke to the mourning family who asked the sign be removed; (4) relayed the request to Mr. Strube (who

refused) and (5) attended to his duties related to the ongoing funeral service. Tr. 282:17-284:18. No evidence establishes that Mr. Molina's truck actually obstructed Mr. Strube's sign. Even assuming that the truck did, in fact, obscure one viewpoint, General Counsel failed to present evidence that this was intentional, that there was any union animus, or that other employees felt coerced. Without such evidence, and in light of the objectively reasonable conduct at issue, parking in a parking lot, General Counsel did not present sufficient evidence to prove a violation. At most, the conduct was *de minimis*. The public policy ramifications for finding a violation on these limited facts are expansive. The ALJ erred in her conclusion and must be reversed.

The trial testimony further established that, at most, Mr. Molina relayed a single request from a grieving family to Mr. Strube that he temporarily move his pro-union sign from his motorcycle. Mr. Strube refused, and the conversation ended. Mr. Strube was not ordered to remove the sign, he continued to routinely display the sign without incident, he received no further requests to remove the sign, and he did not experience any adverse action related to the sign. Given these facts, the conclusion that this lone appeal somehow coerced Mr. Strube in violation of Section 8(a)(1) is unreasonable. The singular authority cited by the ALJ alongside her conclusion involves repeated orders and threats to remove pro-union signs, and is thus unpersuasive here. At most, Mr. Molina's single plea was *de minimis*. Accordingly, the ALJ erred in her conclusion that this conversation violated Section 8(a)(1) and must be reversed.

V. <u>THE ALJ ERRED IN FAILING TO ISSUE APPROPRIATE SANCTIONS FOR SUBPOENA NONCOMPLIANCE.</u>

General Counsel claims that Respondent needed to request the Regional Director to enforce the subpoena or request a continuance prior to pursuit of sanctions for subpoena noncompliance. However, Section 102.31(d) of the Board Rules states that the General Counsel is responsible for instituting enforcement, not upon the other party's request, nor on a continuance of proceedings,

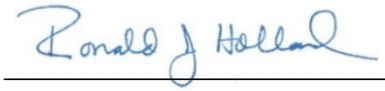
but "[u]pon the failure of any party to comply with a subpoena issued upon the request of a private party." The authority cited by General Counsel do not support that a private party is limited in requesting sanctions upon another party's noncompliance with a valid subpoena (with no attempt to revoke), as are the undisputed facts here. Notably, General Counsel cites no authority that a respondent must take any action before it may request sanctions upon the mid-trial realization that its subpoena *duces tecum* was deliberately ignored when responsive materials were in the Union's possession.

The ALJ found that Respondent met its burden to establish subpoena noncompliance. Dec. at 4:26-27. However, after so concluding, the only sanction the ALJ issued was the exclusion of a single piece of evidence already excluded as inadmissible hearsay. This inconsequential sanction in response to deliberate noncompliance is woefully inadequate, not just in light of the egregious nature of the noncompliance, but also inadequate to deter similar noncompliance in the future. Thus, the ALJ erred in refusing to order appropriate sanctions against the Union. The minimum proper remedy in this case was for the ALJ to strike the entirety of Mr. Strube's testimony.

VI. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Board refuse to adopt the ALJ's findings and conclusions as discussed in its Exceptions, and instead dismiss the unfair labor practice complaints against Respondent in Case Nos. 20-CA-227245 and 20-CA-229015.

Respectfully submitted,



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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within cause. My business address is McDermott Will & Emery LLP, 415 Mission Street, Suite 5600, San Francisco, California 94105.

On December 16, 2019, I served the below listed document(s) described as:

RESPONDENT'S REPLY IN SUPPORT OF EXCEPTIONS

☒ **BY ELECTRONIC SERVICE** By transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Gregorio Rodriguez Cemetery Workers, Golf Courses and Green Attendants, SEIU Local 265 1212 H El Camino Real Suite 482 San Bruno, CA 94066 Email: grodriguez@seiulocal265.org	Jill Coffman, Regional Director National Labor Relations Board, Region 20 901 Market Street, Suite 400 San Francisco, CA 94103-1735 Email: Jill.Cofman@nlrb.com
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 16, 2019 at San Francisco, California.

Henry Leung