

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

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

**MAINE COAST REGIONAL HEALTH FACILITIES,
d/b/a MAINE COAST MEMORIAL HOSPITAL,
the sole member of which is EASTERN MAINE
HEALTHCARE SYSTEMS**

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issues	2
Statement of the case.....	3
I. The Board’s findings of fact	3
A. Background; the Employer’s hospital in Ellsworth, Maine.....	3
B. Maine Coast Memorial Hospital becomes affiliated with Eastern Maine Healthcare Systems.....	3
C. The Employer’s media policy	5
D. Disputes arise between the Employer and its employees	5
E. The ongoing disputes receive coverage in a local newspaper	8
F. Young submits a letter to the editor regarding the ongoing disputes; Young’s letter is published in the newspaper	9
G. The Employer discharges Young solely for writing her letter to the newspaper.....	12
H. Young files unfair-labor-practice charges; the Board’s General Counsel issues a consolidated complaint, which is amended at the subsequent hearing	13
II. The Board’s conclusions and Order	14
Summary of argument.....	15
Standard of review	17

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
Argument.....	18
I. The Employer violated both Section 8(a)(1) and Section 8(a)(3) of the Act by discharging Young for her statutorily protected conduct.....	18
A. Young’s letter to the editor supporting her coworkers’ actions constituted protected concerted activity.....	21
B. Young’s letter to the editor supporting the position of the Union also constituted protected union activity.....	30
C. The content of Young’s letter did not cause it to lose the protection of the Act.....	33
D. The protected letter was the Employer’s admitted sole reason for discharging Young.....	35
E. The Employer’s remaining objections to the Board’s unlawful-discharge findings misconstrue the law.....	36
II. The Employer violated Section 8(a)(1) of the Act by maintaining an overbroad media policy that prohibited employees from contacting the media without permission.....	42
III. The Board reasonably extended its remedial Order to include Eastern Maine Healthcare Systems and to cover all facilities at which the unlawful media policy was maintained.....	45
Conclusion.....	50

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alle Processing Corp.</i> , 369 NLRB No. 52, 2020 WL 1660064 (Apr. 2, 2020)	36
<i>Allstate Ins. Co.</i> , 332 NLRB 759 (2000)	23
<i>Argos USA, LLC</i> , 369 NLRB No. 26, 2020 WL 591742 (Feb. 5, 2020).....	42
<i>Atl. Steel Co.</i> , 245 NLRB 814 (1979)	39
<i>Beth Israel Med. Ctr.</i> , 292 NLRB 497 (1989)	30
<i>Boch Imps., Inc. v. NLRB</i> , 826 F.3d 558 (1st Cir. 2016).....	42
<i>Boeing Co.</i> , 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017)	42, 44-45
<i>C.S. Telecom, Inc.</i> , 336 NLRB 1193 (2001)	32
<i>Clear Pine Mouldings, Inc.</i> , 268 NLRB 1044 (1984)	39
<i>Cont'l Grp., Inc.</i> , 357 NLRB 409 (2011)	41
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978).....	19, 27, 43
<i>Entergy Nuclear Operations, Inc.</i> , 367 NLRB No. 135, 2019 WL 2212130 (May 21, 2019)	18-19

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Eulitt ex rel. Eulitt v. Me. Dep't of Educ.</i> , 386 F.3d 344 (1st Cir. 2004).....	48
<i>Every Woman's Place, Inc.</i> , 282 NLRB 413 (1986), <i>enforced</i> , 833 F.2d 1012 (6th Cir. 1987)	26
<i>Farm Fresh Co.</i> , 361 NLRB 848 (2014)	19
<i>Five Star Transp., Inc. v. NLRB</i> , 522 F.3d 46 (1st Cir. 2008).....	19, 24, 28, 33-34
<i>Fresh & Easy Neighborhood Mkt., Inc.</i> , 361 NLRB 151 (2014)	21-22
<i>Gen. Motors LLC</i> , 369 NLRB No. 127, 2020 WL 4193017 (July 21, 2020).....	39-40
<i>Int'l Bhd. of Elec. Workers, Local Union No. 596</i> , 274 NLRB 1348 (1985).....	31-32
<i>Mannington Mills</i> , 272 NLRB 176 (1984)	26
<i>Manno Elec., Inc.</i> , 321 NLRB 278 (1996), <i>enforced mem.</i> , 127 F.3d 34 (5th Cir. 1997)	32
<i>Mast Adver. & Publ'g, Inc.</i> , 304 NLRB 819 (1991)	19
<i>McGaw of P.R., Inc. v. NLRB</i> , 135 F.3d 1 (1st Cir. 1997).....	18

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Metro. Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	20, 36
<i>Meyers Indus. (Meyers I)</i> , 268 NLRB 493 (1984), <i>remanded sub nom.</i> <i>Prill v. NLRB</i> , 755 F.2d 941 (D.C. Cir. 1985).....	21-22, 25-26, 29
<i>Meyers Indus. (Meyers II)</i> , 281 NLRB 882 (1986), <i>affirmed sub nom.</i> <i>Prill v. NLRB</i> , 835 F.2d 1481 (D.C. Cir. 1987).....	21-22, 24-26, 28-29
<i>Moffat v. U.S. Dep't of Justice</i> , 716 F.3d 244 (1st Cir. 2013).....	34
<i>Mountain Shadows Golf Resort</i> , 330 NLRB 1238 (2000), <i>affirmed sub nom.</i> <i>Jensen v. NLRB</i> , 86 F. App'x 305 (9th Cir. 2004)	34
<i>Mushroom Transp. Co. v. NLRB</i> , 330 F.2d 683 (3d Cir. 1964)	22
<i>NLRB v. Bos. Dist. Council of Carpenters</i> , 80 F.3d 662 (1st Cir. 1996).....	17-18, 41
<i>NLRB v. City Disposal Sys. Inc.</i> , 465 U.S. 822 (1984).....	25, 32-33
<i>NLRB v. Great Dane Trailers, Inc.</i> , 388 U.S. 26 (1967).....	38
<i>NLRB v. Hotel Emps. & Rest. Emps. Int'l Union Local 26</i> , 446 F.3d 200 (1st Cir. 2006).....	34
<i>NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (Jefferson Standard)</i> , 346 U.S. 464 (1953).....	19, 33-34, 40

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Mount Desert Island Hosp.</i> , 695 F.2d 634 (1st Cir. 1982).....	19, 23, 27-28, 35, 40-41, 43
<i>NLRB v. Ne. Land Servs., Ltd.</i> , 645 F.3d 475 (1st Cir. 2011).....	41-42, 44
<i>NLRB v. Portland Airport Limousine Co.</i> , 163 F.3d 662 (1st Cir. 1998).....	22, 29
<i>NLRB v. RELCO Locomotives, Inc.</i> , 734 F.3d 764 (8th Cir. 2013)	24, 37-38
<i>NLRB v. Transp. Mgmt. Corp.</i> , 462 U.S. 393 (1983).....	37-38
<i>NLRB v. Wash. Aluminum Co.</i> , 370 U.S. 9 (1962).....	37
<i>Nor-Cal Beverage Co.</i> , 330 NLRB 610 (2000)	20, 30, 36
<i>Phoenix Transit Sys.</i> , 337 NLRB 510 (2002), <i>enforced</i> , 63 F. App'x 524 (D.C. Cir. 2003)	19, 35-36
<i>Pier Sixty, LLC</i> , 362 NLRB 505 (2015)	39
<i>Pride Ambulance Co.</i> , 356 NLRB 1023 (2011).....	30
<i>Quality Health Servs. of P.R., Inc. v. NLRB</i> , 873 F.3d 375 (1st Cir. 2017).....	18, 23, 41, 45
<i>Radio Officers' Union v. NLRB</i> , 347 U.S. 17 (1954).....	37-38

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Randolph Div., Ethan Allen, Inc. v. NLRB</i> , 513 F.2d 706 (1st Cir. 1975).....	32-33
<i>Reading Hosp. & Med. Ctr.</i> , 226 NLRB 611 (1976), <i>enforced mem.</i> , 562 F.2d 42 (3d Cir. 1977)	23
<i>Reliant Energy</i> , 357 NLRB 2098 (2011).....	20
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945).....	37
<i>Rocky Mountain Eye Ctr.</i> , 363 NLRB No. 34, 2015 WL 6735641 (Nov. 3, 2015).....	20
<i>Signal Oil & Gas Co.</i> , 160 NLRB 644 (1966), <i>enforced</i> , 390 F.2d 338 (9th Cir. 1968).....	30-31, 33, 38
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	18
<i>Valley Hosp. Med. Ctr., Inc.</i> , 351 NLRB 1250 (2007), <i>enforced sub nom.</i> <i>Nev. Serv. Emps. Union, Local 1107 v. NLRB</i> , 358 F. App'x 783 (9th Cir. 2009).....	37

TABLE OF AUTHORITIES

Statutes	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	18-22, 26, 30-32, 35, 39, 42, 43, 45
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	2, 14-16, 18-21, 35-36, 41-42, 45
Section 8(a)(3) (29 U.S.C. § 158(a)(3))	2, 14-16, 18, 20-21, 33, 35-37, 41
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2, 18
Section 10(f) (29 U.S.C. § 160(f))	2

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**ON APPLICATION FOR ENFORCEMENT AND
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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement, and the cross-petition of Maine Coast Regional Health Facilities, d/b/a Maine Coast Memorial Hospital, the sole member of which is Eastern Maine Healthcare Systems (collectively, “the Employer”) for review, of a Board Decision and Order issued against the Employer

on March 30, 2020, and reported at 369 NLRB No. 51. The Board had jurisdiction over the unfair-labor-practice proceeding pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). Venue is proper, as the Board found unfair labor practices that occurred in Maine. The application and petition are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

1. Does substantial evidence support the Board’s findings that the Employer violated Section 8(a)(1) and Section 8(a)(3) of the Act by discharging employee Karen-Jo Young for engaging in statutorily protected conduct by writing a letter to the editor of the local newspaper?

2. Does substantial evidence support the Board’s finding that the Employer violated Section 8(a)(1) of the Act by maintaining an overbroad media policy that prohibited employees from contacting the media without permission?

3. Did the Board reasonably extend its remedial Order to include Eastern Maine Healthcare Systems and to include a notice posting at all facilities at which the unlawful media policy may have been circulated?

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Employer's Hospital in Ellsworth, Maine

The Employer operates Maine Coast Memorial Hospital, a hospital located in Ellsworth, Maine. (D&O 1.)¹ Approximately 500 employees work at the hospital. (D&O 7; Tr. 166.) The Maine State Nurses Association/National Nurses Organizing Committee/National Nurses Union (“the Union”) is the exclusive representative of a bargaining unit composed of registered nurses and other professional staff at the hospital. (D&O 7; A. 112.) The employee whose discharge is at issue in the present case, activities coordinator Karen-Jo Young, was not a bargaining-unit member. (D&O 7; A. 24.)

B. Maine Coast Memorial Hospital Becomes Affiliated with Eastern Maine Healthcare Systems

The hospital in Ellsworth previously operated as an independent entity for many decades, and its registered nurses have long been represented by the Union. (D&O 7; A. 112-13, 355.) In late 2015, Maine Coast Regional Health Facilities,

¹ “A.” references are to the joint appendix filed by the Employer. For clarity and ease of reference, the Board hereinafter refers to the March 30, 2020 Decision and Order under review (Employer Addendum 1-20) as “D&O” using its own internal pagination (D&O 1-20). “Tr.” references are to portions of the unfair-labor-practice hearing transcript, contained in the full record as filed with the Court, ECF Document No. 00117616818, pp. 124-538 (July 20, 2020), which were not reproduced in the joint appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to the Employer’s opening brief to the Court.

doing business as Maine Coast Memorial Hospital, filed restated articles of incorporation with the State of Maine in order to become affiliated with Eastern Maine Healthcare Systems. (D&O 7; A. 385-90.)² As corporate member of Maine Coast Regional Health Facilities, Eastern Maine Healthcare Systems became the equivalent of a corporate parent and assumed the exclusive authority to act unilaterally regarding a range of operational decisions at Maine Coast Memorial Hospital. (D&O 7; A. 317-18, 385-90.) Eastern Maine Healthcare Systems serves a similar role at eight other hospitals in the region. (D&O 1 & n.2; A. 168-72.)

An official employed by Eastern Maine Healthcare Systems, John Ronan, was named the president and highest-ranking official at Maine Coast Memorial Hospital. (D&O 7; A. 136-38, 164-66.) Ronan brought in a new management team of Eastern Maine Healthcare Systems officials to run the hospital, including the hospital's chief operating officer, chief financial officer, community-relations official, and director of human resources. (D&O 7; Tr. 165.) Ronan also serves as president of one of the other hospitals affiliated with Eastern Maine Healthcare Systems. (D&O 7; A. 136-38, 164-66.)

² In November 2017, Eastern Maine Healthcare Systems became the sole corporate member of Maine Coast Regional Health Facilities pursuant to further restated articles of incorporation filed with the State of Maine. (D&O 7; A. 391-96.)

C. The Employer's Media Policy

In April 2016, the Employer made several hundred Eastern Maine Healthcare Systems written policies applicable to the employees at Maine Coast Memorial Hospital. (D&O 8; A. 183, 398.) Among the policies was a one-page "News Release, External Publication and Media Contact" policy. (D&O 8; A. 382.) The media policy stated, in relevant part:

No EMHS employee may contact or release to news media information about EMHS, its member organizations or their subsidiaries without the direct involvement of the EMHS Community Relations Department or of the chief operating officer responsible for that organization. Any employee receiving an inquiry from the media will direct that inquiry to the EMHS Community Relations Department, or Community Relations staff at that organization for appropriate handling.

(D&O 1, 8-9; A. 382.) As with other systemwide policies, the media policy was maintained at all nine facilities affiliated with Eastern Maine Healthcare Systems. (D&O 3; A. 175-79, 398, Tr. 328.)

D. Disputes Arise Between the Employer and Its Employees

The new management team brought in by Eastern Maine Healthcare Systems instituted various changes at the hospital that employees opposed or viewed as controversial. (D&O 7.) In 2017, the Employer cancelled the contracts of 50 of the 54 physicians at the hospital, discharging six of those physicians outright and attempting to renegotiate the contract terms for the others. (D&O 7; A. 14-15, Tr. 168.) Numerous physicians, including four of five emergency-

department physicians, responded by resigning their employment rather than agreeing to renegotiate their contracts. (D&O 7; A. 190-91, 217-18.) Non-physician employees at the hospital, including Young, discussed the situation and were upset by the Employer's actions. (D&O 7; A. 28, 31, 38.)

The management changes introduced by Eastern Maine Healthcare Systems also intensified ongoing concerns about staffing levels that were being raised by the bargaining-unit nurses represented by the Union, and by other employees at the hospital. (D&O 7.) Employees were concerned that there was a shortage of nurses at the hospital and that the shortage was having an adverse impact. (D&O 7-8; A. 122-23, 372-76.) Employees expressed these concerns in various ways in the workplace, such as the nurses' practice of placing a note on each departed nurse's locker to protest the Employer's failure to backfill vacant nursing positions. (D&O 7; A. 40.) Staffing concerns were also a subject of negotiations between the Employer and the Union that resulted in the inclusion of new language in the parties' most recent collective-bargaining agreement, which took effect in May 2016. (D&O 7; A. 122-23.) As of 2017, the Union and the bargaining-unit nurses continued to have concerns that the Employer was not adhering to the terms of the contract regarding staffing levels, and that there was still a shortage of nurses. (D&O 7; A. 122-23, 372-76.)

In August 2017, the Union presented the Employer with a petition objecting to the Employer's staffing practices. (D&O 7-8; A. 130-31, 372-76.) The petition was signed by more than 60 individuals, many of whom identified themselves on the petition as nurses. (D&O 7-8; A. 130-31, 372-76.) The nurses' petition—which was formally presented to officials from both Maine Coast Memorial Hospital and Eastern Maine Healthcare Systems by the chief union steward for the bargaining-unit nurses, several other bargaining-unit members, and a representative of the Union—stated in full:

We, the undersigned, again want to call attention to the lack of adequate nursing and laboratory staffing at the hospital. We have repeatedly requested better staffing levels and have yet to see substantial improvement. We are exhausted, demoralized, and are rapidly losing faith that the MCMH administration will ever respect our professional judgement about working conditions at the hospital and clinics. On a daily basis our departments work without adequate support from the administration: Charge nurses routinely have a patient care assignment; secretaries are frequently not scheduled; continuous telemetry monitoring in the ICU is not a given; the slightest increase in inpatient census taxes our nursing resources and puts our patients at risk. The emotional and physical toll created by these conditions is pushing us to our limits. In light of this daily struggle for professional survival, the rewards of working at MCMH are few and far between.

Inadequate staffing on Med/Surg is the focal point of nursing troubles at MCMH. Higher than average inpatient census stresses MCMH's staffing resources. Med/Surg RNs end up with unsafe patient loads. ICU and OB RNs are required to float to Med/Surg, which increases their job dissatisfaction. Throughput from the ED is slowed and ED RNs effectively become Med/Surg nurses, which increases their job dissatisfaction, too.

Therefore, we demand that you take immediate steps to better support staffing on Med/Surg and ICU. Specifically: 1) In keeping with our contract language, that charge nurses not ordinarily take patient care assignments (ordinarily = not more than 50% of the time). They must be available to be a resource and to coordinate patient care. 2) Follow the Med/Surg and ICU staffing grids. 3) Restore full-time secretarial coverage to all units.

We need to see these urgent issues addressed and resolved within 30 days.

(D&O 7-8; A. 130-31, 372-76.) The Employer did not respond to the nurses' petition. (D&O 8; A. 131.)

E. The Ongoing Disputes Receive Coverage in a Local Newspaper

The disputes between employees and management at the hospital received regular coverage in *The Ellsworth American*, a local weekly newspaper. (D&O 9; A. 25-26.) On August 31, 2017, the newspaper ran a front-page article under the headline "Rewritten contracts cause unrest at MCMH," which detailed the physician departures. (D&O 9; A. 27-28, 37-38, 352-53.) On September 7, the newspaper ran another front-page article under the headline "MCMH nurses cite staffing in petition," reporting on the bargaining-unit nurses' petition and their underlying complaints. (D&O 9; A. 36, 358-59.) The following week, on September 14, the newspaper ran an editorial titled "We need a healthy hospital," which urged the hospital and its nurses to resolve their differences and which suggested, in part, that "organized labor" contributed to rising healthcare costs. (D&O 9; A. 44-45, 361.) In the same issue, the newspaper published a letter from

a former physician at the hospital under the headline “‘Doctor dissatisfaction’ at MCMH,” addressing the dissatisfaction of physicians and low employee morale at the hospital. (D&O 9; A. 44-45, 362.)

F. Young Submits a Letter to the Editor Regarding the Ongoing Disputes; Young’s Letter Is Published in the Newspaper

Young was employed for more than 13 years as an activities coordinator at the hospital. (D&O 8; A. 16-18.) Young had originally trained as a licensed practical nurse, and her regular job duties as activities coordinator included helping with nursing-related tasks. (D&O 8; A. 20-23, 39-41, 75.) In addition to providing patients with activities, Young’s duties included: responding to patient call lights and conveying the patients’ requests to nurses or other staff; interacting with nurses and physical therapists when assisting patients on scheduled walks designed to keep patients physically active; helping patients in and out of beds or chairs and communicating observed changes to occupational therapists and physical therapists; and working with hospital physicians to obtain prescriptions for assistive equipment. (D&O 8; A. 17-24, 39-41, 101.) In late 2016, the Employer issued a performance evaluation commending Young for proactively offering assistance to the nursing department. (D&O 8; A. 251.)

Young considered all of the employees assigned to patient-care areas to be working together “as a team.” (D&O 10; A. 21-23, 38-41.) Young was party to discussions in the workplace about issues relating to the hospital’s physicians,

nurses, and other employees. (D&O 10; A. 28, 31, 38-41.) In particular, Young had daily conversations with coworkers about the perceived lack of adequate staffing and the belief of the certified nursing assistants she worked with that they were being assigned “way too many patients to care for.” (D&O 8; A. 38-41.) Young was sufficiently concerned by what she perceived to be nurse staffing shortages that she sent two emails to managers in June 2017 urging them to allow her to assist with more nursing-related tasks. (D&O 10; A. 101-03, 109, 371.)

In September 2017, Young submitted a letter to the editor of *The Ellsworth American* discussing the perceived staffing shortage and its impact on her and her coworkers’ working conditions at the hospital. (D&O 1; A. 43-44, 47-48, 53-55, 363-65.) The letter expressed support for the ongoing efforts of the Union and its members to improve staffing levels. (D&O 1; A. 43-44, 47-48, 53-55, 363-65.)

Young’s letter to the editor, which the newspaper published on September 21 under the heading “Unrest at MCMH not a surprise,” stated in full:

Dear Editor:

The headline of the front page article in the Aug. 31 edition of *The Ellsworth American* titled “Rewritten contracts cause unrest at MCMH” accurately describes the situation. I have worked at Maine Coast Memorial Hospital under the swing bed program and rehabilitation departments for the past 13 ½ years. Losing many of our experienced, trusted doctors is causing unrest, uncertainty and concern among the staff, patients and the community.

Back in October 2015, in another article in *The American* titled “Maine Coast is now part of Eastern Maine Healthcare Systems,” the

MCMH Board chairman at the time, Adin Tooker, was quoted: “Our primary mission is to ensure that this resource is here and better going forward, and the affiliation with EMHS going forward will do that.” The article stated that the EMHS Board chairwoman, Evelyn Silver, assured the audience members that the Maine Coast Board of Directors “will have a very strong role to play” going forward. She is also quoted as saying: “Local input is critical in how decisions are made.”

I have to wonder why our local hospital board is not vehemently protesting the actions taken by parent organization EMHS causing MCMH to change its contracts with doctors. We were told back in 2015 that our local board would still “have a very strong role to play.” Current MCMH Board Chairwoman Debbie Ehrlenbach’s statement in the Aug. 31 article is as follows: “We are pleased with the plans that Maine Coast’s senior leadership has developed, working in partnership with EMHS, to ensure we will have sufficient physician coverage to continue to deliver high-quality care for residents at Ellsworth and other Downeast communities.” This sounds like complete allegiance to EMHS. What happened to loyalty to our local hospital, staff and the patients and communities that have benefited by the consistent, dedicated, experienced care given by trusted local doctors?

After I wrote the above paragraphs in a letter to *The American*, yet another article about MCMH was published in the Sept. 7 edition with the front page headline “MCMH nurses cite staffing in petition.” I have to applaud the nurses for going public with their valid concerns of inadequate, unsafe staffing levels. The nurses followed the proper internal procedures for voicing their concerns in the grievance process, but little changed. Hospital management who work out of their offices and have meeting after meeting and who are not working where patients are being cared for, but who then make decisions about staffing levels should be listening to those who are actually caring for patients. Nurses at MCMH have valid reasons to be concerned about patient safety, and management needs to make the necessary changes.

The Sept. 14 editorial “We need a healthy hospital” pointed out that unions have helped improve salaries of both unionized nurses and teachers and that this brings about increased tensions with

management because the unions want better pay, working conditions, etc. for their members. The implication is that nurses getting a fair wage is a driver of increased health care costs, but your editorial is very deficient in analyzing the reasons why health care is so expensive. This topic would be better accomplished in an article of facts, not in an editorial opinion. Nurses and teachers have traditionally been mostly women and this continues to be true nationwide. Women continue to earn less than men (gender pay gap does exist). Maine nurses' and teachers' average salaries are lower than the national average. But salaries are not the issue in the MCMH nurses' current position. The MCMH nurses are using their strength in numbers in order to voice their valid concerns about patient safety that is at risk because of inadequate staffing levels.

Nurses and other staff leave and are not replaced. Frustrated doctors leave and more expensive locums fill in temporarily until other expensive temporary locums arrive, driving costs up further. And management keeps going to their meetings or are in their offices in their administrative building, far from the doctors and nurses and other staff who are working on the Med/Surg floor, ICU, operating rooms, Emergency Department, maternity, etc.

No wonder there is unrest and uncertainty at our hospital.

Karen Jo Young
[Corea, Maine]

(D&O 10-11; A. 365.)

G. The Employer Discharges Young Solely for Writing Her Letter to the Newspaper

On the same day that Young's letter appeared in the print edition of *The Ellsworth American*, hospital president Ronan met with other Eastern Maine Healthcare Systems officials to discuss the letter, after which the Employer decided to discharge Young. (D&O 11-12; A. 155-58, 194-95, 209, 379.) The

Employer called Young into a meeting several hours later and informed her that she was being discharged. (D&O 12; A. 16, 57-58, 366.) The Employer's sole basis for discharging Young was her letter to the editor and its violation of the Employer's media policy. (D&O 11-12; A. 71, 366.)

H. Young Files Unfair-Labor-Practice Charges; the Board's General Counsel Issues a Consolidated Complaint, Which Is Amended at the Subsequent Hearing

In October 2017, Young filed an unfair-labor-practice charge with the Board's General Counsel, which was subsequently amended and supplemented with a second charge. (A. 320-25.) In June 2018, the Board's General Counsel issued an amended consolidated complaint alleging that the Employer violated the Act by discharging Young and by maintaining overbroad media policies. (A. 338-45.) An administrative law judge held a two-day evidentiary hearing in July 2018. (D&O 6.) On the second day of the hearing, counsel for the Board's General Counsel made an oral motion to amend the complaint to clarify that the respondent included Eastern Maine Healthcare Systems. (A. 222-30.) Following off-the-record discussions, counsel for the Employer informed the judge that the Employer consented to the Board General Counsel's motion. (A. 316-17.) The judge granted the unopposed motion to amend the complaint to clarify the inclusion of Eastern Maine Healthcare Systems and to designate the respondent as "Maine Coast Regional Health Facilities, d/b/a Maine Coast Memorial Hospital, the sole

member of which is Eastern Maine Healthcare Systems.” (A. 316-17.) In November 2018, the administrative law judge issued a recommended decision and order finding that the Employer violated the Act as alleged. (D&O 6-20.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On March 30, 2020, the Board (Chairman Ring, and Members Kaplan and Emanuel) issued a Decision and Order affirming the judge in relevant part and finding that the Employer violated Section 8(a)(1) and Section 8(a)(3) of the Act by discharging Young for writing her statutorily protected letter, and that the Employer violated Section 8(a)(1) by maintaining an unlawfully overbroad media policy. (D&O 1-3.) The Board reversed the judge’s separate finding—not before the Court on review—that the Employer also violated Section 8(a)(1) by maintaining a revised version of its media policy. (D&O 2-3.)

The Board’s Order requires the Employer to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights.

(D&O 4.) Affirmatively, the Board’s Order requires the Employer to: advise employees that the unlawful media policy will not be used to discipline them for contacting the media regarding terms and conditions of employment or union activity; offer Young full reinstatement to her former job or a substantially equivalent position; make Young whole for any loss of earnings and other benefits,

including adverse tax consequences; remove from its files any reference to Young's unlawful discharge and notify her in writing that the discharge will not be used against her; post a remedial notice at its Ellsworth, Maine facility; and post an alternative remedial notice, limited to addressing the unlawful media policy, at other facilities where that policy may have been circulated. (D&O 4-6.)

SUMMARY OF ARGUMENT

The primary issue before the Court is whether the Board reasonably found that the Employer violated the Act by discharging a longtime employee, Karen-Jo Young, after she wrote a letter to the editor of the local newspaper discussing work-related concerns shared by herself and her coworkers, and expressing support for the concerted actions of her coworkers and their union in protesting perceived staffing shortages. Substantial evidence and well-established precedent support the Board's straightforward findings that Young's letter constituted protected concerted activity, that it also constituted protected union activity, that it did not lose the protection of the Act due to its mild criticisms of the Employer, and that it was the Employer's admitted sole reason for terminating Young's employment. Thus, substantial evidence and well-established precedent support the Board's ultimate findings that the Employer violated Section 8(a)(1) of the Act by discharging Young for engaging in protected concerted activity, and Section 8(a)(3) of the Act by discharging her for engaging in protected union activity.

On review, the Employer raises a series of meritless arguments that indicate its disagreement with the conclusions reached by the Board, but that do not in any way undermine the Board's amply supported findings or legal analysis. Many of the Employer's arguments are premised on misconstructions of Board law that were long ago conclusively rejected by the Supreme Court, including the Employer's mistaken contentions: that a single employee cannot engage in statutorily protected conduct without the authorization or participation of others; that a violation of Section 8(a)(3) requires specific proof of an actual adverse impact on union activity; and that a violation of Section 8(a)(3) requires proof of a subjective antiunion purpose beyond an employer's admitted intent to discipline an employee solely for union conduct that the Board finds was protected by the Act. In general, the Employer has failed to establish that the Board's findings in the present case are irrational, inconsistent with the Act, unsupported by evidence sufficient to satisfy a reasonable factfinder, or otherwise not entitled to deference.

The Employer has also failed to call into question the Board's separate finding that the Employer violated Section 8(a)(1) by maintaining an overbroad media policy. That policy, by its plain terms, prohibited employees from contacting the media regarding any issue involving the Employer, which necessarily included efforts to publicize work-related disputes. The Employer's lone argument with respect to such finding is premised on its overarching

contention that Young was not engaged in protected conduct. However, even assuming that Young had not been engaged in protected conduct, the Employer has failed to confront or rebut the Board’s detailed analysis of the media policy and balancing of the interests involved, or the Board’s conclusion that the Employer’s mere maintenance of the policy, as written, unlawfully burdened employees’ statutory rights in violation of the Act.

Finally, there is no merit to the Employer’s procedural objections to the inclusion of Eastern Maine Healthcare Systems in the Board’s Order, and to an anodyne portion of the Board’s Order requiring notice postings at all Eastern Maine Healthcare Systems facilities where the unlawful media policy was in effect—and where, as a result, the policy unlawfully interfered with employees’ statutory rights. Contrary to the Employer, the respondent before the Board included Eastern Maine Healthcare Systems. Indeed, counsel for the Employer actively consented to a motion at the unfair-labor-practice hearing clarifying the identity of the respondent to include Eastern Maine Healthcare Systems for the purposes of any resulting remedial order.

STANDARD OF REVIEW

As the Board bears primary responsibility “for developing and applying a coherent national labor policy,” the Court affords “considerable deference” to the Board’s decisions. *NLRB v. Bos. Dist. Council of Carpenters*, 80 F.3d 662, 665

(1st Cir. 1996). The Court will uphold the Board’s conclusions of law as long as the Board’s interpretations of the Act are “reasonably defensible.” *McGaw of P.R., Inc. v. NLRB*, 135 F.3d 1, 7 (1st Cir. 1997). The Court will enforce a Board order “if the Board correctly applied the law and if its factual findings are supported by substantial evidence on the record.” *Quality Health Servs. of P.R., Inc. v. NLRB*, 873 F.3d 375, 384 (1st Cir. 2017); *see* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (holding that the Board’s findings “shall be conclusive” if supported by substantial evidence). If there is evidence that a “reasonable mind might accept as adequate to support the conclusion,” the Court “will not substitute its judgment for the Board’s,” or displace the Board’s choice “between two fairly conflicting views,” even if the Court “would justifiably have made a different choice” in the first instance. *Quality Health*, 873 F.3d at 384.

ARGUMENT

I. The Employer Violated Both Section 8(a)(1) and Section 8(a)(3) of the Act by Discharging Young for Her Statutorily Protected Conduct

Section 7 of the Act guarantees employees the right “to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid or protection.” 29 U.S.C. § 157.

Pursuant to Section 7, employees are thus guaranteed the right to engage in both “protected concerted activities” and “protected union activities.” *See, e.g., Entergy Nuclear Operations, Inc.*, 367 NLRB No. 135, 2019 WL 2212130, at *1 n.1 (May

21, 2019) (noting that an employee’s conduct may constitute both protected concerted and protected union activity); *Farm Fresh Co.*, 361 NLRB 848, 848 n.2, 861-64 (2014) (same). Those protections extend to channels outside the immediate employee-employer relationship, including employee communications to the public or other outside third parties. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-67 (1978); *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 640-41 (1st Cir. 1982). However, an employee’s outside communications may lose the protection of the Act if sufficiently disloyal or disparaging. *NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers*, 346 U.S. 464, 477-78 (1953) (“*Jefferson Standard*”); *Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 52 (1st Cir. 2008).

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” 29 U.S.C. § 158(a)(1). An employer thus violates Section 8(a)(1) by discharging or otherwise disciplining an employee for engaging in protected concerted activity. *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002), *enforced*, 63 F. App’x 524 (D.C. Cir. 2003). Where an employer admittedly discharged or disciplined an employee for engaging in particular conduct alleged to be protected concerted activity, the sole issue before the Board is whether that conduct was ultimately protected by the Act. *Id.*; *Mast Adver. & Publ’g, Inc.*, 304 NLRB 819, 819-20 (1991).

Similarly, Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against employees in order to “encourage or discourage” union activity. 29 U.S.C. § 158(a)(3). An employer violates Section 8(a)(3) by discharging or otherwise disciplining an employee for engaging in protected union activity, and the requisite antiunion motive for a Section 8(a)(3) violation is established where an employer admittedly discharged or otherwise disciplined an employee solely for conduct that the Board finds to be protected union activity. *Rocky Mountain Eye Ctr.*, 363 NLRB No. 34, 2015 WL 6735641, at *1 n.1 (Nov. 3, 2015); *Reliant Energy*, 357 NLRB 2098, 2099 (2011); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611-12 (2000).³

There is no dispute in the present case that the Employer discharged Young solely for writing her letter to *The Ellsworth American*. As a result, the only material issues before the Court are whether substantial evidence supports the Board’s findings that Young’s letter was protected by Section 7 and that the contents of the letter did not cause it lose the protection of the Act. The Employer does not challenge the Board’s latter finding on review and, as demonstrated below, substantial evidence and well-settled precedent support the Board’s findings that Young’s letter constituted both protected concerted activity and protected union activity. Thus, substantial evidence supports the Board’s ultimate

³ A violation of Section 8(a)(3) also results in a derivative violation of Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

findings that the Employer violated both Section 8(a)(1) and Section 8(a)(3) by discharging Young, and the Employer's arguments to the contrary are meritless.

A. Young's Letter to the Editor Supporting Her Coworkers' Actions Constituted Protected Concerted Activity

For an employee's nonunion conduct to be protected under Section 7 of the Act, it must be both "concerted" and engaged in for purposes of "mutual aid or protection." 29 U.S.C. § 157; *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 152-53 (2014). There is no dispute in the present case that Young's letter addressed employees' terms and conditions of employment as well as an ongoing dispute between employees and the Employer, and that it therefore fell within the scope of "mutual aid or protection." (D&O 12-13.) See *Fresh & Easy*, 361 NLRB at 153 (explaining that the concept of "mutual aid or protection" focuses on whether employees are seeking to "improve their lot as employees"). As shown below, the Board reasonably found that Young's letter was also "concerted" within the meaning of the Act and pursuant to well-settled precedent.

The Board's established standard for determining whether employee conduct is "concerted" was first set forth in its decisions in *Meyers I* and *Meyers II*, which held that the concept of concerted activity should be understood in terms of "individuals united in pursuit of a common goal." *Meyers Indus.*, 268 NLRB 493, 493 (1984) ("*Meyers I*"), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), supplemented, *Meyers Indus.*, 281 NLRB 882 (1986) ("*Meyers II*"),

affirmed sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987). The Board overruled precedent that, in its view, had improperly extended the definition of concerted activity to include solitary employee conduct as long as it merely addressed an issue “about which employees *ought* to have a group concern.” *Meyers I*, 268 NLRB at 495.

Pursuant to the Board’s *Meyers* standard, there must be “some linkage to group action in order for conduct to be deemed ‘concerted’ within the meaning of Section 7.” *Meyers II*, 281 NLRB at 884; *see Fresh & Easy*, 361 NLRB at 153. Thus, for example, an employee’s actions are concerted if they are “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself,” if they “seek to initiate or to induce or to prepare for group action,” or if they address “truly group complaints” shared by other employees. *Meyers II*, 281 NLRB at 885-87. The Board’s inquiry ultimately turns on whether the employee’s actions bear “some relation to group action in the interest of the employees.” *Meyers II*, 281 NLRB at 887 (quoting *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)); *accord NLRB v. Portland Airport Limousine Co.*, 163 F.3d 662, 666 (1st Cir. 1998).

Substantial evidence supports the Board’s finding that Young’s letter constituted concerted activity. (D&O 12-13.) Both the Board and this Court have consistently held that employees engage in concerted activity when they

individually undertake to publicize work-related concerns shared by coworkers. *See, e.g., Mount Desert Island Hosp.*, 695 F.2d at 639-40 (affirming that employee engaged in concerted activity by writing letter to newspaper based on concerns previously discussed with coworkers); *Allstate Ins. Co.*, 332 NLRB 759, 767 (2000) (finding that employee engaged in concerted activity by speaking to magazine about concerns previously discussed with other employees); *Reading Hosp. & Med. Ctr.*, 226 NLRB 611, 612 (1976) (finding that employee engaged in concerted activity by suggesting she might write letter to local newspaper following discussion of shared concerns with coworkers), *enforced mem.*, 562 F.2d 42 (3d Cir. 1977). As the Board found here, Young was “party to prior discussions with other employees regarding their concerns over the staffing shortages and physician resignations that she discussed in her letter.” (D&O 13.) Young testified without contradiction that, for example, she regularly interacted with nurses as part of her daily work, and that the nurses she worked with “every day would say . . . they had way too many patients.” (A. 38-41.) Young also testified that she spoke with coworkers about the physician departures referenced in her letter, and that “it was very upsetting for everybody.” (A. 28, 30-31.)⁴

⁴ The Employer’s subjective interpretation of Young’s testimony and its assertion that she merely “overhear[d]” such discussions, rather than being a participant in them (Br. 18-19), is contrary to Young’s testimony in context and, in any event, not compelled by the record evidence. *See Quality Health*, 873 F.3d at 384 (noting deference afforded to Board’s choice between “two fairly conflicting views”). Nor

Moreover, even assuming that Young herself had *not* had any prior discussions with coworkers, the Board emphasized that her letter was plainly concerted insofar as it was an overt attempt at “joining forces” with and “arguing in support of the observations and objectives” of the group petition already circulated and presented to the Employer by the bargaining-unit nurses. (D&O 13.) As the Board found, the nurses’ petition was “indisputably concerted activity” and, under established law, Young’s expression of support and solidarity with that group action was therefore also concerted, regardless of whether she had spoken to or received preclearance from the nurses themselves. (D&O 13.) *See, e.g., NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 785-86 (8th Cir. 2013) (affirming that individual employee engaged in concerted activity by unilaterally contacting third-party vendor regarding issue that other employees had discussed during earlier group meeting); *Five Star Transp.*, 522 F.3d at 51-52 (affirming that employees engaged in concerted activity by independently writing letters to school district following group meeting where shared concerns were discussed). Indeed, Young’s letter was no less a concerted action than if she had simply signed her name to the group petition, which would have undoubtedly constituted concerted activity whether or not she had discussed signing her name with another coworker

would the claim that Young was a passive listener alter the Board’s analysis that she was party to shared concerns about hospital staffing. *Meyers II*, 281 NLRB at 887 (explaining that the relevant concertedness inquiry is whether an individual employee was raising “truly group complaints”).

first. Under the circumstances of the present case, it is readily apparent that Young's letter to the editor bore at least "some relation" to group action involving other employees. *Meyers II*, 281 NLRB at 887.⁵

The Employer's contention that Young's letter was not "concerted" within the meaning of the Act (Br. 37-47) is based on a misconstruction of well-settled precedent. Selectively quoting in part from the Board's decision in *Meyers I*, the Employer first implies that Young must have received express "authorization" from coworkers before her letter may be deemed concerted (Br. 37-39, 45-47), and that conduct is concerted "*only if*" engaged in with or on the authority of other employees (Br. 38-39). Such a narrow reading of concertedness is contrary to established law. Congress did not intend to limit the statutory protection for "concerted" activities to "situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984).

In *Meyers II*, the Board explained that there is "nothing in the *Meyers I* definition that states that conduct engaged in by a single employee at one point in time" cannot constitute concerted activity. 281 NLRB at 885; *see also Meyers I*,

⁵ The Employer's objection (Br. 39-40) to the hearsay content of articles in evidence from *The Ellsworth American* is frivolous, as the Board did not rely on the content of the newspaper reporting in making its findings of fact. The Employer's own witnesses testified to the existence of the underlying workplace disputes and the collective grievances of the physicians and bargaining-unit nurses.

268 NLRB at 496-97 (cautioning that the definition of concerted activity set forth therein was “by no means exhaustive”). The Board has unambiguously clarified that, pursuant to its *Meyers* standard, it is “immaterial that [an employee] was not following express instructions from other employees.” *Every Woman’s Place, Inc.*, 282 NLRB 413, 413 (1986), *enforced*, 833 F.2d 1012 (6th Cir. 1987) (unpublished). Where there is evidence of a genuine shared complaint, the Board does not “require evidence of formal authorization in order to find that steps taken by individuals in furtherance of the group’s goals are a continuation of activity protected by Section 7.” *Id.*⁶

The Employer acknowledges in passing that actions by an individual employee involving “truly group complaints” may constitute concerted activity (Br. 38, 39 n.15), but in doing so the Employer again misconstrues the law by adopting an overly literal interpretation of one sentence from the Board’s decision in *Meyers II* regarding group complaints brought “to the attention of management,” 281 NLRB at 887. It is equally well established, and beyond dispute, that employees also have a statutory right to engage in protected concerted activities

⁶ Moreover, Young’s letter directly followed a publicized petition from the bargaining-unit nurses soliciting support for their staffing-related complaints. Such facts clearly distinguish this case from a case such as *Mannington Mills*, 272 NLRB 176 (1984), cited by the Employer (Br. 45-46), in which the Board found that an employee was not engaged in concerted activity because he acted “solely by and on behalf of himself” when unilaterally threatening a work stoppage despite the lack of any “awareness on the part of [his coworkers]” of the threatened action involving them, *Meyers II*, 281 NLRB at 886 (clarifying *Mannington Mills*).

directed at third parties outside the immediate employee-employer relationship. *Eastex*, 437 U.S. at 565-67; e.g., *Mount Desert Island Hosp.*, 695 F.2d at 640-41 (letter to newspaper). Simply put, the Employer’s arguments are based on its own subjective interpretation of Board law and of what it believes should constitute concerted activity—an interpretation which is contrary to decades of uniform precedent, and which in practice would significantly undermine the rights guaranteed to employees by federal law.

Indeed, in *Mount Desert Island Hospital*, this Court rejected an employer’s substantially similar arguments that an individual employee was not engaged in concerted activity when he sent a letter to the editor of the local newspaper voicing his concerns about working conditions and management at the hospital where he worked. 695 F.2d at 636. The Court found “ample support” for the Board’s concertedness finding despite the fact that the employee in question neither presented his letter to coworkers nor discussed it with them before sending it to the local newspaper. *Id.* at 639. Reciting facts that mirror those of the present case, the Court observed that the employee had generally discussed the working conditions at issue with coworkers, that his letter explicitly referenced “the plight of fellow workers” at the hospital, and that his letter bore at least “some relation” to group action. *Id.* at 639-40. The Court held that the relevant inquiry is

ultimately whether the employee had the “welfare of others in mind,” even if his specific conduct was “not endorsed in advance by other employees.” *Id.* at 640.

Likewise, the Court rejected substantially similar arguments in *Five Star Transportation*. 522 F.3d at 51-52. That case involved individual letters sent to a local school district by bus drivers expressing their concerns about the terms of employment that would be instituted by the employer if it was awarded a busing contract. *Id.* at 49. The letters were prompted in part by a group meeting at which a union representative urged the drivers to write to the school district, but there was no evidence that the individual drivers coordinated their letters with each other or discussed them prior to sending. *Id.* at 48-49. On review, the employer argued that the employees were not engaged in concerted activities when sending their individual letters. *Id.* at 51. Affirming the Board’s contrary finding, the Court recognized that the “critical inquiry is not whether an employee acted individually, but rather whether the employee’s actions were in furtherance of a group concern.” *Id.* (citing *Meyers II*, 281 NLRB at 885-87). The Court held that such inquiry was satisfied where the individual employees’ letters raised genuine “group complaints” and discussed the “same concerns” previously identified by other employees, irrespective of the lack of evidence that the letter writers in particular had actively discussed the matter with each other or with anyone else. *Id.*

The Employer relies in part (Br. 37-38) on the Court's opinion in *Portland Airport Limousine*, but that case does not support the Employer's position. The Court held in that case that an individual employee was not engaged in concerted activity when he told a coworker that he did not want to drive his own truck due to a potential safety issue and that he was taking the coworker's truck instead. 163 F.3d at 663. Reversing the Board, the Court concluded that the employee's isolated statement constituted "mere griping" bearing no discernable relation to group action, *id.* at 667-68, and that his statement was selfishly motivated and was "made by himself and for himself alone," *id.* at 666 (quoting *Meyers I*, 268 NLRB at 501). The facts of the present case are readily distinguishable. Given Young's prior discussions with coworkers, the previous actions of the hospital physicians, the various protests by the bargaining-unit nurses, and the existence of the nurses' petition, there can be little dispute that Young's letter directly addressed "truly group complaints," *id.* at 665 (quoting *Meyers II*, 281 NLRB at 887), that it was an attempt to "join forces" with other employees regarding shared concerns, *id.* at 666 (quoting *Meyers II*, 281 NLRB at 887 n.10), and that it did not involve the sort of personal "griping" excluded from the coverage of the Act, *id.* at 667-68.

As the Board found, "[n]o reasonable reading of Young's letter permits the conclusion that it reflects solely Young's individual concerns about her own working conditions, and not those of other employees including nurses and

physicians.” (D&O 13.) Instead, substantial evidence supports the Board’s finding that Young’s letter was an attempt to act together “with the signers of the petition, the departing physicians, and other employees in the common endeavor of seeking improvements to working conditions at [the hospital].” (D&O 13.) Thus, the Board reasonably found that Young’s letter constituted protected concerted activity within the meaning of the Act. (D&O 12-13.)

B. Young’s Letter to the Editor Supporting the Position of the Union Also Constituted Protected Union Activity

The Section 7 right of employees to “assist labor organizations,” 29 U.S.C. § 157, includes the right of an employee to make common cause with, or otherwise support the actions of, a union or unionized coworkers—even if that employee is not a member of the bargaining unit. *E.g.*, *Pride Ambulance Co.*, 356 NLRB 1023, 1023-24, 1036-40 (2011) (finding that non-bargaining-unit employee engaged in protected union activity by refusing to perform work of striking bargaining-unit employees); *Beth Israel Med. Ctr.*, 292 NLRB 497, 497-98 (1989) (finding protected union activity where non-bargaining-unit employee refused to cross union picket line). Of particular relevance here, non-bargaining-unit employees may engage in protected union activity by openly expressing support for union activities engaged in by other employees. *E.g.*, *Nor-Cal Beverage*, 330 NLRB at 611-12 (finding protected union activity where employee urged coworkers to support striking employees in different bargaining unit); *Signal Oil & Gas Co.*,

160 NLRB 644, 646-49 (1966) (finding that non-bargaining-unit employee engaged in protected union activity by expressing approval of potential strike by union), *enforced*, 390 F.2d 338, 342-44 (9th Cir. 1968).

Substantial evidence supports the Board’s finding that Young’s letter constituted protected union activity. (D&O 13.) As the Board explained, Young’s letter “gave support to the Union by arguing in favor of the observations and objectives of the petition that union representatives had submitted to [the Employer] and arguing more generally in support of union efforts to secure better working conditions for hospital workers.” (D&O 13.) Young’s letter specifically referenced a recent front-page article in *The Ellsworth American* about the Union’s petition, before “applaud[ing] the nurses for going public,” confirming their “valid concerns” about staffing levels, and urging the Employer to “make the necessary changes” being advocated by the Union. (A. 365.) In response to a recent editorial in *The Ellsworth American*, Young’s letter also defended unionization and the role of unions more broadly, and once again expressed her support for the Union and the nurses’ decision to use their “strength in numbers” to publicize their concerns about inadequate staffing levels. (A. 365.)

Contrary to the Employer (Br. 46-47 & n.17), the absence of a specific finding of concertedness would not remove Young’s *union* activity from the protection of the Act, because “the protection afforded by Section 7 [for union

activity] is absolute and not contingent on a showing that the victim of coercion had made or intended to make common cause with other employees.” *Int’l Bhd. of Elec. Workers, Local Union No. 596*, 274 NLRB 1348, 1351 (1985). Nor is there any legal basis for the Employer’s suggestion that Young must have affirmatively “met with the Union” or spoken “to a Union representative” first. (Br. 36.) As the Supreme Court has conclusively held, Section 7 “defines both joining and assisting labor organizations” as “concerted” activities, and those forms of protected union activities remain “concerted” even though they are “activities in which a single employee can engage.” *City Disposal*, 465 U.S. at 830-33.

Accordingly, the Board and the courts have consistently recognized that an employee’s union activity, such as lending support to a union or advocating in favor of a union, is necessarily concerted within the meaning of the Act “without regard to the fact that [the employee] may have acted alone.” *C.S. Telecom, Inc.*, 336 NLRB 1193, 1193-94 & n.3 (2001); *e.g.*, *Randolph Div., Ethan Allen, Inc. v. NLRB*, 513 F.2d 706, 708-09 (1st Cir. 1975) (individual employee’s expression of pro-union sentiments to manager); *Manno Elec., Inc.*, 321 NLRB 278, 281 (1996) (individual employee’s job action protesting perceived discrimination against union), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997). Even as a non-bargaining-unit employee, Young was entitled to lend her support to the Union’s cause, and the right to engage in union activity guaranteed by Section 7 is not dependent on the

participation or consent of a union official. *E.g., Ethan Allen, Inc.*, 513 F.2d at 708-09; *Signal Oil*, 160 NLRB at 646-49; *cf. City Disposal*, 465 U.S. at 830-33.

In any event, the Employer's argument also fails given that, as detailed above, pp. 21-30, Young's union activity in this case was plainly undertaken in concert with other employees, and given that her letter had the overt purpose of supporting the actions of the Union. (D&O 12-13.) Thus, although a specific finding of concertedness is not a separate requirement for union activity to be protected, the present case is even more straightforward than those cases involving isolated employees engaging in union activity absent any relation to concrete group action involving a union or other employees. *Cf. Ethan Allen, Inc.*, 513 F.2d at 708-09 (affirming that employer violated Section 8(a)(3) by discharging individual employee for expressing pro-union views). In sum, the Board reasonably found that Young's letter separately constituted protected union activity. (D&O 12-13.)

C. The Content of Young's Letter Did Not Cause It To Lose the Protection of the Act

As noted, the Supreme Court has held that an employee's otherwise-protected communications to the public referencing a work-related dispute may lose the protection of the Act in certain circumstances. *Jefferson Standard*, 346 U.S. at 477-78. Under the Board's framework implementing *Jefferson Standard*, as affirmed by this Court, such communications remain protected unless "so disloyal, reckless or maliciously untrue as to lose the Act's protection." *Five*

Star Transp., 522 F.3d at 52 (quoting *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000), *affirmed sub nom. Jensen v. NLRB*, 86 F. App'x 305 (9th Cir. 2004)). Having found that Young's letter constituted both protected concerted activity and protected union activity, the Board further found that no portion of the letter caused it to forfeit the protection of the Act pursuant to that framework. (D&O 12-16.) The Employer does not challenge the Board's *Jefferson Standard* analysis in its opening brief, and it has therefore waived any objection to the Board's findings on that issue before the Court. *NLRB v. Hotel Emps. & Rest. Emps. Int'l Union Local 26*, 446 F.3d 200, 206 (1st Cir. 2006) (holding that a party waives an argument "by failing to raise it in her opening brief on appeal"); *see also, e.g., Moffat v. U.S. Dep't of Justice*, 716 F.3d 244, 255 (1st Cir. 2013) (noting "few principles more securely settled" than principle that parties "cannot raise an argument for the first time in a reply brief").

In any event, substantial evidence supports the Board's reasonable finding that Young's letter was a "measured response" to the workplace concerns shared by her and her coworkers at the hospital, and that the content of the letter "does not even begin to approach" the standard that would cause it to forfeit the protection of the Act. (D&O 12-16.) In particular, the Board found that no portion of Young's letter was deliberately false, unduly disloyal, or designed "to impugn [the Employer's] operation or to harm [the Employer's] reputation . . . rather [than] to

encourage improvements to working conditions.” (D&O 13-16.) The Board’s conclusion is supported by a wealth of precedent involving similar employee communications to outside third parties criticizing an employer or its officials and attempting to publicize work-related concerns. (D&O 12-16.) *E.g.*, *Mount Desert Island Hosp.*, 695 F.2d at 636 n.1, 640-41 (affirming protected status of public letter which expressed concerns about impact of hospital staffing levels on “patient care” and “safety standards,” and which criticized hospital management for having “lost touch with the real work of the hospital”).

D. The Protected Letter Was the Employer’s Admitted Sole Reason for Discharging Young

As shown above, substantial evidence supports the Board’s findings that Young’s letter to *The Ellsworth American* constituted both protected concerted activity and protected union activity within the meaning of Section 7 of the Act, and that no portion of the letter caused it to lose the protection of the Act. There is no dispute that the Employer discharged Young solely for writing her letter to the editor, and thus, as the Board found, for engaging in statutorily protected conduct. Accordingly, substantial evidence supports the Board’s findings that the Employer violated both Section 8(a)(1) and Section 8(a)(3) of the Act by discharging Young, and no further inquiry into the Employer’s subjective motive is necessary to establish either violation. (D&O 1-2, 12-16.) *Phoenix Transit*, 337 NLRB at 510 (finding Section 8(a)(1) violation and holding mixed-motive analysis inapposite

where it was undisputed that employer discharged employee for writing newsletter articles which Board found to be protected concerted activity); *Nor-Cal Beverage*, 330 NLRB at 611-12 (finding Section 8(a)(3) violation and holding mixed-motive analysis inapposite where there was undisputed causal connection between discipline and actions which Board found to be protected union activity).⁷

E. The Employer’s Remaining Objections to the Board’s Unlawful-Discharge Findings Misconstrue the Law

The Employer’s only remaining arguments regarding Young’s unlawful discharge are without merit. The Employer first challenges the Board’s distinct finding of a Section 8(a)(3) violation on the grounds that the text of the statute requires proof that the decision to discharge Young resulted in an actual “discouragement of union membership” (Br. 29), and proof that the Employer’s decision was subjectively “motivated by an antiunion purpose” (Br. 30-31). The Employer’s arguments once again misconstrue settled law. The Supreme Court long ago rejected the proposition that a violation of Section 8(a)(3) requires either specific proof of “actual” discouragement of union activities resulting from an

⁷ The Board’s finding that Young’s letter constituted protected union activity provides an alternative basis for the Board’s conclusion that the Employer violated Section 8(a)(1) by discharging Young—even assuming, *arguendo*, that Young’s letter did not also constitute protected concerted activity. *Metro. Edison*, 460 U.S. at 698 n.3 (noting that a Section 8(a)(3) violation results in a derivative Section 8(a)(1) violation); *see, e.g., Alle Processing Corp.*, 369 NLRB No. 52, 2020 WL 1660064, at *1 n.1 (Apr. 2, 2020) (finding violation of Section 8(a)(3) and (1) where discharged employee engaged in protected union activity, without passing on whether employee’s conduct also constituted protected concerted activity).

employer's discrimination against protected union conduct, or proof that an employer's discriminatory actions were "motivated by opposition to [a] particular union" or to "unionism" in general. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 44-46, 48-52 (1954). An adverse impact on union activity is the obvious and foreseeable consequence of discharging an employee for engaging in statutorily protected union conduct, and an employer may not escape unfair-labor-practice liability by alleging that its retaliation against protected conduct carried some ulterior motive, such as uniformly enforcing a neutral workplace policy. *Id.*; *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945); *see also NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 16 (1962).

Thus, the Supreme Court has squarely held that "if the employer fires an employee for having engaged in union activities and has no other basis for the discharge . . . the employer commits an unfair labor practice" in violation of Section 8(a)(3). *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 398 (1983) (noting paradigmatic violation before going on to affirm the Board's framework for evaluating mixed-motive cases). Where, as in the present case, there is no dispute that an employer discharged an employee for particular conduct, the sole issue is whether that conduct was protected by the Act. *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1251 n.5 (2007), *enforced sub nom. Nev. Serv. Emps. Union, Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009); *see also, e.g., RELCO*

Locomotives, 734 F.3d at 785 (“When the employer’s admitted motivation encompasses protected labor activity, the employer has in effect admitted [a violation], and there is no need to proceed with [a mixed-motive] analysis.”).

Contrary to the Employer (Br. 29-31), the framework set forth by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-35 (1967), is inapposite. That framework is generally used to infer an unlawful motive from employer actions that have a discriminatory impact in the absence of direct evidence of an unlawful intent to discriminate against union activities. *Id.* However, such inquiry is unnecessary in the context of an unlawful-discharge allegation where the evidence shows that “the employee’s protected conduct was a substantial or motivating factor” in the employer’s decision to discharge the employee. *Transp Mgmt.*, 462 U.S. at 401; *see Radio Officers’ Union*, 347 U.S. at 45 & n.53 (explaining that “proof of certain types of discrimination,” including the discharge of an employee for engaging in protected conduct, “satisfies the intent requirement”). Here, there is no dispute that Young’s letter was the sole basis for the Employer’s decision to discharge her. Moreover, even assuming that the *Great Dane Trailers* framework were apposite, it is beyond cavil that discharging an employee for engaging in protected union conduct is inherently destructive of the right of employees to engage in such conduct. *See Signal Oil*, 390 F.2d at 343-44.

Lastly, there is no merit to the Employer’s suggestion (Br. 47-49) that the Court should remand the present case to the Board “for further proceedings” in light of the Board’s recent decision in *General Motors LLC*, 369 NLRB No. 127, 2020 WL 4193017 (July 21, 2020). The Board’s decision in that case has no bearing on its legal analysis in the present case or the final order on review. In *General Motors*, the Board revisited several distinct lines of cases, none of which are implicated here, involving “setting-specific standards” applicable to abusive employee conduct in the course of: (i) outbursts toward management in the workplace; (ii) conversations among employees in the workplace and, by analogy, social-media posts; and (iii) misconduct on union picket lines. 2020 WL 4193017, at *1, *6-10 (citing *Atl. Steel Co.*, 245 NLRB 814 (1979), *Pier Sixty, LLC*, 362 NLRB 505 (2015), and *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984)). The Board revisited those setting-specific standards out of recognition of employers’ valid interests in preventing abusive conduct, such as profane ad hominem attacks or racial slurs, “in the workplace.” *Id.* at *1, *14. It is in that context that the Board concluded that Section 7 activity should no longer be considered “analytically inseparable from abusive conduct” (Br. 48), in order to afford employers the ability to maintain “a workplace free from invidious discrimination,” *id.* at *12.

By contrast, the Board in *General Motors* did not revisit the distinct *Jefferson Standard* framework that it applied to assess Young’s letter in the present case. To the contrary, the Board explicitly noted that its decision does *not* affect that framework for evaluating whether an employee’s otherwise-protected communications to outside third parties have lost the protection of the Act due to particular content deemed disparaging or disloyal. *Gen. Motors*, 2020 WL 4193017, at *9 n.16 (clarifying that the *Jefferson Standard* framework and related precedent addressing claims of disparagement or disloyalty are “beyond [the] scope” of its decision); *see also id.* at *16 n.25 (recognizing that *Jefferson Standard* already provides a parallel framework for resolving the type of concerns identified by the Board in *General Motors*).

In any event, the Employer’s argument also fails for the simple reason that the portions of Young’s letter it now attempts to reframe as “abusive” and unprotected (Br. 23-24, 47-49) are statutorily protected under any theory. Young’s mild criticisms—that hospital management was out of touch with day-to-day operations, and that the board chairwoman showed more allegiance to Eastern Maine Healthcare Systems than to the hospital staff—directly related to the core of her work-related concerns, her support for the nurses’ petition, and her statutory right to raise such issues with outside third parties. (D&O 15-16 & n.14.) *See Mount Desert Island Hosp.*, 695 F.2d at 641 (noting that employee’s protected

“criticism of the Hospital’s administration was intertwined inextricably with complaints of working conditions”). In other words, this is not a case in which Young’s protected criticisms of the Employer were interspersed with gratuitous or unrelated attacks, or for which the concept of misconduct committed during the “res gestae” of a protected course of action is germane. As a result, the Employer’s argument merely reinforces the Board’s finding that the Employer discharged Young solely for protected conduct.

In sum, substantial evidence and well-established precedent support the Board’s findings that the Employer violated both Section 8(a)(1) and Section 8(a)(3) of the Act by discharging Young for engaging in statutorily protected conduct. At the very least, the Board “acted well within the bounds of its considerable discretion,” *Bos. Dist. Council*, 80 F.3d at 667, and the Employer has failed to demonstrate that the Board’s findings are irrational, inconsistent with the Act, or unsupported by record evidence that a “reasonable mind might accept as adequate,” *Quality Health*, 873 F.3d at 384.⁸

⁸ Given the Board’s amply supported findings that the Employer violated the Act by discharging Young for engaging in protected conduct, the Board did not reach the alternative allegation that the Employer violated the Act by discharging Young pursuant to its unlawfully overbroad media policy. (D&O 17 n.16.) Even when an employee has not engaged in protected concerted activity, such a discharge may violate Section 8(a)(1). See *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 488-84 (1st Cir. 2011); *Cont’l Grp., Inc.*, 357 NLRB 409, 410-13 (2011).

II. The Employer Violated Section 8(a)(1) of the Act by Maintaining an Overbroad Media Policy That Prohibited Employees from Contacting the Media Without Permission

An employer may violate Section 8(a)(1) of the Act by maintaining a workplace rule that unduly restricts employees' Section 7 rights. *Boch Imps., Inc. v. NLRB*, 826 F.3d 558, 568 (1st Cir. 2016). The mere maintenance of such a rule may be unlawful even absent evidence of enforcement. *Ne. Land Servs.*, 645 F.3d at 481. The Board evaluates the lawfulness of a facially neutral rule by first asking whether the rule, "when reasonably interpreted," would potentially interfere with the exercise of employees' Section 7 rights. *Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495, at *4 (Dec. 14, 2017). If so, then the Board performs a further balancing analysis by weighing "(i) the nature and extent of the potential impact on [employees' statutory] rights," against "(ii) legitimate justifications associated with the rule." *Id.* The Board performs its analysis "by reference to the perspective of an objectively reasonable employee." *Argos USA, LLC*, 369 NLRB No. 26, 2020 WL 591742, at *1 n.3 (Feb. 5, 2020).

Substantial evidence supports the Board's application of its *Boeing* framework to the Employer's media policy. (D&O 1-2 & n.7, 16-17.) As an initial matter, the Board found that reasonable employees would interpret the media policy—which broadly stated that no employee "may contact or release to news media information about" the Employer without the "direct involvement" of

the Employer's community-relations department (A. 382)—as interfering with the exercise of Section 7 rights. (D&O 16.) As noted, it is firmly established that employees have a statutory right to contact the media to publicize work-related disputes and to attempt to improve their terms of employment “through channels outside the immediate employee-employer relationship.” *Eastex*, 437 U.S. at 565; *e.g.*, *Mount Desert Island Hosp.*, 695 F.2d at 640-41 (letter to newspaper). The plain language of the Employer's media policy restricted that right by prohibiting *any* communications with the media, or the disclosure of *any* information about the Employer, without the approval or involvement of the Employer itself. (D&O 16-17.) As the Board found, such overbroad interference with the statutory right to contact the media, which the Board has “repeatedly recognized the importance of,” significantly burdened the exercise of employees' Section 7 rights. (D&O 16-17.)

In contrast, the Board found the Employer's only proffered justifications for its media policy to be comparatively insignificant. (D&O 2 n.7, 17.) Those justifications were as nebulous as ensuring that the Employer was presented to the public in a manner consistent with its “brand” and its “mission statement” (A. 382), and protecting the Employer's “brand and reputation” (A. 298). The Board further explained that, even assuming the Employer may have had legitimate interests in, for example, limiting certain employee disclosures in order to protect patient privacy, its overbroad media policy was not tailored to address

those interests. (D&O 17.) Thus, substantial evidence supports the Board’s conclusion that the media policy’s burden on employees’ statutory rights “far outweighed” the Employer’s proffered justifications for the policy, and that the media policy was therefore unlawful as written. (D&O 2 n.7, 17.)

On review, the Employer’s only challenge to the Board’s unfair-labor-practice finding is premised on its contention that Young did not engage in protected conduct and that, as a result, the media policy was never applied to restrict protected conduct. (Br. 50-51.) That contention regarding Young’s letter fails for all of the reasons previously discussed. However, even assuming that Young’s letter did *not* constitute protected conduct, it would not alter the Board’s analysis of the Employer’s unlawful rule. A “historical impact” on protected employee activities (Br. 51) is not necessary to establish a violation. *See Ne. Land Servs.*, 645 F.3d at 481; *Boeing*, 2017 WL 6403495, at *1-2. Here, the Board noted that its findings were bolstered by the fact that the only time the Employer’s media policy had ever been enforced was to discharge Young for her protected letter mildly criticizing the Employer in connection with valid work-related concerns, but the Board’s detailed balancing analysis did not depend on that additional consideration. (D&O 16-17.)⁹

⁹ Indeed, if the Board had been relying exclusively on the fact that the Employer applied its media policy to restrict Young’s protected conduct, then its *Boeing* balancing analysis would have been superfluous. An employer’s workplace rule

The Employer makes the conclusory assertion that if Young was not engaged in protected conduct, then its legitimate justifications for the media policy would somehow “far outweigh” the policy’s lack of any historical impact on the exercise of employees’ statutory rights. (Br. 11, 50-51.) Even assuming that the Employer has adequately raised such argument in its opening brief by making a conclusory assertion, it has failed to call into question the Board’s analysis of the employee and employer interests involved, much less to demonstrate that no reasonable factfinder could reach the conclusions that the Board did here. *Quality Health*, 873 F.3d at 384. As such, substantial evidence supports the Board’s finding that the Employer’s policy violated Section 8(a)(1). (D&O 2 n.7, 16-17.)

III. The Board Reasonably Extended Its Remedial Order To Include Eastern Maine Healthcare Systems and To Cover All Facilities at Which the Unlawful Media Policy Was Maintained

Finally, the Employer raises a baseless challenge to the Board’s extension of its remedial Order to Eastern Maine Healthcare Systems and to facilities other than Maine Coast Memorial Hospital. (Br. 31-37.) Contrary to the Employer, there is no procedural impropriety in the Board’s Order. The formal respondent before the Board was not, as the Employer asserts (Br. 32), Maine Coast Memorial Hospital alone, but instead “Maine Coast Regional Health Facilities, d/b/a Maine Coast Memorial Hospital, the sole member of which is Eastern Maine Healthcare

may be found independently unlawful if it “has been applied to restrict the exercise of Section 7 rights.” *Boeing*, 2017 WL 6403495, at *1, *8.

Systems.” (D&O 1, 4.) The unfair-labor-practice complaint and related pleadings were specifically amended at the hearing, with the active consent of counsel for the Employer, to clarify the inclusion of Eastern Maine Healthcare Systems for purposes of any resulting remedial order.

Young’s original unfair-labor-practice charge in October 2017 named the respondent’s representative as Noah Lundy, in his capacity as regional director of human resources for “Eastern Maine Healthcare Systems.” (A. 320.) Lundy was subsequently served with each of Young’s amended charges and with the consolidated unfair-labor-practice complaint issued by the Board’s General Counsel. (A. 320-25, 345.) Lundy is a management official employed by Eastern Maine Healthcare Systems who serves as regional human resources director for multiple network facilities. (A. 379, Tr. 325-26.) Thus, Eastern Maine Healthcare Systems was on notice and received service of each formal pleading alleging that the decision to discharge Young (which was exclusively made by high-ranking Eastern Maine Healthcare Systems officials) and the media policy (which was written and maintained by Eastern Maine Healthcare Systems) were unlawful.

At the evidentiary hearing, counsel for the Board’s General Counsel recognized that the case caption left some ambiguity as to the potential remedial liability of Eastern Maine Healthcare Systems. As a result, counsel made an oral motion to “have the amended complaint further amended to correct the name of the

Respondent, not only on the amended complaint, but also . . . with respect to all the pleadings in this case to correctly reflect the fact that Eastern Maine Healthcare Systems is certainly the Respondent in this case, as the sole corporate member of Maine Coast Regional Health Facilities, doing business as Maine Coast Memorial Hospital.” (A. 222.) In response to a question from the judge, counsel confirmed that the purpose of the amendment went to the relief being sought. (A. 223, 225-26.) Counsel further stated that the purpose of the Board General Counsel’s motion was to make clear the full identity of the respondent, insofar as Eastern Maine Healthcare Systems was party to the case and its officials were exclusively responsible for the alleged unfair labor practices involving Maine Coast Memorial Hospital. (A. 225-28.)

In response, counsel for the Employer requested more time to “consult with our clients.” (A. 230.)¹⁰ Following further off-the-record discussions, counsel for the Employer informed the judge that “the Respondent has consented to the counsel for the General Counsel’s motion to amend the complaint” in order to “amend the name of the Respondent in the complaint [and other formal papers] . . . to be Maine Coast Regional Health Facilities, doing business as Maine Coast

¹⁰ While such discussions were taking place, and throughout the hearing, the Employer’s in-person representative was hospital president Ronan, an official employed by Eastern Maine Healthcare Systems. (A. 164, Tr. 17.) Indeed, three of the four respondent witnesses called at the hearing were high-ranking officials employed by Eastern Maine Healthcare Systems. (A. 164, 295, Tr. 325-26.)

Memorial Hospital, the sole member of which is Eastern Maine Healthcare Systems.” (A. 316-17.) As a result, the judge granted the motion. (A. 317.) Insofar as the Employer consented to the motion and conceded that the respondent included Eastern Maine Healthcare Systems, counsel for the Board’s General Counsel had no cause to, for example, allege a single-employer relationship instead. Thus, there is no merit to the Employer’s procedural objections on review.

Indeed, the very fact that the Employer is contesting Eastern Maine Healthcare Systems’ liability confirms that Eastern Maine Healthcare Systems is represented as respondent by counsel for the Employer, who also represented the Employer before the Board. Despite its management officials having notice of all of the relevant pleadings and decisions, at no point during the unfair-labor-practice proceedings before the Board did Eastern Maine Healthcare Systems attempt to intervene as a purportedly distinct non-party to the proceedings. Nor has Eastern Maine Healthcare Systems filed a separate petition for review of the Board’s Order with the Court as a distinct, aggrieved party. To the extent the Employer is alleging that Eastern Maine Healthcare Systems is a distinct non-party, then the Employer would lack standing to raise this argument on its behalf. *See Eulitt ex rel. Eulitt v. Me. Dep’t of Educ.*, 386 F.3d 344, 351-52 (1st Cir. 2004).

In sum, the Board reasonably extended its Order to include Eastern Maine Healthcare Systems and to require notice postings at all facilities where the

overbroad media policy may have been circulated, and where a notice posting is therefore necessary to remedy the unlawful interference with the rights of the employees at issue. (D&O 3-4.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full and denying the Employer's cross-petition for review.

Respectfully submitted,

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National Labor Relations Board
October 2020

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

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner/Cross-Respondent)	No. 20-1589
)	
v.)	Board Case Nos.
)	01-CA-209105
MAINE COAST REGIONAL HEALTH FACILITIES,)	01-CA-212276
d/b/a MAINE COAST MEMORIAL HOSPITAL,)	
the sole member of which is EASTERN MAINE)	
HEALTHCARE SYSTEMS)	
)	
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that the foregoing contains 11,839 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 365.

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Dated at Washington, D.C.
this 7th day of October, 2020

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)	
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)	

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2020, I electronically filed the foregoing brief with the Clerk for the Court of the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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this 7th day of October, 2020