

**United States Court of Appeals
For the First Circuit**

No. 20-1589

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

MAINE COAST REGIONAL HEALTH FACILITIES, d/b/a Maine Coast
Memorial Hospital, the sole member of which is Eastern Maine Healthcare
Systems

Respondent

Petition for Enforcement from the National Labor Relations
Board

REPLY BRIEF OF RESPONDENT

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ARGUMENT

Respondent Maine Coast Regional Health Facilities d/b/a Maine Coast Memorial Hospital (“MCMH”) replies as follows to the Brief for the National Labor Relations Board (the “Board” or “NLRB”) (the Brief for the NLRB is hereinafter referred to as the “Red Brief”):

I. *SEACOAST HOSPITALS GROUP, INC. v. NLRB*, 846 F.3D 448, 454 (1ST Cir. 2017), and *NLRB v. GREAT DANE TRAILERS, INC.*, 388 U.S. 26, 32 (1967), ARE STILL BINDING AUTHORITY FOR THE RULE THAT GENERAL COUNSEL MUST PROVE DISCOURAGEMENT OF UNION MEMBERSHIP IN ORDER TO ESTABLISH A VIOLATION OF SECTION 8(a)(3).

Section 8(a)(3) states in relevant part that it is an unfair labor practice for an employer to “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage *or discourage membership in any labor organization.*” 29 U.S.C. § 158(a)(3) (emphasis added). The U.S. Supreme Court held in 1967 that proof of a violation of Section 8(a)(3) therefore “requires specifically that the [NLRB] find a discrimination *and* a resulting discouragement of union membership.” *Great Dane*, 388 U.S. at 32 (emphasis added).

Unsurprisingly, this Court in *Seacoast Hospitals*, following and quoting *Great Dane*, explained that “‘discrimination and a resulting discouragement of union membership’ are necessary but not sufficient conditions to support a claim under

section 8(a)(3) and (1).” *Seacoast Hospitals*, 846 F.3d at 454 (quoting and citing *Great Dane*, 388 U.S. at 31-32).¹

The Board, citing cases prior to *Great Dane*, asserts that the Supreme Court “long ago rejected the proposition that a violation of Section 8(a)(3) requires . . . proof of ‘actual’ discouragement of union activities.” (Red Brief p. 36-37)

Contrary to the Board’s assertion, these prior cases, and others cited by the Board, cast no doubt on the continuing validity of *Great Dane* and *Seacoast Hospitals*.

For example, in *Rocky Mountain Eye Ctr.*, 363 NLRB No. 34, 2015 WL 6735641, cited by the Board (Red Brief, p. 20), the complaint alleged that the respondent “violated Section 8(a)(3) and (1) of the Act by discharging Brown for assisting the Union . . . and to discourage other employees from doing the same” (emphasis added). The ALJ found that the “very conduct for which Brown was terminated was union organizing activity”, which took the form of providing co-worker contact information to the union’s business agent for purposes of a union organizing campaign. The ALJ thus concluded that the respondent violated Section 8(a)(3) by discrimination in the tenure of Brown’s employment to discourage membership in the union. This case casts no doubt on MCMH’s argument that the

¹ The General Counsel himself agreed that this is an element of his case by expressly alleging in ¶ 12 of the Amended Consolidated Complaint that MCMH violated the act by conduct “discouraging membership in a labor organization.” (A 340-41).

Board committed legal error by finding a violation of Section 8(a)(3) without any finding of, and without any evidence of, discouragement of union membership.

The same is true for *Reliant Energy*, 357 NLRB 2098, 2011 WL 7121891, which was also cited by the Board (Red Brief, p. 20). In that case the respondent withheld benefits from its employees who were attempting to organize, and the ALJ found that the respondent violated Section 8(a)(3) by withholding those benefits “in order to discourage membership in and support for the Union.”

Reliant Energy, 363 NLRB at 2117, 2011 WL 7121891 at *32. This case also supports MCMH’s position that the Board erred by finding a violation of Section 8(a)(3), without any finding of intent to discourage membership in the Union.

A third case cited by the Board (Red Brief, p 20), *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000), is likewise inapposite.² There, the ALJ concluded that the respondent did not violate Section 8(a)(1) or Section 8(a)(3) without reaching the issue of discouragement of union membership, finding instead that calling a fellow employee a “scab” was not protected conduct, or in the alternative, that the General Counsel failed to establish an anti-union motive. The Board reversed, deciding that the use of the term “scab” was protected in that context, that there was no need to consider the motives of the respondent, and that the respondent violated Section

² Even if the *Nor-Cal Beverage Co.* case did hold that proof of discouragement of membership in a union was no longer needed to prove a violation of Section 8(a)(3)—which it did not—it would not suffice to overrule the Supreme Court or this Court’s 2017 decision in *Seacoast Hospitals*.

8(a)(1) and (3). The respondent did not petition to a Circuit Court of Appeals for review of the Board's decision. It therefore appears that the respondent never raised the issue of whether the respondent could be found to have violated Section 8(a)(3) without a finding of discouragement of union membership.³

The Board is thus arguing against plain, on point authority, that proof of discouragement of union membership is unnecessary under Section 8(a)(3). MCMH appreciates that when a Section 8(a)(3) complaint is joined with a Section 8(a)(1) complaint, whether the Board ultimately prevails under Section 8(a)(3) may be of little or no practical importance. Presumably, that is why the bulk of the Red Brief is devoted to trying to convince this Court that regardless of Section 8(a)(3), Karen Jo-Young ("Ms. Young") was discharged for her "concerted" protected activity within the meaning of Section 7 and 8(a)(1). MCMH addresses those arguments concerning Section 8(a)(1), below, but regardless of how this case is otherwise decided, this Court should not enforce the Board's Decision and Order to the extent it purports to find a violation of Section 8(a)(3).

³ The Board also cites *NLRB v. Trans. Mgmt. Corp.*, 462 U.S. 393 (1983) (Red Brief, p. 37) as somehow overruling *Great Dane*. The Court in *Trans. Mgmt.* never mentions *Great Dane* and was not concerned with, and says nothing about, the elements of proof of a violation of Section 8(a)(3). *Trans. Mgmt.* concerns the burden of proof when applying a *Wright Line* analysis.

II. THE BOARD ERRED BY ORDERING A REMEDY EXTENDING TO NON-PARTY EMHS AND OTHER NON-PARTIES.

Though the Board does its best to convince the Court there were two Respondents in this case, there is and always has been just one—MCMH, and not EMHS. Counsel for the General Counsel moved to amend the complaint and related pleadings “to correct the name of the Respondent,” not to add a second respondent. (A 222) The ALJ, observing that the General Counsel had already rested his case, expressed concern about even substituting a “new name” for the Respondent, much less bringing in a new party. (A 229) The ALJ reserved any ruling. (A 230) The parties in this case (i.e., the Board and MCMH) later agreed by stipulation to “amend the name of the Respondent named in the complaint to be . . . Maine Coast Regional Health Facilities, doing business as Maine Coast Memorial Hospital, the sole member of which is Eastern Maine Healthcare Systems.” (A 316) Counsel for the General Counsel concurred that “that will be the name of *the* Respondent.” (A 317) In short, the effect of the amendment was to add the wording “the sole member of which is Eastern Maine Healthcare Systems” to the name of the one and only Respondent, MCMH. The amendment did not add EMHS as a second party, or otherwise “include” EMHS as a party as the Board suggests.

The Board does not even attempt to distinguish the cases and statutory language relied upon by MCMH in its brief, pp. 31-37, and the Board studiously

ignores any reference at all to the Maine Nonprofit Corporation Act and what it means to be a “member” of a nonprofit under Maine law. To say that EMHS “was on notice” of the claims against MCMH (Red Brief, p. 46) is legally irrelevant, and to represent that EMHS “received service” of each formal pleading is legally false and misleading. The Affidavits of Service in the record do name Noah Lundy as an addressee, but they do so only and plainly in his capacity as receiving service for Maine Coast Regional Health Facilities located at 55 Union Street in Ellsworth, Maine, and only under a caption naming “Maine Coast Regional Health Facilities d/b/a Maine Coast Memorial Hospital” as the only Respondent. (A 321, 323, 325, 332, 345) There is no way Mr. Lundy, or anyone, would have understood this to be service of a pleading upon Eastern Maine Healthcare Systems.

For the Board to flippantly argue that these concerns are merely “procedural” is simply incorrect and misses the mark. These are weighty and serious issues of personal jurisdiction, subject matter jurisdiction, and the scope of the agency’s jurisdiction. And for the Board to argue that MCMH has no authority or standing to bring this issue to the attention of the Board (which it did) or to the attention of this Court (which it is does) is ludicrous. If this Court enforces the Order of the Board, and if that Order continues to order that MCMH go onto the property or into the systems of other corporations, over which MCMH has no control, on pain of contempt, that is a serious problem for MCMH, not “anodyne,”

as posited by the Board. (Red Brief, p. 17) It is well within the rights of MCMH to bring this to this Court's attention and to seek relief in the event the Order is enforced to any extent.⁴

III. THE FRAGMENTS OF TESTIMONY FROM MS. YOUNG UPON WHICH THE BOARD BASES ITS FINDING THAT SHE ACTIVELY PARTICIPATED IN PRIOR DISCUSSIONS WITH HER COWORKERS ABOUT ISSUES IN HER LETTER DO NOT CONTAIN SUBSTANTIAL EVIDENCE IN SUPPORT OF THAT FINDING.

As sometimes happens, even though the Board designated hundreds of additional pages for the Appendix, much boils down to just a few pages; specifically, what to make of testimony from Ms. Young at A 28-29, 30-31, and 38-42? Fragments within these pages contain the sum total of the testimony upon which the Board relies for its conclusion that Ms. Young was a party to prior

⁴ Counsel for the General Counsel seemed never to understand the distinction between MCMH and EMHS. Even after Counsel for MCMH explained that as a Maine nonprofit corporation, MCMH is not owned by anyone or by anything, Counsel for the General Counsel continued to insist falsely that EMHS “owned” the hospital (or “owned” MCMH). (A 224, 225) And even now the Board inaccurately represents to this Court (Red Brief, p. 4) that EMHS has “the exclusive authority to act unilaterally regarding a range of operational decisions at [MCMH].” Rather, EMHS has authority acting independently to authorize certain enumerated actions called “Joint Initiatory Powers,” *provided only* if (1) such action furthers the goal of developing and strengthening patient care for the benefit of patients within the MCMH service area, and (2) EMHS reasonably conferred with MCMH as to such action, and, provided further, that (3) upon a 2/3 vote of the full Board of Trustees of MCMH, such action is also be subject to further review by the EMHS Council of Chairs. (A 389, 395) That is hardly *carte blanche* authority on the part of EMHS to “act unilaterally regarding a range of operations decisions” at MCMH, as the Board incorrectly maintains (Red Brief, p. 4).

discussions with other employees regarding certain concerns that she discussed in her Letter. Whether this is substantial evidence, or really no evidence at all, is the crux of the issue of whether Ms. Young engaged in “concerted activity” based on the Board’s theory that her Letter was the logical outgrowth of her prior discussions with other employees. MCMH argues this is no evidence, or at most, a “scintilla,” while the Board argues it is substantial evidence and that MCMH incorrectly interprets Ms. Young’s testimony “subjectively,” and even if MCMH’s interpretation is “fair,” the Board is free to choose between two “fairly conflicting views.” (Red Brief, p. 23, p. 23 n.4) The Board misapprehends this evidence, and the proper analysis of it and the standard of review in this situation.

The General Counsel has the burden of proof by a preponderance of the evidence on the issue of whether Ms. Young in fact actively engaged in previous discussions with her coworkers that gave rise to her Letter. *See NLRB v. Transp. Mgt. Corp.*, 462 U.S. 393, 399, 401 (1983), *abrogated on other grounds, Dir., Office of Workers’ Comp. Programs, DOL v. Greenwich Collieries*, 512 U.S. 267, 276-78 (1994); 22 Fed. Proc., L.Ed. § 52:885 (Oct. 2020) (generally, “the burden of proving the unfair labor practice by a preponderance of the evidence is on the NRLB”).⁵

⁵ The General Counsel has this burden throughout this case, except in the application of the *Wright Line* burden shifting analysis where, if the General Counsel had met his burden, the employer may still prevail by affirmatively

Ms. Young testified as follows:

BY MR. SWITZER [Counsel for the General Counsel]:

Q. Okay. Prior to seeing the article,⁶ were you aware that doctors were dissatisfied at the hospital?

A. I knew that several doctors were leaving the hospital.

Q. And how did you know that?

A. Word of mouth.

Q. People talked about it?

A. People—people were talking about it, yes.

Q. So when you saw that article in the paper, did you do anything in response?

A. Well, I did write the first letter to the editor that I composed, and then I revised it once.⁷

...

Q. Before you wrote this letter, did you talk to anyone about writing it.

A. I did not.

establishing that it would have taken the same action in the absence of the Section 7 activity. *See General Motors LLC*, 269 NLRB No. 127, 2020 WL 4193017 at *16.

⁶ The article in the Newspaper was titled “Rewritten contracts cause unrest at MCMH,” and was entered into evidence as G.C. Exhibit 2, reproduced at A 352-53.

⁷ Ms. Young wrote her first letter, then revised it several times the final revision of which was published as the Letter. (A 29-3, 34-37, 41-42)

Q. So did you have any conversation with any other hospital employee before you wrote this letter to the editor?

A. Well, of course, there was just the general talk about the doctors leaving, and, you, know, it was very upsetting for everybody. But I did not say that I was going to write a letter.

...

THE WITNESS: Okay. Well, in working with the nurses, CNAs—I knew the CNAs every day would say, you know, they had way too many patients to care for. . . . And I knew the registered nurses—well, I knew from the staff lounge—in the staff lounge, there were sticky notes on different lockers saying that that nurse had left and had not been replaced. And there were like a lot of these sticky notes. So, yes, . . . in just working on the floor with the nurses, I knew they were in—short-staffed.

...

Q. So after reading General Counsel's Exhibit Number 5, did you do anything in response to that?

A. I—I added to my previous letter. I added another section and e-mailed it to the Ellsworth American [i.e., the Newspaper].

Q. So [Ms.] Young, I'm showing you what's been marked for identification as General Counsel's Exhibit Number 6. Can you identify that for us?

A. Yes. That's the letter I wrote in response to the article in the [N]ewspaper about the nurses' petition.

(A 28-31, 40, 41)

Ms. Young never testified that she, personally, ever actually spoke with anyone about these matters in the ordinary sense of being an active participant in a

conversation. She recounts vaguely that there was “word of mouth,” “people talked about it,” there was “general talk,” and she “knew the CNAs every day would say, you know, they had way too many patients to care for.” That is the extent of her testimony. MCMH does not contend she dissembled. On the contrary, she spoke very carefully and the words she chose do not indicate that she was an active participant in a single discussion with a coworker about any of the things she wrote about in the Letter. The General Counsel had the burden of proof, but never asked her the simple and straightforward, albeit risky, follow-up question: “But were you, yourself, an active participant in any of these conversations?” That he failed to directly ask any iteration of this question speaks volumes, for this is not an issue of witness credibility for the Board. Rather, the true and literal testimony simply does not qualify as substantial evidence that supports the finding by a preponderance of the evidence that Ms. Young actively engaged in previous discussions with her coworkers that gave rise to her writing the Letter.⁸

⁸ The Board wrongly implies in its Red Brief p. 23 n.4, that if either interpretation of Ms. Young’s testimony is equally plausible, then this Court must defer to the Board’s choice. That is incorrect. The NLRB has the burden of proof. If there is equipoise, the Board is not free to flip a coin or to simply pick against the Respondent. Rather, if the evidence is in equipoise, then substantial evidence does not support the finding by a preponderance of the evidence that she engaged in previous discussions with her coworkers that gave rise to her Letter.

Moreover, according to Ms. Young herself, it was *not* “word of mouth,” “people talking,” or “general talk” that caused her to write the Letter. Rather, Ms. Young was quite specific, and quite honest, when she testified repeatedly that she wrote her letters (including the version that was ultimately published) in response to other things she read in the Newspaper.⁹ Thus not only is there no substantial evidence that Ms. Young actively participated in workplace discussions about things in her Letter, even if there were such evidence—which there is not—there is no evidence the Letter was penned by Ms. Young in response to what she discussed in the workplace. To the contrary, all the evidence establishes is that Ms. Young’s Letter was written in response to things she read in the Newspaper. Consequently, Ms. Young did not engage in “concerted activity” with her coworkers by writing and submitted her Letter for publication in the Newspaper.¹⁰

⁹ Ms. Young explained that she began her letter writing process in response to an article in the Newspaper (A 29), not a workplace discussion. She went on to explain that she added to her previous drafts of her Letter in response to other things she read in the Newspaper (A 41-42), not workplace discussions; and that she added still more to her Letter until its final version, again, in response to still others things she read in the Newspaper (A 45, 47, 49), not in response to workplace discussions.

¹⁰ Though at most barely relevant to legal arguments before the Court, MCMH notes that the Board, Red Brief pp. 5-6, misstates matters as to the physicians’ contracts and resignations. The evidence, instead, is that MCMH opened 50 of 54 physician contracts intending to re-sign them all, that only about 17 of these re-opened contracts had to do with desired changes in wages, hours, or working conditions, that only 4 physicians, and no more than 4, resigned, and that only 5 ER physicians were angry, but not at the process, generally, but rather, about one

IV. THE BOARD CONFUSES “UNION ACTIVITY” WITH “ASSISTING THE UNION.”

The Board would have this Court enforce the Order against MCMH even if Ms. Young engaged in no concerted activity, as long as she engaged in “union activity,” on the theory that “union activity” is necessarily “concerted activity.” (Red Brief, pp. 31-33) This argument obfuscates the real issue.

Section 8(1)(a) makes it unlawful to interfere with the exercise of rights guaranteed in Section 7. Those rights, in relevant part, include the right to “assist labor organizations” and “to engage in other concerted activities.” 29 U.S.C. § 157. Therefore, for MCMH to have violated Section 8(a)(1) with respect to anything involving the Union, the Board would have had to have shown either that Ms. Young “assisted the Union” (and was discharged for that), or that Ms. Young engaged in some other form of *concerted* activity with the Union (and was discharged for that).

The Letter never refers to the Union (A 364-65) and was not introduced into evidence for the truth of anything stated in the Letter (A 49, 53). The General Counsel introduced no evidence that anyone in the Union even read the Letter,

specific misunderstanding having to do with whether they would become part of a collaborative arrangement with ER physicians at Eastern Maine Medical Center. (Transcript p. 168; A 142, 190-91, 215-218)

much less that the Letter assisted the Union in any way, shape, or form.¹¹ Thus for there to have been a violation of Section 8(a)(1), the Board did in fact have to prove that Ms. Young actually engaged in some sort of “concerted” activity within the meaning of “other concerted activity.” For the reasons stated above and in MCMH’s principal brief, the Board failed to show that Ms. Young engaged in any “concerted activity” with nurses or with any other coworkers when she sent the Letter to the Newspaper.

The cases cited by the Board do not support its argument that Ms. Young engaged in “concerted activity” in the form of “Union activity.”

NLRB v. City Disposal Systems Inc., 465 U.S. 822 (1984), is not on point because Ms. Young was not a member of the Union invoking her rights under a collective bargaining agreement; she was not intending to induce group activity; she was not acting as a representative of the Union; and the Board did not allege, did not find, and there is no evidence that discharging Ms. Young interfered with the rights of the nurses in the Union. *Id.* at 825, 831, 833 n.10; see *Epic Systems Corp. v. Lewis*, ---U.S.---, 138 S.Ct. 1612, 1628 (2018) (“In *NLRB v. City Disposal Systems, Inc.*, . . . we held only that an employee's assertion of a right under a

¹¹ The Board’s unspoken premise seems be that any praise for a position asserted by members of a union necessarily counts as “assisting the union,” regardless of any evidence that the praise had any impact whatsoever. But this is tantamount to saying that if a fan yells her support for her favorite sports team, that counts as “assisting the team,” even if her team did not hear her and even if there is no evidence that it otherwise assisted the team in any way.

collective bargaining agreement was protected, reasoning that the collective bargaining “process—beginning with the organization of the union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity.”).

C.S. Telecom, Inc., 336 NLRB 1193, 1193 (2001), is not on point because in that case the employee who was discharged unquestionably assisted the union by directly providing the Union with information useful to the union about the employer’s jobsite locations.

Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706 (1st Cir. 1975), is not on point because in that case the employee who was discharged was exercising her rights to “form” and “to assist” the union by engaging in the early stages of information gathering for union organizing activity, by taking action aimed at initiating or preparing for group action, and because the basis of the Section 8(a)(1) violation was the substantial evidence supporting the Board’s determination that her “discharge was due to petitioner’s antiunion sentiment.” *Id.* at 707, 708.

Manno Elec., Inc., 231 NLRB 278, is not on point because in that case the employee, who was a member of the union, told a manager he was going on an “unfair labor practice strike,” telephoned the President of the employer intending to tell the President the same, but was referred to the President’s son, the General Manager, instead, whom he did tell he was going on an unfair labor practice strike,

at which point he was told that he was fired because he “didn’t report to work and went on strike.” *Id.* at 279.

In short, in this case, the Board confuses “union activity” with “assisting a union,” when there is (i) no substantial evidence to support a finding that Ms. Young assisted the Union (and was discharged for that), and (ii) no substantial evidence that Ms. Young engaged in a form of other concerted, protected activity (and was discharged for that).

V. EVEN IF MS. YOUNG ENGAGED IN *CONCERTED* ACTIVITY WITHIN THE MEANING OF SECTION 7 BY ASSISTING THE UNION OR BY ENGAGING IN OTHER CONCERTED ACTIVITIES—WHICH SHE DID NOT—MCMH MET ITS BURDEN PURSUANT TO WRIGHT LINE OF SHOWING THAT IT WOULD HAVE DISCHARGED HER EVEN IN THE ABSENCE OF THE SECTION 7 ACTIVITY.

Historically, the Board’s decisions as to when to apply the so-called *Wright Line* burden-shifting analysis are tortured and inconsistent. The General Counsel has always been reluctant to apply it, presumably, because the application of the *Wright Line* analysis makes it more difficult for the General Counsel to prevail when the employer can establish that the employee would have been discharged regardless of any Section 7 implications.

Such was the case here. When MCMH attempted to introduce testimony as to exactly why it discharged Ms. Young, including the fact that she would have been discharged regardless of her alleged Section 7 activity, the General Counsel

objected on the grounds that the *Wright Line* analysis does not apply and the witness should not be permitted to answer. (A 160-62) The ALJ allowed the testimony, though the ALJ and the Board ultimately did not consider this testimony, opting instead to deem MCMH's actual motives irrelevant under the rubric of a "res gestae" analysis. (Add. 16, n.14) The Board has in the interim, more recently, overruled and invalidated this very sort of "res gestae" approach, *General Motors LLC*, 2020 WL 4193017 at *2 (Jul. 21, 2020), finding it appropriate for *Wright Line* to be applied retroactively to pending cases, such as this. *Id.* at *17.

The *Wright Line* concept is simple and fair. In a case like this, logically, the circumstance is that Ms. Young wrote the Letter containing statements A, B, C, and D. Ms. Young was discharged for publishing the Letter, so the General Counsel wants to say, without further nuance, that this necessarily means she was discharged for each of her statements A, B, C, and D. But that is of course logically false. Further, if we are to assume that (a) statements A and B were protected Section 7 activity, (b) statements C and D were not, and (c) the real reason Ms. Young was discharged had nothing to do with statements A and B and instead everything to do with statements C and D, it is hard to envision how discharging Ms. Young for the latter statements would constitute an unlawful interference with her right to make the former.

There is no evidence in the record that MCMH harbored or acted out of any animus against the Union or other concerted Section 7 activity. Rather, the evidence is that MCMH would have discharged Ms. Young even if she had not made any statements in the Letter expressing support for what she believed were the views of nurses expressed in the Petition,¹² and for what she believed were the doctors' contract concerns.¹³ (A 159-62) Thus the Board failed even to meet its initial burden under *Wright Line* that MCMH had any animus against the Section 7 activity at all; but even if the Board did meet this burden, which it did not, MCMH met its defense burden to prove that it would have taken the same action even in the absence of the Section 7 activity. *General Motors*, 2020 WL 4193017 at *15-16 (“Under *Wright Line*, the General counsel must initially show that . . . the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity” and if the General Counsel makes his initial case, the employer will not be found to violate the Act if the employer proves that “it would have taken the same action even in the absence of the Section 7 activity”).

¹² The “Petition” is the petition presented by the nurses to management at MCMH on August 28, 2017, discussed in detail in MCMH’s principle brief, pp. 14-16.

¹³ Ms. Young testified that what she believed about the nurses’ Petition and the doctors’ contracts came solely from what she read previously in the Newspaper. (A 43, 86-88, 90)

Because the Board has now ruled in *General Motors LLC* that it is appropriate to apply *Wright Line* retroactively to all pending cases such as this in whatever stage, *General Motors LLC* at *17, this Court, following that interpretation of the Act by the Board, should apply the *Wright Line* analysis now. Alternatively, the Court should remand this matter to the Board for further proceedings so that this case can be properly evaluated under the *Wright Line* standard.¹⁴

¹⁴ The Board at Red Brief pp. 39-41 incorrectly reads *General Motors LLC* as only applying to “abusive conduct” unlike what is in the Letter. Conceptually, Ms. Young’s gratuitous, ad hominem attacks in her Letter against MCMH’s Chairwoman and executives cannot be meaningfully distinguished from the example of an ad hominem social media post attacking a manager cited in *General Motors LLC* as exemplifying just the type of case in which *Wright Line* needs to be applied. *Id.* at *1. Furthermore, even if there were a reliable, detectible line that could be drawn between “abusive” conduct and conduct that is “seriously disparaging and recklessly untrue,” the Board, to the extent it says *General Motors LLC* applies to the former, expressly reaffirms that as to the latter, a *Wright Line* analysis is already understood to apply to sort out the employer’s real motives. *Id.* at *16 n.25. So either way, whether this case arises under the rubric of *Atlantic Steel*, is examined under the “totality of circumstances,” or the “*Jefferson Standard*,” the lesson from *General Motors LLC* is that the Board has determined a *Wright Line* analysis ought to be applied. It is no longer good law for the Board to rely upon the amorphous doctrine of “*res gestae*.”

VI. IF THE BOARD INCORRECTLY CONCLUDED THAT MS. YOUNG ENGAGED IN CONCERTED ACTIVITY UNDER THE ACT, THE BOARD ALSO INCORRECTLY CONCLUDED THAT UPON BALANCE, THE MEDIA POLICY IN PLACE WHEN MS. YOUNG WAS DISCHARGED WAS BY ITSELF A VIOLATION OF SECTION 8(a)(1).

The Board does not seriously argue that if Ms. Young's Letter did not constitute protected conduct, the Media Policy all by itself would have still been unlawful to maintain. (Red Brief pp. 44-45) Instead, the Board ignores the fact that in that case, (a) the Media Policy was never applied to restrict or chill Section 7 activity, and (b) no employee or other witness testified that he or she ever considered the Media Policy as a possible obstacle to the exercise of Section 7 rights. The nurses were certainly not concerned about the Media Policy when they went to the Newspaper about the Petition. And they were right not to be concerned, because they knew that MCMH appreciated the Act and did not intend for the Media Policy to interfere with Section 7 activity. The Board also fails to give fair weight to the legitimate interests served by the Media Policy. (A 297-302) In today's world, hospitals, like other service providers, must take care as to how they portray themselves to the public and how they are perceived by the public. It is also a fact that in today's world, maintaining the privacy of patients is paramount. Thus, the Media Policy was designed, in part, to act as a safety net for hospital employees when dealing with reporters and other individuals who may solicit protected health information about patients. (A 300) The Board flippantly

argues that these are merely “conclusory assertions.” In reality, these are all legitimate justifications that together outweigh the lack of any discernable, practical impact of the Media Policy on employees of MCMH.

CONCLUSION

WHEREFORE, MCMH respectfully requests that the Court deny the Board’s application for enforcement of the Order. In the alternative, this matter should be remanded to the Board for further proceedings, so that the case can be properly evaluated under the *Wright Line* standard. If, instead, the Court grants enforcement of the Order to any extent, MCMH respectfully requests that the Court modify, or remand to have modified, the Order, so that it does not attempt to reach and require the cooperation and affirmative action of non-parties to this case.

Dated: October 28, 2020

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,478 words, excluding the parts of the brief exempted by Fed. R. App. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2020, I electronically filed the foregoing Respondent's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit. All attorneys listed below are ECF filers and will receive service by electronic means pursuant to Rule 4 of this Court's Rules

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