

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

AMERICAN MEDICAL RESPONSE  
OF CONNECTICUT, INC.

and

INTERNATIONAL ASSOCIATION OF  
EMTS AND PARAMEDICS LOCAL  
R1-999, NAGE/SEIU LOCAL 5000

Case 01-CA-263985

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

John A. McGrath  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Subregion 34  
A.A. Ribicoff Federal Building  
450 Main Street, Suite 410  
Hartford, CT 06103

**Table of Contents**

- I. SUMMARY ..... 4
- II. EVIDENCE..... 5
  - A. The Parties ..... 5
  - B. The October 2019 Subcontracting Grievance..... 7
  - C. The 2020 Schedule Cuts & Subcontracting Issue..... 9
  - D. The Union’s May 7 Request ..... 15
  - E. The Union’s June 15 Requests..... 20
  - F. The 2020 Subcontracting Grievance..... 23
  - G. The Union’s July 22 Request..... 25
- III. ANALYSIS..... 29
  - A. General Legal Principles..... 29
  - B. The Information Requests..... 30
    - 1. Information About Employees Affected by the Brown Outs ..... 30
      - a. The Union’s May 7 Request ..... 30
      - b. Respondent’s June 7 Response ..... 30
      - c. The Union’s June 10 Letter & Respondent’s July 17 Reply ..... 32
      - d. The Union’s July 22 Request & Respondent’s July 29 Reply..... 35
    - 2. Information About Call Volume..... 36
      - a. The Union’s May 7 Request ..... 36
      - b. Respondent’s June 7 Letter..... 38
      - c. The Union’s June 10 Letter & Respondent’s July 17 Reply ..... 41
    - 3. Information About Response Times..... 42
  - C. Respondent’s Defenses ..... 45
    - 1. Respondent’s arguments about waiver and/or the Region’s investigation lack merit 45
    - 2. The Respondent’s Challenge to the Authority of the AGC is without merit ..... 46
      - a. Background: By default, federal officers are removable at the will of the appointing authority ..... 46
      - b. The NLRB’s General Counsel serves at the pleasure of the President..... 48
    - 3. Even assuming former General Counsel Robb’s removal was improper, Respondent has not established grounds for the Board to dismiss the Complaint. .... 51
- IV. CONCLUSION..... 53

## Cases

<i>American Medical Response, Inc.</i> , 335 NLRB 1176 (2001) .....	43
<i>A-Plus Roofing, Inc.</i> , 295 NLRB 967 (1989).....	29
<i>BFP v. Resolution Trust Corporation</i> , 511 U.S. 531 (1994) .....	49
<i>Bonwit Teller, Inc. v. NLRB</i> , 197 F.2d 640 (2d Cir. 1952).....	52
<i>Cincinnati Enquirer</i> , 298 NLRB 275 (1990).....	45
<i>Digital Realty Trust, Inc. v. Somers</i> , 138 S.Ct. 767 (2018) .....	49
<i>Disneyland Park</i> , 350 NLRB 1256 (2007) .....	29
<i>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. &amp; Const. Trades Council</i> , 485 U.S. 568 (1987).....	51
<i>Ex parte Hennen</i> , 38 U.S. (13 Pet.) 230 (1839).....	47
<i>Fairbanks v. Superior Court</i> , 46 Cal. 4th 56 (2009).....	49
<i>Free Enterprise Fund v. Public Co. Acct’g Oversight Bd.</i> , 561 U.S. 477 (2010) .....	47, 49
<i>GTE California, Inc.</i> , 324 NLRB 424 (1997).....	39
<i>Intel Corp. Inv. Policy Comm. v. Sulyma</i> , 140 S. Ct. 768 (2020).....	49
<i>Island Creek Coal Co.</i> , 292 NLRB 480 (1989) .....	30
<i>Lasher Service Corp.</i> , 332 NLRB 834 (2000) .....	39, 41
<i>Lincoln Lutheran of Racine</i> , 362 NLRB 1655 (2015) .....	49
<i>Local Jt. Exec. Bd. of Las Vegas v. NLRB</i> , __ Fed. Appx. __, 2020 WL 7774953 (9th Cir. Dec. 30, 2020) .....	49
<i>Loughrin v. United States</i> , 573 U.S. 351 (2014).....	49
<i>Maine Cmty. Health Options v. United States</i> , 140 S. Ct. 1308 (2020) .....	48
<i>Massachusetts v. Morash</i> , 490 U.S. 107 (1989) .....	34
<i>Myers v. United States</i> , 272 U.S. 52 (1926).....	47, 51
<i>Nat’l Fed’n of Indep. Bus. v. Sebelius</i> , 567 U.S. 519 (2012).....	49
<i>National Steel Corp.</i> , 335 NLRB 747 (2001) .....	39
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967).....	29
<i>NLRB v. Gemalo</i> , 130 F. Supp 500 (S.D.N.Y. 1955) .....	52
<i>Northern Indiana Public Service Co.</i> , 347 NLRB 210 (2006) .....	39
<i>Oncor Elec. Delivery, LLC</i> , 369 NLRB No. 40 (Mar. 6, 2020) .....	37, 39, 40
<i>Pall Biomedical Corp.</i> , 331 NLRB 1674 (2000) .....	29
<i>Parsons v. United States</i> , 167 U.S. 324 (1897) .....	47, 48
<i>Redway Carriers</i> , 274 NLRB 1359 (1985).....	45
<i>Russello v. United States</i> , 464 U.S. 16 (1983) .....	49
<i>Sampson v. Murray</i> , 415 U.S. 61 (1974) .....	47
<i>Schrock Cabinet Co.</i> , 339 NLRB 182 (2003).....	30
<i>Seila Law v. CFPB</i> , 140 S. Ct. 2183 (2020) .....	51
<i>Sho-Me Power Elec. Cooperative</i> , 360 NLRB 349 (2014) .....	31
<i>U.S. Postal Service</i> , 364 NLRB No. 27 (June 15, 2016) .....	29, 33, 37
<i>United Cerebral Palsy of New York City</i> , 347 NLRB 603 (2006).....	43
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967) .....	49
<i>Valley Hosp. Med. Ctr.</i> , 368 NLRB No. 139 (2019) .....	49
<i>Virginia Mason Hosp.</i> , 357 NLRB 564 (2011).....	43

**Statutes**

12 U.S.C. § 242..... 48  
15 U.S.C. § 41..... 48  
29 U.S.C. § 153(d)..... 49  
29 U.S.C. § 156..... 49  
29 U.S.C. § 159..... 49  
29 U.S.C. § 160(b)..... 49  
29 U.S.C. § 160(c)..... 49  
29 U.S.C. § 161..... 49  
Conn. Gen. Stat. § 19a-175..... 8  
Conn. Gen. Stat. § 19a-177(8)(A)..... 21  
Conn. Gen. Stat. § 19a-181b(a)..... 21  
Conn. Gen. Stat. § 19a-181b(a)(3)..... 21  
Conn. Gen. Stat. § 19a-181c(a)(3)..... 21  
Conn. Gen. Stat. § 19a-181c(b)..... 21

**Other Authorities**

20 Fed. Reg. 2175..... 50  
32 Fed. Reg. 9588..... 52  
Memo from John Roberts to Fred Fielding, White House Counsel re: NLRB Dispute 1, 3 (July 18, 1983)..... 50  
U.S. Const., Art. II, Sec. 2, Cl. 2..... 47  
U.S. Const., Art. II, Sec. 3, Cl. 5..... 47

**Regulations**

29 C.F.R. § 102.15-26..... 52  
29 C.F.R. § 102.67..... 50  
29 C.F.R. § 102.71..... 50  
29 C.F.R. § 102.90..... 50

## I. SUMMARY

This is a simple information request case. In the Spring of 2020, the Union began to suspect that Respondent was cutting bargaining unit hours and violating the subcontracting provision of their collective-bargaining agreement. The Union therefore asked for information to determine whether Union-represented employees were having their hours cut or “browned out,” why their hours were being cut in the way that they were, and whether bargaining-unit work was being farmed out to others. The Union also requested information relevant for Respondent’s proffered reasons for the schedule reductions. Respondent answered the Union’s information requests at a leisurely pace, and ultimately refused to provide most of what the Union requested. Accordingly, on October 15, 2020, Region 1 issued the Complaint (GC-1(c), the “Complaint”)<sup>1</sup> in this case.<sup>2</sup>

Although the record contains numerous information requests, including several repeated requests, the Complaint alleges that the following six requests are at issue:

- 1) A list of all bargaining unit members who have been removed from the schedule since March 1, 2020 (requested on May 7). (Complaint ¶ 9(a).)
- 2) Data showing the call volume since March 1, 2020 (requested May 7). (Complaint ¶ 9(b).)
- 3) The number of calls responded to by non-AMR New Haven bargaining unit members in the New Haven coverage area since March 1, 2020 (requested May 7). (Complaint ¶ 9(c).)
- 4) Documentation detailing the AMR New Haven response times for the period of May 1, 2020 (requested June 15). (Complaint ¶ 10.)

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<sup>1</sup> References to General Counsel’s exhibits and Respondent’s exhibits will be denoted by “GC-” and “R-” respectively, followed by the exhibit number and, if applicable, page number. References to the transcript will be identified by “Tr.” followed by the applicable page number.

<sup>2</sup> Unless otherwise noted all dates are in 2020.

- 5) A list of all bargaining unit employees affected by the “brown out” since March 1, 2020 (requested July 22). (Complaint ¶ 11(a).)
- 6) AMR New Haven’s response time policy/procedures/standard operating guidelines (requested July 22). (Complaint ¶ 11(b).)

The information described in the Complaint is clearly relevant to the Union’s investigation and processing of its grievance. The information should have been provided, but it was not.

## II. EVIDENCE

### A. The Parties

American Medical Response of Connecticut, Inc. (the “Respondent”) operates an ambulance company. Respondent has four divisions in Connecticut: New Haven (“AMR New Haven”), Bridgeport (“AMR Bridgeport”), Hartford, and Waterbury. (Tr. 40.)

The International Association of EMTs and Paramedics Local R1-999, NAGE/SEIU Local 5000 (the “Union”) represents a bargaining unit of Emergency Medical Technicians (“EMTs”) and paramedics employed by Respondent at AMR New Haven (the “Unit,” GC-2 at 6).<sup>3</sup> AMR New Haven provides emergency medical and transport services to the cities and towns of New Haven, West Haven, East Haven, Hamden, Orange, and Woodbridge. (Tr. 169.) There are approximately 425 employees in the Unit, about 125 of whom are full-time employees. (Tr.

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<sup>3</sup> Article 1 of the parties’ collective-bargaining agreement defines the Unit as follows:

[A]ll employees included in the bargaining unit for which the Union was certified by the National Labor Relations Board as the exclusive bargaining representative in matter number 01-RC-102304. The bargaining unit shall include all full time and regular part-time Paramedics, EMTs and HandiVan Drivers employed by the Employer at its New Haven, Connecticut facility excluding all other employees, mechanics, dispatchers, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

(GC-2 at 6.)

169.) Between 50 and 75 of the part-time employees are regularly scheduled part time employees. (Tr. 170.) AMR New Haven has about 48 ambulances. (Tr. 170.)

Bill Schietinger is the Regional Director of Respondent's "Connecticut South" Region, which consists of AMR New Haven and AMR Bridgeport. (Tr. 286.) Schietinger has held this position since August 2019. (Tr. 286.) Prior to August 2019, Schietinger had served as General Manager (since 2006) and Regional Director (since about 2014 or 2015) of AMR Bridgeport. (Tr. 305.) Tim Craven is AMR New Haven's Operations Manager. (Tr. 43.) Aaron D. Nupp is Respondent's Labor Relations Manager. (Tr. 242.)

In addition to working as a full-time Emergency Medical Technician in AMR New Haven, Mike Montanaro is President of the Union. He has worked for Respondent for the past 26 years, and has been President of the Union for about the last six years. (Tr. 167-68, 169.) Nate Smith is a National Representative for the International Association of EMTs and Paramedics ("IAEP"). (Tr. 37.)

The Unit is covered by a collective-bargaining agreement effective January 1, 2019 to December 31, 2021. (GC-2, the "CBA".) Section 4.02 of the CBA provides the following:

Section 4.02 – Subcontracting

EMT and Paramedic work done by bargaining unit employees shall not be subcontracted to any outside party during the term of this Agreement. Other work may be subcontracted as long as such action does not cause any employee who was in the bargaining unit to be laid off over his/her objection.

(GC-2 at 10.) The Union maintains that § 4.02 prohibits Respondent from assigning Unit work to non-Unit employees from Respondent's other divisions because those divisions are an "outside party" within the meaning of § 4.02. There is textual support for this contractual interpretation: the preamble of the CBA identifies the "Employer" as "American Medical Response of Connecticut, Inc., *New Haven Division*." (GC-2 at 5, emphasis added.) Similarly, Article 1 of the

CBA also identifies the “Employer” as “American Medical Response of Connecticut, *New Haven Division*.” (Id. at 6, emphasis added.) In NLRB case number 01-RC-102304—which is expressly cited in Article 1 of the CBA—the Employer stipulated that its correct name was “American Medical Response of New Haven” (GC-28 at 1), and was accordingly identified as “American Medical Response of New Haven” in the subsequent Supplemental Decision on Objections and Certification of Representative in that case (GC-29 at 1). Thus, as a matter of contract interpretation, the Union argues that the subcontracting provision restricts Respondent’s ability to assign Unit work to outside divisions.<sup>4</sup>

**B. The October 2019 Subcontracting Grievance**

On October 14, 2019, the Union filed a grievance (GC-3, the “2019 Grievance”) alleging that Respondent was violating Article 4.02 of the CBA by assigning Unit work to other AMR divisions.<sup>5</sup> The Union filed this grievance because employees in the Unit had noticed an increase in the number of ambulances from AMR Bridgeport performing emergency calls and routine transports in the New Haven area. (Tr. 175.)<sup>6</sup> Respondent denied the grievance at Step 1 (GC-4),

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<sup>4</sup> Of course, this case need not decide whether the Union’s interpretation of § 4.02 is the correct one, but rather that an arbitrator could reasonably conclude so. Although, frankly, it is difficult to imagine why any union would agree to a provision that would prohibit an employer from assigning bargaining unit work to outside companies while allowing that same employer free reign to assign bargaining unit work to employees outside of the bargaining unit so long as those employees were employed by the same employer.

<sup>5</sup> The 2019 Grievance alleged as follows: “AMR New Haven has been subcontracting EMT’s and Paramedics from other AMR corporate divisions to perform duties of EMT’s and paramedics form AMR New Haven.” (GC-3 at 2.)

<sup>6</sup> Due to differences in the call numbers between the New Haven and Bridgeport Divisions, it is not difficult for one to visually distinguish ambulances from the two divisions. (Tr. 170; 290.) Moreover, as the ambulances identify by call number when responding to calls over the radio, it is not difficult to identify whether a call has been answered by a Bridgeport or New Haven ambulance. (Tr. 176.)

and the Union escalated the grievance to Step 2 (GC-5, Tr. 43). The grievance was resolved at the Step 2 level, during a meeting attended by Schietinger, Montanaro, and Smith in November 2019. (Tr. 47.) At that meeting, according to both Montanaro and Smith, Schietinger appeased the Union by promising that he would not schedule Bridgeport crews to work in New Haven, and that he would only use Bridgeport crews in New Haven for “mutual aid.” (Tr. 47, 179.)

The term “mutual aid” is a common term in the emergency services field, denoting assistance between jurisdictions when the emergency responders of one are unavailable or unable to respond to an emergency call. (Tr. 49, 178.)<sup>7</sup> Although the term “mutual aid” is not expressly used anywhere in the CBA, the Union has not sought to enforce § 4.02 in such a stringent manner as to preclude inter-divisional assistance in the event of a bona fide emergency. Indeed, Montanaro testified that he personally has provided mutual aid to AMR Bridgeport as well as Respondent’s Hartford Division. (Tr. 179.)

Schietinger’s testimony regarding the November 2019 meeting was less detailed, but is not inconsistent with Montanaro’s and Smith’s testimony. (Tr. 288.) According to Schietinger, “we resolved it by saying that AMR wouldn’t preschedule Bridgeport units to cover New Haven.” (Tr. 288.) Schietinger’s grafting of the term “prescheduled” onto the dispute seemed a

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<sup>7</sup> Connecticut law, Conn. Gen. Stat. § 19a-175, provides the following definition:

(19) “Mutual aid call” means a call for emergency medical services that, pursuant to the terms of a written agreement, is responded to by a secondary or alternate emergency medical service organization if the primary or designated emergency medical service organization is unable to respond because such primary or designated emergency medical service organization is responding to another call for emergency medical services or the ambulance or nontransport emergency vehicle operated by such primary or designated emergency medical service organization is out of service. For purposes of this subdivision, “nontransport emergency vehicle” means a vehicle used by emergency medical technicians or paramedics in responding to emergency calls that is not used to carry patients; ....

bit unnatural, as that term is not used in § 4.02. Schietinger testified that he believed that “subcontracting” was synonymous with “prescheduling”—testimony that seemed based more on convenience or wishful thinking than on a close reading or understanding of the CBA. (Tr. 332.) Schietinger did recall that the term “mutual aid” was used during the meeting while discussing the Bridgeport issue, but he did not recall the specifics. (Tr. 307.)

The meeting did not produce any written agreement that might qualify or modify the CBA’s language. As such, there is no allegation that the Union signed off on any document that modified or narrowed the text of § 4.02 to only restrict “prescheduling.”

### **C. The 2020 Schedule Cuts & Subcontracting Issue**

In April 2020, the subcontracting issue resurfaced. Montanaro testified that, at that time, he personally witnessed AMR Bridgeport ambulances in the New Haven area, and even spoke with some of the Bridgeport crews. (Tr. 180-81, 183-84.) Montanaro also noticed an increase in the amount of radio traffic indicating that AMR Bridgeport ambulances were responding to New Haven calls. (Tr. 185-86.) Montanaro also received complaints about the Bridgeport ambulances from Union members. (Tr. 186.) At the hearing, Schietinger did not deny that Bridgeport ambulances were in the New Haven area at this time, but merely denied that they had been “prescheduled” to work in New Haven. (Tr. 293.)

Further complicating matters, Unit members also began complaining to Montanaro at that time that their shifts were being cut or “browned out.” (Tr. 187.)<sup>8</sup> According to Montanaro:

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<sup>8</sup> The term “brown out” is not used in the CBA, but rather appears to come from Respondent’s timekeeping software. (Tr. 257.) A shift can be “browned out” on the schedule, indicating that it was cancelled or not filled by an employee. (Tr. 257.) A shift can be browned out because an employee’s hours were cancelled, indicating that the employee lost hours. (Tr. 257.) However, the term brown out does not always imply that an employee lost hours: a shift could be browned out because no employee was available to work those hours, or because an employee originally scheduled for a shift changed their hours. (Tr. 257, 260.)

[Montanaro:] They would come to me and they would -- they would complain that they were being taken away -- they were losing some hours off their weekly shifts. And at that time, it was the same time that we noticed the Bridgeport units increasing to do calls in the New Haven area. That was -- that was around the same time.

[Judge:] And how often would you receive such complaints after April 2020?

[Montanaro:] After April 2020, I mean they complained to me every day, Your Honor. But specifically about the Bridgeport units was about three or four times a week.

(Tr. 187-88.) Montanaro further testified that he observed a significant number of shifts removed from the “line up” (i.e. the daily roster). (Tr. 188.) At the hearing, Schietinger admitted that call volume started declining in March 2020, and that the Employer removed hours from the schedule due to declining demand. (Tr. 308, 309.)

Naturally, this double whammy of complaints from Unit members about their hours being reduced and that their work was increasingly being performed by non-Unit personnel was a concern to the Union. This would be a serious concern for *any* union. On Saturday, May 2, Montanaro emailed Schietinger to complain about the effects of the schedule cuts on the Union’s members, requesting that hours be increased and for Respondent to consider seniority when reducing any hours:

With so many part time permanent and regular part time hours being eliminated from the schedule, the union is requesting that shift consideration for part time employees be given to the most senior employees to the least senior employees as defined in article 9 section 9.03 in the final paragraph. Self filling shifts is also a problem for some part time employees as they are stating the system will not allow it. There has always been a set number of days allowed to self fill and our question would be, is this practice still implemented or has it been temporarily suspended? The union realizes that the call volume is reduced at this time and these steps may be necessary to maintain proper business, but these steps are now resulting in hold overs sometimes up to 4 hours past the end of out times. With crews being mandated to stay due to the removal of hours and spikes in volume, it is putting even more stress levels upon them added to the already high stress level of the current state of affairs. Hold overs or order ins may result in crew fatigue,

which may result in unsafe driving and poor patient care. The union is requesting that cars be added to eliminate these hold overs so employees can be well rested between shifts.

(GC-7 at 1.)

The Union believed that the brown outs had affected “Regular Part-Time Employees” as defined in Article 9 of the CBA. That article does provide Respondent with significant flexibility when scheduling part-time employees’ hours.<sup>9</sup> However, the CBA also provides that when Respondent intends to cut a part-time employee’s hours “to a level substantially below the number of hours previously agreed upon,” it must do so in order of “inverse seniority.” (GC-2 at 18.)<sup>10</sup>

Schietinger replied to Montanaro’s May 2 email in less than an hour. (GC-7.) He did not deny that hours had been cut from the schedule, nor did he dispute Montanaro’s assertion that the reduction in hours was connected to call volume. To the contrary, Schietinger confirmed both of those contentions:

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<sup>9</sup> CBA § 9.03 provides, in part, as follows:

The assignment of work hours will be made at the Employer’s sole discretion in order to meet its operational needs in consideration of employee availability and, if needed, part time employee seniority. The Employer reserves the right to limit the amount of shifts which a part-time employee may work at any time specifically to ensure that the Employer is not required to begin providing additional benefits to that employee which they are not already receiving as a part-time employee.

(GC-2 at 17.)

<sup>10</sup> CBA § 9.03 provides, in part, as follows:

If the Employer, contrary to the wishes of the affected employee, is to cut the number of hours of work available for a Regular, Part-Time Employee to a level substantially below the number of hours previously agreed upon, it must do so in the order of inverse seniority, provided always that a senior employee seeking to exercise seniority rights must be available to work the shifts which the Employer requires to have filled.

(GC-2 at 18.)

We have been monitoring the volume daily and will be adding shifts back on to the schedule. These added hours will be based on volume demands over this past week. The volume has been extremely chaotic and we absolutely appreciate the union's assistance in maintaining professionalism and a positive culture in our operation. I am willing to sit and discuss your ideas with the leadership team hopefully on Monday.

(GC-7 at 1.) The email concluded with "Looking forward to a respectful discussion on this." (Id.)

That following Monday morning, May 4, Montanaro sent another email to Schietinger about the shift reductions and the increased use of Bridgeport ambulances around New Haven:

I reported for my morning shift and saw the line up for days today. I was taken back by the amount of cars and shifts that were deleted. I now have heard Bridgeport division cars signing on to assist with the over abundance of calls that New Haven is facing. I was under the impression from our last email conversation that cars were going to be added to the schedule to ease with volume. With the call volume increasing I am requesting pages go out to NH employees to come in to assist overwhelmed crews for safety and proper decontamination.

(GC-8 at 1.) Montanaro sent this email because he had noticed that morning that 10 or more "cars" (i.e. ambulances) had been removed from the roster for that morning. (Tr. 192-92.)

Schietinger replied to Montanaro about half an hour later:

We just met this morning and reviewed the last 2 weeks of volume. We are adding between 30 to 40 unit hours back each day of the week.

There was a Bpt unit up in New Haven dropping off a patient and it was during a volume spike. Comms gave the Bpt crew a discharge since they were right there.

I just check our status. We have multiple units available currently.

(GC-8 at 1.) There are several obvious takeaways from Schietinger's reply. First, he did not dispute Montanaro's allegation that shifts had been removed, but responded that he would be adding 30-40 hours back to the daily schedule. Second, Schietinger again linked the addition (or

subtraction) of hours to call volume.<sup>11</sup> Third, Schietinger did not dispute that there had been a Bridgeport ambulance in the New Haven area, but rather sought to explain *why* it was present and why it had been given the call: “a volume spike.”<sup>12</sup>

The following Wednesday, May 6, Montanaro discussed these issues with Schietinger in his office at the New Haven facility. (Tr. 192-93.) During that conversation, according to Montanaro’s un rebutted testimony, Montanaro told Schietinger that he had heard that about 1,000 hours had been removed from the schedule. (Tr. 193.) Schietinger did not deny this. (Id.) Montanaro asked why 1,000 hours had been cut from the schedule, to which Schietinger said it was due to COVID and coming from corporate. (Id.) Montanaro complained that the short staffing was causing crews to be “held over,” to which Schietinger said that he would do his best to get the crews out on time. (Id.)<sup>13</sup> Montanaro also raised the issue of the Bridgeport ambulances: “I said to him what about the Bridgeport units. Why are they coming up here?” (Tr. 193-94.) Schietinger replied that he was doing his best not to schedule Bridgeport crews in New Haven. (Tr. 194.) Schietinger asked Montanaro what he would want him to do, to which

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<sup>11</sup> Schietinger made similar statements in his May 6 email to all of the New Haven employees:

We have reviewed the most current volume trends and have begun adding hours back on to the schedule to help handle this increase and help ease the frequency of employees being held past end of shift times and also to improve our on time performance.

(R-7 at 1.)

<sup>12</sup> Schietinger testified that the Bridgeport ambulance was already at Yale-New Haven Hospital because of a transport from Bridgeport, and that it was given a discharge at Yale “[f]or efficiency reasons.” (Tr. 292.) However, Schietinger could not recall the destination of that discharge. (Tr. 311.) Thus, that call may very well have been a transport within the New Haven area, and nothing in § 4.02 authorizes Respondent to assign Unit work to non-Unit personnel for “efficiency reasons.”

<sup>13</sup> A “hold over” is when employees are required to work beyond the scheduled end of their shift. (Tr. 54.)

Montanaro replied: “I said to him, well, put the hours back. Please put the hours back so our crews can start working again.” (Id.) Schietinger responded that he was looking at the numbers—the call volume—and that they did not justify increasing the number of ambulances. (Id.)

About May 5 or May 6, Nate Smith discussed the brown outs and Bridgeport issue with Bill Schietinger during a brief phone conversation. (Tr. 62-63.) Initially, Smith expressed concerns to Schietinger that Respondent was cutting hours but without following seniority. (Tr. 63.) Schietinger replied that the Employer was *not* following seniority, but was instead using a metric called “unit hour utilization” (or “UHU”) to determine which shifts to brown out. (Tr. 63, 66.) Smith also raised the issue of the Bridgeport ambulances. (Tr. 66.) According to Smith, Schietinger admitted that some Bridgeport crews were responding to New Haven calls, but that it was strictly for mutual aid. (Tr. 66.)<sup>14</sup> Smith concluded the conversation by telling Schietinger that he would be submitting an information request. (Tr. 66.) Smith told Schietinger that he would be requesting the information so that he could communicate with the Union’s members about their concerns. (Tr. 66, 124.)

In his testimony at the hearing, Schietinger admitted that Respondent reduced hours on the schedule because of reduced demand: “We had to remove hours from the schedule because volume had initially dropped, and we were hoping to see an increase in the volume and rectify that.” (Tr. 294.) Schietinger admitted that Respondent did not follow seniority when cutting shifts, but rather that he instructed his team to remove hours during times when volume demands

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<sup>14</sup> On page 66, from lines 9 to 16, the transcript mistakenly identifies the Judge instead of Mr. Smith as the speaker. Additionally, on page 241, line 15, the transcript also mistakenly identifies Mr. McGrath instead of Mr. Carmody as the speaker. On page 267, line 24, the transcript appears to mistakenly identify two speakers where Mr. McGrath was speaking.

Counsel for the Acting General Counsel respectfully moves that the transcript be corrected.

decreased. (Tr. 297.) Schietinger admitted that Bridgeport ambulances were in the New Haven area around May 2020, although he did deny that they were “prescheduled” to be there. (Tr. 293.) According to Schietinger: “Either they were coming up as what we call ‘mutual aid request’ because of volume spike or they were transporting patients up to the New Haven area from other areas.” (Tr. 293.)

Schietinger recalled having a conversation with either Montanaro or Smith about seniority and brown outs, but he could not recall which of the two he had that conversation with, nor could he recall when the conversation happened. (Tr. 297, 298.) Schietinger testified that he discussed that “AMR has sent out to IEP [*sic*] the disaster declaration giving me authority to be flexible with what we’re doing with the work conditions, the scheduling and what have you.” (Tr. 297.) Schietinger’s testimony about discussing the “disaster declaration” is somewhat suspect, as neither Montanaro nor Smith recalled any similar statements in their testimony about their conversations with Schietinger. Moreover, Schietinger testified that he discussed each of the information requests with Aaron Nupp (Tr. 330), yet Nupp made no mention of the “disaster declaration” in his first response to the Union’s information requests. (GC-12 at 2.)

#### **D. The Union’s May 7 Request**

On May 7, Smith emailed the following information request (the “May 7 Request”) to Schietinger.

As the IAEP continues to look into concerns regarding the reduction of part time membership, and the reduction of shifts, we are respectfully requesting the following information from you:

1. List of all bargaining unit members who have been removed from the schedule since March 1, 2020
2. List of all shifts removed from the schedule since March 1, 2020.
3. Data of call volume since March 1, 2020.
4. Number of calls responded to by non AMR New Haven bargaining unit members in the New Haven coverage area since March 1, 2020.

5. Explanation of management's decision on what shifts to cut since March 1, 2020.
6. Copies of the schedule from March 1, 2020 to present.

This request is made without prejudice to the Union's rights to file subsequent requests. Please provide this information by the close of business on Thursday, May 14, 2020 by means of electronic mail. If part of this request is denied or if any material is unavailable, please provide the remaining items as soon as possible, which the Union will accept without prejudice to its position that it is entitled to all documents and information called for within this request.

(GC-9 at 2.) As Smith explained at the hearing, “the intent of the request for information was to evaluate if they were violating the contract. (Tr. 128.) “We were looking for the information to determine if a grievance would be necessary.” (Id.)

Smith did not receive a response prior to his May 14 deadline. (Tr. 68.) Accordingly, on May 18, Smith resent the request to Schietinger. (Id.; GC-10). On May 19, Schietinger replied to Smith that Labor Relations Manager Aaron Nupp would contact Smith on Respondent’s behalf.

(GC-11.)

A day or two after the May 19 email, Smith had a brief phone conversation with Nupp about the May 7 Request. (Tr. 74.) Both Smith and Nupp testified about this conversation. (Tr. 244.) According to Smith, Nupp said that he was working on gathering the information, but that some of it was so large that he could not email it to Smith. (Tr. 74.) Specifically, Nupp told Smith that the employees’ schedules were over 200 pages long. (Id.) Smith responded that he did not necessarily need the whole schedule, but that he was primarily looking for information about the brown outs—what shifts had been browned out from the New Haven schedule and the members affected by that. (Tr. 74.) Aside from the schedules, Nupp and Smith did not discuss any other parts of the May 7 Request. (Tr. 74.) Nupp did not ask Smith any questions during the conversation. (Tr. 77-78.) At no point during the conversation did Nupp ask Smith to clarify, revise, or narrow the requests in items 1, 3, 4, or 5 of the May 7 Request. (Tr. 77-78, 261.) At no

point during the conversation did Nupp say anything about confidentiality or express any other objections to items 1, 3, 4 or 5. (Tr. 77.) The only thing that might have come close was Nupp's cryptic comment that, according to Smith, "some were making it difficult for him to get some of the information to me." (Id.) However, Nupp did not explain to whom he was referring, or what information was presenting difficulty. (Id.) Nupp did not provide Smith with any estimated date of production. (Id.)

Nupp was present for Smith's testimony at the hearing. (Tr. 243.) He did not directly contradict any of Smith's testimony. According to Nupp, the call lasted no more than five or six minutes, and focused exclusively on one of the requests in the May 7 Request: item # 2. (Tr. 245.)

On June 7, Nupp replied by email to Smith's May 7 information request. (Tr. 78; GC-12, GC-12(a), 12(b) & 12(c).) In an attached letter (GC-12 at 2, the "June 7 Letter"), Nupp gave the following responses to Smith's requests:

Your information request for AMR New Haven dated May 7, 2020 was forwarded to me for reply, and this letter will serve as the Employer's response. The Employer has considered your request and is providing the following responses and information.

1. List of all bargaining unit members who have been removed from March 1, 2020. *The Employer objects to the Union's request as it is overly broad. Should the Union wish to revise its request to indicate the specific reason(s) the employee(s) had hours reduced or removed from the schedule, the Employer may consider the revised request.*
2. List of all shifts removed from the schedule since March 1, 2020. *The Employer objects to the Union's request as it is overly broad. However, the Employer is providing information with regards to shifts that have been Browned out (BO) as part of its response to request #6 below. Please be aware that just because a shift was removed from the schedule on a specific day or days during a specific week may not be indicative of permanent removal from the schedule.*

3. Data of call volume since March 1, 2020. *The Employer objects to the Union's request as it is overly broad, lack a basis of relevance, and is proprietary in nature and is outside the Union's jurisdiction and the collective bargaining relationship.*
4. Number of calls responded to by non-AMR New Haven bargaining unit members in the New Haven AMR coverage area since March 1, 2020. *The Employer objects to the Union's request as any information pertaining to non-bargaining unit employees is outside the Union's jurisdiction and the collective bargaining relationship.*
5. Explanation of management's decision on what shifts to cut since March 1, 2020. *The Employer's decision to assert its rights under the CBA, including the allocation of Company resources, was necessary to ensure continued operational efficiency. Should the Union wish to discuss further, please contact the Regional Director.*
6. Copies of the schedule from March 1, 2020 to present. *The Employer is providing the information as requested from March 1, 2020 to May 31, 2020. It should be noted that just because an employee(s) may have been removed from a shift(s), it does not mean that they weren't reassigned/rescheduled for the same numbers of hours on the same day, or during the workweek.*

Thank you in advance for your attention to this matter, and please do not hesitate to contact me should you have any questions or concerns.

(GC-12 at 2.)<sup>15</sup> Also attached to the email were three printouts, totaling 96 pages, showing shifts that had been browned out during the months of March (GC-12(a)), April (GC-12(b)) and May (GC-12(c)) 2020. According to their date stamp, the printouts were all retrieved on June 5. The printouts do not identify any of the employees affected by the brown outs, but only identify the browned out shifts by date and time. (Tr. 259.) Nor do the printouts identify which brown outs resulted in a loss of hours to Unit personnel—because a shift could be browned out because employees switched shifts or were reassigned to different vehicles/partners, the mere fact that a shift was browned out does not necessarily imply that an employee lost hours. (Tr. 260.)

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<sup>15</sup> In the original June 7 Letter, as well as certain other documents in evidence (GC-20, GC-24), certain segments of text were differentiated by color. For ease of readability, where excerpted those differentiations are indicated by italicization rather than color.

On direct examination, when asked why he did not respond to the May 7 Letter until a month later (Tr. 245-46), Nupp answered:

Obviously dealing with the pandemic and oversight of other Regions, workload was number one. Number two, it wasn't where they specified times with regard to responding, they didn't give a time so I responded as appropriately as possible.

(Tr. 246.) However, Nupp provided no specifics about his workload to explain what—if anything—prevented him from responding to the Union any earlier than June 7. Moreover, Nupp's claim that the Union had not specified a response time is simply untrue: in the May 7 Request, Smith had expressly requested a response on or before May 14. (GC-9 at 2.)<sup>16</sup>

Nupp also testified that his claim that call volume data was “proprietary” was based on his conversation with Schietinger. (Tr. 255.) Schietinger, however, provided rambling, conclusory testimony that “our call volume is what *I consider* confidential....” (Tr. 301, emphasis added.) Schietinger went so far as to assert “that information is *privileged*.” (Tr. 302, emphasis added.) Respondent did not provide any written policies or procedures to support this claim.

On June 10, Smith emailed a letter to Nupp (GC-13, the “June 10 Letter”) addressing Nupp's objections:

I am in receipt of your response to our initial request for information dated June 7, 2020, and wish to clarify some of the information I am seeking:

1. **List of bargaining member unit members who have been removed from the schedule from March 1, 2020** - I am asking for the list the Company used, by seniority of the members who were impacted by the “brown outs” as per CBA, Article 9, Section 9.03.
2. **List of all shifts removed from the schedule since March 1, 2020** - the Union will accept the list of shifts that the company has issued.

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<sup>16</sup> The fact that he accused the Union of failing to provide a response time raises an interesting question: was Nupp implying that he could have provided a response earlier than June 7 if the Union had provided a response time? If so, then clearly June 7 was *not* the earliest date possible.

3. **Data of call volume since March 1, 2020** - the information is relevant to the ongoing union investigation into non-bargaining unit AMR employees performing bargaining unit work in the New Haven coverage area on a frequent basis during continued brown outs.
4. **Number of calls responded to by non-AMR New Haven Bargaining Unit members in the New Haven AMR coverage area since March 1, 2020** - See number 3.
5. **Explanation of management's decision on what shifts to cut or brown out since March 1, 2020** - I will be reaching out to Bill [Schietinger] for another discussion on this and making an attempt to set up a Labor Management Meeting to further clarify what is being requested.
6. **Copies of schedule from March 1, 2020 to present.** - The Union will accept the information provided describing the "brown out shifts".

This request is made without prejudice to the Union's rights to file subsequent requests. Please provide this information by the close of business on Wednesday, June 17, 2020 by means of electronic mail. If part of this request is denied, please indicate so and advise as to the reason. If any material is unavailable, please provide the remaining items as soon as possible, which the Union will accept without prejudice to its position that it is entitled to all documentation and information called for within this request.

(GC-13 at 2.) Smith did not receive an immediate response to his June 10 Letter. Accordingly, he sent Nupp a follow-up email on July 2 (GC-15). Smith sent a second follow-up email on July 16 (GC-18), as Nupp had *still* not responded by that point. On July 17, Smith finally got a response from Nupp. (GC-20.)

#### **E. The Union's June 15 Requests**

On June 15, Smith sent the following information request to Bill Schietinger via email:

As the IAEP continues to look into concerns over staffing levels and the brown outs, we are requesting the following information:

1. Documentation supporting response time requirements for emergency calls.
2. Documentation detailing the AMR New Haven response times for the period of May 1, 2020 through today's date.

This request is made without prejudice to the Union's rights to file subsequent requests. Please provide this information by the close of business on Monday, June 22, 2020 by means of electronic mail. If part of this request is denied or if any material is unavailable, please provide the remaining items as soon as

possible, which the Union will accept without prejudice to its position that it is entitled to all documents and information called for within this request.

(GC-14 at 2.)

By way of background, Connecticut law expressly uses response times as a mandatory performance metric for responders such as ambulance services. Specifically, state statute requires each municipality to establish “a local emergency medical services plan,” Conn. Gen. Stat. § 19a-181b(a), and that each plan must include, among other things:

The establishment of performance standards, including, but not limited to, standards for responding to a certain percentage of initial response notifications, response times, quality assurance and service area coverage patterns, for each segment of the municipality’s emergency medical services system; ....

Conn. Gen. Stat. § 19a-181b(a)(3). A municipality may petition the state to remove a “responder” (e.g. ambulance company) if it fails to meet its agreed response time standards with the municipality and fails to comply with a mutually agreed corrective plan. See Conn. Gen. Stat. § 19a-181c(a)(3) (defining “unsatisfactory performance”), § 19a-181c(b) (discussing petition for removal). State statute also requires ambulance companies such as Respondent to document and report response times as an important performance metric. Specifically, licensed ambulance companies must regularly submit data including “(iii) the response time for each licensed ambulance service, certified ambulance service or paramedic intercept service during the reporting period; ....” Conn. Gen. Stat. § 19a-177(8)(A).<sup>17</sup> But beyond legalistic requirements, it is common knowledge that shorter response times contribute to better health outcomes while longer response times often can contribute to poorer health outcomes in most medical

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<sup>17</sup> At the hearing, Schietinger’s testimony wavered on the issue of Respondent’s reporting requirement. At one point, he testified that “We don’t report response times to the State.” (Tr. 317.) Just a few moments later, however, he testified “I’m not sure what specific information goes up to the state.” (Tr. 318.)

emergencies. Thus, Respondent's employees record the time that a call arrives at dispatch, the time that a dispatcher gives the call to an ambulance, the time that the ambulance begins travelling to the scene, the time of arrival at the scene, the time that the crew make contact with the patient, the time that the patient is transported to the hospital, and the time that the patient arrives at the hospital. (Tr. 202, 316.) Respondent tries to keep response times as low as possible. (Tr. 324.) According to Montanaro, Employees who take too long to respond to a call risk potential discipline for an alleged "delay of call." (Tr. 203.)<sup>18</sup>

At the hearing, Smith testified that he requested the response times for two reasons. First, he wanted to determine what the response times of the Unit employees were, and whether they were consistent with the employer's expectations. (Tr. 160.) Second, Smith hoped to get more information on whether Bridgeport ambulances were being staged in or near the New Haven area. (Tr. 161.) Longer response times might suggest that the Bridgeport ambulances were coming from farther away, while shorter response times would indicate that the Bridgeport ambulances were closer to New Haven when they received the call. (Tr. 323-24.)<sup>19</sup>

Moreover, as Schietinger's May 6 email illustrates, call volume, staffing levels, and response times are interconnected:

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<sup>18</sup> In his testimony, Schietinger denied that employees were disciplined for failing to respond within a certain amount of time. (Tr. 327.) However, the mere fact that a policy may entail some amount of discretion or flexibility does not disqualify it as a policy. More problematically, this denial came only after hearing a lengthy objection by Respondent's counsel:

Your Honor, I maintain my objection on relevance. There is no evidence in this record that I can think of, not testimony, not document, that says or even implies that the potential of discipline for an employee's inability or refusal to satisfy response time requirement is a – is a reason for any of these information requests. So it's irrelevant to this proceeding and we would object on that basis.

(Tr. 327.)

<sup>19</sup> Bridgeport and New Haven are approximately 16 miles apart.

We have reviewed the most current volume trends and have begun adding hours back on to the schedule to help handle this increase and help ease the frequency of employees being held past end of shift times and also to *improve our on time performance*.

(R-7 at 1, emphasis added.) In addition to testifying that he considers response times when deciding how many ambulances to schedule for a particular shift (Tr. 329), and despite agreeing that response times for AMR Bridgeport ambulances would likely vary depending on their distance from New Haven (Tr. 324), Schietinger claimed that he did not understand why the Union was seeking information about response times (Tr. 329.)

As detailed below, Respondent did not respond to Smith's June 15 Request until July 17, at which time it refused to provide the requested information.

**F. The 2020 Subcontracting Grievance**

On July 8, the Union filed a grievance over the alleged subcontracting violation. (GC-16.) The grievance alleged that "AMR New Haven has been using surrounding AMR Divisions to attempt to cover increased call volume while taking and not returning hours to the New Haven Division schedule." (Id. at 2.) At that point, Smith still had not received a response to his July 2 follow-up email regarding his June 10 letter.

On July 16—the same day that Smith sent his second follow-up email (GC-18) to Nupp regarding the June 10 Letter—Respondent denied the subcontracting grievance at Step 1. (GC-17.) In the denial, Operations Manager Tim Craven simply wrote:

This letter is in response to a grievance dated July 7<sup>th</sup> and 8<sup>th</sup> (Subcontracting). The employer has reviewed the Union's allegation and has found that there were no violations of Article 4 section 4.02 of the union contract. [*Sic.*]

(Id at 2.) The Union filed the subcontracting grievance at Step 2 the following day. (GC-19.)

On July 17, Nupp emailed Smith a letter responding to both Smith's June 10 letter and June 15 Request. (GC-20.) Nupp wrote:

The Employer has considered your request for information and is providing the following responses.

1. List of all bargaining unit members who have been removed from March 1, 2020.- I am asking for the list the Company used, by seniority of the members who were impacted by the "brown outs" as per CBA, Article 9, Section 9.03. *The Employer has no responsive information regarding a seniority list for "brown outs." Hours reduced or removed from the schedule were based on the Employers determination of need and its rights as defined in Article 4, Section 4.01 of the CBA. Additionally, the Union was provided notice on 3/16/2020 that the Employer was temporarily invoking the local and national disaster provisions of the collective bargaining agreements due to the COVID 19 Crisis which temporarily relieves the Employer of obligations under the CBA relating to certain matters including scheduling and shift changes.*
2. Data of call volume since March 1, 2020 the information is relevant to the ongoing union investigation into non-bargaining unit AMR employees performing bargaining unit work in New Haven coverage are on a frequent basis during continued brownouts. *The Employer renews its objection to the Union's request as it is unduly broad, lacks a basis of relevance, and is proprietary in nature and is outside the Union's jurisdiction and the collective bargaining relationship.*
3. Number of calls responded to by non-AMR New Haven bargaining unit members in the New Haven AMR coverage area since March 1, 2020, See number 3. *The Employer renews its objection to the Union's request as it has a right to allocate and/or reallocate Company resources and to, "...take such measures as it may determine to be necessary for an orderly operation of the business..." Additionally, any information pertaining to non-bargaining unit AMR employees is outside the Union's jurisdiction and the collective bargaining relationship.*
4. Documentation supporting response time requirements for emergency calls. *The Employer objects to the Union's request as it is overly broad, lack a basis of relevance, and is outside the Union's jurisdiction and the collective bargaining relationship.*
5. Documentation detailing the AMR New Haven response times for the period of May 1, 2020 through June 15, 2020. *The Employer objects to the Union's request as it is overly broad, lack a basis of relevance, and is outside the Union's jurisdiction and the collective bargaining relationship.*

Thank you in advance for your attention to this matter, and please do not hesitate to contact me should you have any questions or concerns.

(GC-20 at 2-3.)

As mentioned in Nupp’s letter above, Respondent had invoked the “Local Disaster” and “National Disaster” provisions of the CBA by letter dated March 16. (R-4 at 8-9.) The “National Disaster” section of the CBA, § 23.03(B) does not apply here, as no “Disaster Response Team” is allegedly involved.<sup>20</sup> CBA § 23.03(A) (“Local Disasters”), discussed in the letter above, provides as follows:

The Parties agree that the Employer shall be relieved of any and all obligations hereunder relating to scheduled paid time off, job posting, shift changes and transfers, in the event of and during the term of a disaster or catastrophe such as fire, flood, explosion, power failure, earthquake, or other act outside the control of the Employer and causing disruption to the Employer's normal operations. In the event that the employee is on shift when a disaster occurs, or the Employer designates a disaster situation, the Employer shall make every reasonable effort to allow the employee sufficient time to insure the welfare of the employee's family.

(GC-2 at 45.) With respect to § 23.03(A), Schietinger testified at the hearing that COVID impacted Respondent in two ways: by causing “volume demands” to decrease (Tr. 297) and by causing an increase in the number of employees who became unable or unwilling to work due to their own illness, health concerns of family members, or outside employment restrictions put in place by other employers (Tr. 340).

**G. The Union’s July 22 Request**

On July 22, Smith sent via email the following information request (GC-21, the “July 22 Request”) to Nupp:

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<sup>20</sup> Section 23.03(B) is expressly limited to volunteers for a “Disaster Response Team.”

The Parties agree that the wages, hours, and all conditions of employment established by this Agreement shall be suspended, and the Employer shall be relieved of any obligations under this Agreement relating to wages, hours, benefits, and other terms and conditions of employment for employees who volunteer and are deployed to work as part of an Employer sponsored Disaster Response Team (DRT) effort.

(GC-2 at 45.)

The IAEP submits this request for information while we investigate an active grievance which has been filed as a Step 2 at New Haven AMR. The information we are requesting is as follows:

1. List of employees affected by the “brown out” since March 1, 2020
2. Data of AMR New Haven call volume since March 1, 2020
3. Number of calls responded to in the New Haven service area by non-bargaining unit employees.
4. AMR New Haven's response time policy/procedure/standard operating guidelines
5. Detailed log of response times for AMR New Haven for a time period of May 1, 2020 through present.

This request is made without prejudice to the Union's rights to file subsequent requests. Please provide this information by the close of business on Wednesday, July 29, 2020 by means of electronic mail. If part of this request is denied, please indicate so, and advise as to the reason. If any material is unavailable, please provide the remaining items as soon as possible, which the Union will accept without prejudice to its position that it is entitled to all documentation and information called for within this request.

As Smith explained, since the prior information requests were to investigate a *potential* grievance, he drafted the July 22 Request as a new information request because the Union was now seeking the information in connection with a *pending* grievance. (Tr. 91.)

Regarding item #1 above (“List of employees affected by the brown out since March 1, 2020”), Smith testified that although the language was not necessarily identical to his previous requests, he was in fact seeking the same information that he had previously requested and which the Employer had refused to provide. (Tr. 149.)

Respondent denied the subcontracting grievance at Step 2 on July 24. In the denial, Schietinger wrote:

This letter is in response to a step 2 grievance received by me via e-mail on July 16, 2020 regarding Article 4, Section 4.02 Subcontracting. The employer has reviewed the Union's allegation and has found that there were no violations of Article 4, Section 4.02, Subcontracting.

(GC-22 at 2.) Respondent and the Union did not meet to discuss the subcontracting grievance prior to either the Step 1 or Step 2 denials.

On July 29, Nupp provided the following response to Smith's July Request.

I am in receipt of your information request for AMR New Haven dated July 22, 2020, and this letter will serve as the Employer's response. The Employer has considered your request and is providing the following responses and information.

1. List of all employees affected by the "brown out" since March 1, 2020. *The Employer objects to the Union's request as it is overly broad and subjective in nature.*
2. Data of AMR New Haven call volume since March 1, 2020. *The Employer has already provided a response to this request in its letters dated 6/7/2020. and 7/17/2020.*
3. Number of calls responded to in the New Haven service area by non-bargaining unit employees. *The Employer has already provided a response to the same or similar request in its letter dated 7/17/2020.*
4. AMR New Haven's response time policy/procedure/standard operating guidelines. *The Employer has no responsive information regarding response time policy/procedures/ standard operating guidelines for AMR New Haven.*
5. Detailed log of response times for AMR New Haven for a time period of May 1, 2020 through present. *The Employer has already provided a response to the same or similar request in its letter dated 7/17/2020.*

Thank you in advance for your attention to this matter, and please do not hesitate to contact me should you have any questions or concerns.

(GC-29 at 2.)

With regard to the Union's requests for "response time policy/procedure/standard operating guidelines," Nupp testified that his response was based on Schietinger's indication that no such documentation existed. (Tr. 254.) When questioned about response times, Schietinger did not dispute that Respondent documents times copiously, but he seemed to quibble about whether such time should be called "response times" or something else.

[GC Counsel:] So the -- so does AMR New Haven have any procedures regarding response times?

[Schietinger:] No.

[GC Counsel:] Is there no procedure that employees are supposed to document the response times?

[Schietinger:] Repeat the question.

[GC Counsel:] Is there no procedure stating that employees are supposed to document the response times?

[Schietinger:] They don't document response times. They document a time for every aspect of the trip.

(Tr. 315.) Schietinger also testified that Respondent has different response times for different clients. (Tr. 328.) Schietinger also testified that he was aware that failure to meet agreed response times, if uncorrected, could be grounds for a municipality (i.e. client) to seek removal of that responder on grounds of "unsatisfactory performance" (Tr. 323.) Schietinger also testified that response times affect the scheduling of units: "It's my job to make sure -- we try and adhere to those response times through making sure we have enough units." (Tr. 328-29.)

[GC Counsel:] ... So when deciding how many ambulances to have on the schedule, take off the schedule, one of the things you're thinking about is your ability to meet the response time agreements that you have with various municipalities.

[Schietinger:] That's one of the things, yes.

[GC Counsel:] And do you -- Mr. Schietinger, what's your understanding of why the Union requested information on response times?

[Schietinger:] I don't know, I didn't see any point for it. For the -- for the -- for the information they are looking for.

(Tr. 329.)

Subsequently, the Union sent the Employer a notice of intent to arbitrate the grievance.

(GC-23, GC-25.)

### III. ANALYSIS

#### A. General Legal Principles

An employer has a statutory obligation to provide to a union that represents its employees, on request, information that is relevant and necessary to the union's performance of its duties as collective-bargaining representative. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); accord *A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989), *enfd.* 39 F.3d 1410 (9th Cir. 1994). This includes information necessary to decide whether to file or process contractual grievances on behalf of unit employees. *Acme Industrial*, 385 U.S. at 438 (“Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims.”); *Disneyland Park*, 350 NLRB 1256, 1257 (2007). When a union's requested information pertains to employees within the bargaining unit, the information is presumptively relevant and the employer must provide it. Where the requested information is not presumptively relevant, it is the union's burden to demonstrate relevance. *Disneyland Park*, 350 NLRB at 1257. To request information outside of the bargaining unit, the Union must establish that it is “acting upon the probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” *Pall Biomedical Corp.*, 331 NLRB 1674, 1678 (2000) (quoting *Acme Industrial Co.*, 385 U.S. at 437). “This burden is not a heavy one.” *Id.*

The Board uses a broad, discovery-type standard in determining the relevance of requested information. Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. To demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information or, (2) that the relevance of the information should have been apparent to the Respondent under the circumstances.

*U.S. Postal Service*, 364 NLRB No. 27, slip op. at 18 (June 15, 2016) (quoting *Disneyland Park*, 350 NLRB at 1258; internal citations omitted). A union may establish relevance of not

presumptively relevant by informing the employer that it seeks the information to process a grievance, or investigate a potential grievance, pursuant to the parties' collective-bargaining agreement. *Schrock Cabinet Co.*, 339 NLRB 182, fn. 6 (2003). "[A]n employer is required to provide such information regardless of the potential merits of any particular grievance." *Id.* "[T]he Board does not pass on the merits of the union's claim... thus, the union need not demonstrate that the contract has been violated in order to obtain the desired information." *U.S. Postal Service*, supra, slip op at 18. (quoting *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989)).

## **B. The Information Requests**

### **1. Information About Employees Affected by the Brown Outs**

#### **a. The Union's May 7 Request**

On May 7, the Union sought the information to "look into concerns regarding the reduction of part time membership, and the reduction of shifts...." (GC-9 at 2.) To that end, the Union requested a "List of all bargaining unit members who have been removed from the schedule since March 1, 2020." (*Id.*) The Union's request for a list of Unit members who had been removed from the schedule sought presumptively relevant information about employees in the Unit, and it should have been provided without controversy. Indeed, Nupp did not ask any questions about this request during his phone conversation with Smith. (Tr. 77-78.)

#### **b. Respondent's June 7 Response**

Nevertheless, Respondent refused to provide the information, claiming in its June 7 letter that:

The Employer objects to the Union's request as it is overly broad. Should the Union wish to revise its request to indicate the specific reason(s) the employee(s) had hours reduced or removed from the schedule, the Employer may consider the revised request.

(GC-12 at 2.) This objection is nothing more than pretextual boilerplate. Had Nupp actually thought that the request was overly broad or otherwise ambiguous, he easily could have clarified it over the phone with Smith. Why didn't he? Most likely because it was obvious to everyone involved at that point—based on the oral and written communications between the Union and Respondent—that the Union was looking for information about employees who had lost hours because Respondent was cutting hours from the schedule.

Moreover, Respondent's offer that it "may consider" the Union's request if narrowed falls far short of its responsibilities under the Act, as the Union was under no obligation to narrow its original request. If the Union wanted information about employees who had *asked* to be taken off the schedule, that information would be no less presumptively relevant than a request for information about employees who had been *involuntarily* removed from the schedule. Schietinger's testimony that some employees may have requested to work fewer hours due to COVID-related concerns (Tr. 340) highlights this very issue—to the extent that Respondent might argue in the grievance that some employees *requested* schedule cuts, information about those employees would clearly be relevant. Moreover, it is entirely plausible that there could be disagreement over whether particular employees were voluntarily or involuntarily removed from the schedule. Thus, even if the Union was not planning to grieve over employees who did not want to work<sup>21</sup>, it would be logical and reasonable for the Union to ask Respondent for a list of *all employees* who had been removed from the schedule. The Union does not need to guess why employees were removed from the schedule in order to get information about those employees' work hours. See *Sho-Me Power Elec. Cooperative*, 360 NLRB 349, 355 (2014) ("The Union is

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<sup>21</sup> Of course, it is entirely plausible that the Union might have opinions on whether and how any vacant/open shifts should be filled under the CBA.

not required to accept the Respondent's contention.... The Board has held that the union is entitled to the actual information to verify the employer's assertions.”).

Finally, it bears noting that if Respondent honestly believed that the Union only wanted a specific subset of employees who had been removed, it might have produced *that* information at the time and then followed up with the Union whether that information was sufficient.

Respondent’s failure to make any such effort indicates that it was not attempting in good faith to provide the Union with the information that it needed, but that it was simply looking for excuses to avoid providing clearly pertinent information.

**c. The Union’s June 10 Letter & Respondent’s July 17 Reply**

Even though it had no obligation to narrow its request, the Union humored Respondent on the issue, and on June 10, Smith wrote: “I am asking for the list the Company used, by seniority of the members who were impacted by the ‘brown outs’ as per CBA, Article 9, Section 9.03.” (GC-13 at 2.) Unfortunately, this did not get the Union any closer to obtaining its information. After a couple of email reminders from the Union (GC-15, GC-18), Nupp finally responded more than a month later:

The Employer has no responsive information regarding a seniority list for “brown outs.” Hours reduced or removed from the schedule were based on the Employers determination of need and its rights as defined in Article 4, Section 4.01 of the CBA. Additionally, the Union was provided notice on 3/16/2020 that the Employer was temporally invoking the local and national disaster provisions of the collective bargaining agreements due to the COVID 19 Crisis which temporarily relieves the Employer of obligations under the CBA relating to certain matters including scheduling and shift changes.

(GC-20 at 2.) Having unlawfully insisted that the Union narrow its request, Respondent then claimed that the Union requested something that did not exist. Reviewing this back-and-forth objectively, it is difficult to imagine that Respondent was doing anything other than looking for excuses to avoid providing any useful information to the Union. This is only corroborated by

Respondent's claim that "[h]ours removed from the schedule were based on the Employers determination of need and its rights..."—a dismissive non-explanation, practically indistinguishable from the well-worn parental scold of "because I said so."

Respondent's reference to the CBA's Management's Rights clause (§ 4.01) is beside the point. First, the Management's Rights clause is expressly limited by the other provisions of the CBA, and so Respondent cannot rely on the Management's Rights clause to justify a violation of another part of the CBA. (GC-2 at 10.) Thus, so long as the Union is investigating a possible grievance over a breach of the CBA, Respondent cannot cite to the Management's Rights clause to defeat the relevance of information requested by the Union to determine whether Respondent has failed to comply with another provision of the CBA. As mentioned above, "the Board does not pass on the merits of the union's claim... thus, the union need not demonstrate that the contract has been violated in order to obtain the desired information." *U.S. Postal Service*, supra, slip op. at 18. Accordingly, in the context of the Union's request for relevant information, Respondent's reference to the Management's Rights clause is a non sequitur.

Respondent's June 17 Letter also opportunistically mischaracterized § 23.03(A) ("Local Disasters") of the CBA to make it seem far broader than its actual text provides. For starters, the term "scheduling" is not used in that section. Rather, § 23.03(A) relieves the Employer "of any and all obligations hereunder relating to *scheduled paid time off, job posting, shift changes and transfers*" during a disaster or catastrophe situation. (GC-2 at 45, emphasis added.) Were § 23.03(A) intended to give Respondent carte blanche over any and all issues relating to

scheduling, it would say that.<sup>22</sup> And were that the case, listing such specific items as “scheduled paid time off,” “job posting” and “transfers” would be superfluous. Following the general principle that “words grouped in a list should be given related meaning,” *Massachusetts v. Morash*, 490 U.S. 107, 114 (1989), one would read “shift changes” to have a meaning related to the terms surrounding it: “scheduled paid time off,” “job posting,” and “transfers.” A common thread among those three is that they refer to things generally involving *employee requests*: employees can request paid time off, employees can request jobs by bidding on job postings, and employees can request transfers. Thus, reference to “shift changes” would logically refer to changes requested by the employee. As it happens, the CBA discusses such changes in § 9.09 (“Shift Bidding”), which provides in part that “Employees may submit in writing a request to change or swap their shift bid with another employee or into an open bid.” (GC-2 at 18.)<sup>23</sup> This interpretation makes sense from a practical perspective: fires, floods, explosions, power failures and earthquakes—the specific examples cited in that CBA section—typically cause a surge in demand for emergency medical services and medical transport. In such a situation, it would be entirely foreseeable that Respondent might need to cancel vacations, halt transfers, and revoke job postings/job bids to muster all hands on deck. The last sentence of § 23.03, which discusses

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<sup>22</sup> Although not at issue here, the language of § 23.03(B) (“Natural Disasters”) is illustrative as it uses much broader waiver language than 23.03(A): “the Employer shall be relieved of any obligations under this Agreement relating to wages, hours, benefits, and other terms and conditions of employment for employees who volunteer and are deployed to work as part of an Employer sponsored Disaster Response Team (DRT) effort.” (GC-2 at 45.) If the parties wanted to include similarly expansive waiver in 23.03(A), they obviously were capable of doing so. But they did not.

<sup>23</sup> To the extent that Respondent may argue that the term “shift changes” in § 23.03 refers to the Employer’s right to “establish and change work schedules and assignments” in § 4.01, it makes little sense why the CBA would contain a provision relieving Respondent of its obligations under the Management’s Rights clause.

release time for on-duty employees to ensure their families' welfare, supports such an interpretation.

It also bears noting that § 23.03 contains no mention of layoffs (§ 7.04) or subcontracting (§ 4.02). Thus, there can be no credible argument that the Local Disaster section allows Respondent to take work away from the Unit and give it to another AMR division, or that Respondent can use the Local Disaster section to conduct stealth layoffs.

And finally, in order to invoke § 23.03, Respondent would have to establish "disruption to the Employer's normal operations." (GC-2 at 45.) As Schietinger testified, the COVID pandemic allegedly impacted Respondent's operations by depressing demand (Tr. 297) and affecting the number of Unit employees available to work (Tr. 340). Thus, information regarding staffing levels, call volume and response times would be relevant to Respondents' claims of disruption.

**d. The Union's July 22 Request & Respondent's July 29 Reply**

Despite Respondent's gamesmanship, the Union filed its grievance on July 8 and decided to give another try at obtaining the obviously relevant information that it had previously requested. And so on July 22, Smith sent a letter requesting a "List of employees affected by the "brown out" since March 1, 2020." On July 29, Respondent answered that: "The Employer objects to the Union's request as it is overly broad and subjective in nature." (GC-20 at 2.)

At the hearing, Mr. Nupp did not explain precisely what he meant by "subjective," though he did testify that he needed clarification by what the Union meant by "affected." (Tr. 253.) Nupp testified that an employee whose schedule was changed might not necessarily suffer a net loss of hours but nonetheless might be "objectively" viewed as having been "affected." (Tr. 253.) Although that's an interesting hypothetical, it doesn't really help Respondent. If an

employee had their hours cut, but Respondent had made the employee whole by offering them hours at another date/time, why wouldn't the Union want to know about that? Especially if that was a potential defense to a grievance. Moreover, if some employees were being offered make-up hours while others were not, wouldn't the Union want to know about that?<sup>24</sup> Under Nupp's hypothetical, the Union would still be asking for presumptively relevant, and actually relevant, information.<sup>25</sup>

**2. Information About Call Volume**

**a. The Union's May 7 Request**

On May 7, the Union requested the following information regarding call volume in the New Haven area:

3. Data of call volume since March 1, 2020.
4. Number of calls responded to by non AMR New Haven bargaining unit members in the New Haven coverage area since March 1, 2020.

(GC-9 at 2.) By this time, the Employer was already well aware that the call volume data was clearly relevant to the Union's concerns over both the reduction in Unit employees' hours and subcontracting of Unit work. Bill Schietinger told Union representatives on multiple occasions, both orally and in writing, that shifts had been reduced because of call volume. Determining the

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<sup>24</sup> Since CBA § 9.03 requires that part time employees work a minimum number hours per month to keep their status as employees (GC-2 at 17), the Union may very well have an interest in determining what efforts Respondent had been making to provide employees with an opportunity to avoid slipping below that threshold.

<sup>25</sup> To the extent that Respondent may attempt to argue that this request sought information on employees outside of the Unit, that argument must be rejected. From the prior oral and written communications up to that point, it was inescapably clear that the Union was seeking information about Unit members who lost hours. The fact that the July 22 request explicitly cited "an active grievance" only increased the obviousness of the Union's goal. Clearly, Respondent understood this at the time, as it did not object to the request on grounds that it sought information "outside the Union's jurisdiction."

total number of calls in the New Haven area was also relevant to determining the relative number of those calls being assigned to non-Unit ambulances.

Similarly, the Union’s request for the number of calls responded to by non-Unit ambulances (item #4) clearly relates to the concerns—which the Union voiced multiple times to Respondent—that non-Unit employees were performing Unit work in violation of the CBA’s subcontracting language. *Oncor Elec. Delivery, LLC*, 369 NLRB No. 40 (Mar. 6, 2020) clearly stands for the proposition that this information is relevant. In *Oncor*, the Board held that information requested by the union regarding work orders was relevant to its grievance over the respondent’s use of non-unit employees to perform storm work.<sup>26</sup> To the extent that Nupp’s letter disputed the relevance of the information requested, the Employer seems to have imposed on the Union a burden greater than the Board has traditionally imposed. *US Postal Service*, supra, slip op. at 1 (“the information was necessary in order for the Union to determine whether it had a right to invoke the provision in its collective-bargaining agreement with the Respondent concerning bargaining over the Respondent’s potential outsourcing initiatives.”).

Moreover, the requested call volume data was clearly relevant to Schietinger’s claim that he was resorting to the use of Bridgeport ambulances due to call volume increases.<sup>27</sup> If Respondent were to argue that CBA § 4.02 contains an implicit exception for “mutual aid” (as there is obviously no explicit exception in the text itself), call volume would be clearly relevant

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<sup>26</sup> Although the Board ultimately held that the respondent asserted a valid confidentiality interest regarding specific customer information contained in the work orders, here the Union has only requested data on call volume, it has not requested data about customers/patients identities, contact information or medical information. Thus, the relevance here is directly analogous to the relevance of the work orders in *Oncor*.

<sup>27</sup> Schietinger testified at the hearing that “We may also send Bridgeport units up to New Haven for assistance for high volume. Just like we subsequently will send New Haven units into Bridgeport to assist with high volume.” (Tr. 291.)

to the question of whether AMR New Haven ambulances were truly unavailable at the time of the disputed calls.<sup>28</sup>

Finally, as mentioned earlier, the information would be relevant to Respondent's attempts to invoke the "Disasters" provision of the CBA, insofar as Respondent appears to argue that the COVID pandemic caused "disruption" to its "normal operations."<sup>29</sup>

**b. Respondent's June 7 Letter**

With respect to the Union's request for "Data of call volume since March 1, 2020" (item #3), Nupp responded that:

The Employer objects to the Union's request as it is overly broad, lack a basis [*sic*] of relevance, and is proprietary in nature and is outside the Union's jurisdiction and the collective bargaining relationship.

(GC-12 at 2.) This objection reads like pretextual boilerplate. It is unclear how a request for call volume over a period of less than three months is somehow "overbroad," and Respondent's claim that the Union's request "lacks basis in relevance" flatly ignores the communications between the parties up to that point. The Union was merely asking for the very kind of information that Schietinger repeatedly said that he was using to cut or add hours to the schedule. For example:

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<sup>28</sup> Of course, the fact that volume might have been high does not necessarily mean that a mutual aid call was warranted: Respondent could be busier than usual but still have resources available within the division to respond to calls. However, call volume need not be dispositive to be relevant.

<sup>29</sup> Although the Respondent did not specifically cite CBA § 23.03 with respect to the information requests until later in its correspondence with the Union, to the extent that Respondent intended to assert a defense that schedule cuts were warranted by the fact that call volume was depressed by the COVID-19 pandemic, data regarding that call volume would be clearly relevant to proving or testing that defense.

- “We have been monitoring the volume daily and will be adding shifts back on to the schedule. These added hours will be based on volume demands over this past week.” (GC-7 at 1.)
- “We just met this morning and reviewed the last 2 weeks of volume. We are adding between 30 to 40 unit hours back each day of the week.” (GC-8 at 1.)
- “We will continue to try our best matching resources to the demand.” (R-7 at 1.)

It is vexingly disingenuous for Respondent to tell the Union that it is adjusting hours based on business volume, and then respond to the Union’s request for data showing that volume by denying that such data is relevant and pretending not to know why the Union wants it.

Respondent’s argument that the call volume is “proprietary in nature” is unsubstantiated and must be rejected. The Board has recognized certain protections where an employer establishes a “legitimate confidentiality concern.” *Oncor Electric Delivery*, supra, slip op. at 3; *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006) (“Initially, the party must show that it has a legitimate and substantial confidentiality interest...”). The burden of establishing that requested and relevant information is confidential is on the party asserting it. *Lasher Service Corp.*, 332 NLRB 834 (2000). An employer cannot avoid its obligation to furnish information merely by asserting that it has a confidentiality interest. Rather, the employer has an obligation to seek an accommodation that meets the needs of both parties. *National Steel Corp.*, 335 NLRB 747, 748 (2001); *GTE California, Inc.*, 324 NLRB 424, 427 (1997).

Here, Respondent’s naked assertion that the requested call volume data was “proprietary in nature” falls far short of Respondent’s obligations under the Act. First, it bears noting that “proprietary” and “confidential” are not necessarily the same thing. Even if we are to treat Respondent’s June 7 letter as an assertion of confidentiality, that claim should be rejected because Respondent did nothing in its correspondence with the Union or at the hearing to substantiate any such claim. The Employer failed to provide any confidentiality or data retention

policies that might support its claim. One might reasonably have expected Nupp to testify that he was simply applying a confidentiality policy maintained by Respondent... perhaps something similar to the employer’s policy in *Oncor Electric Delivery*, which the Board discussed at length. *Supra*, slip op. at 3. Here, however, Respondent offered nothing of the sort. Instead, Nupp testified that his “proprietary” claim was based solely on his conversation with Bill Schietinger. (Tr. 255.)

In his testimony, Schietinger did not identify any actual rules or policies by the Employer regarding confidentiality. Instead, he testified that “our call volume is what *I consider* confidential....” (Tr. 301, emphasis added.) Instead of citing an actual policy, he provided a sequence of thoughts that weren’t particularly illuminating.

[R. Counsel:]           And what types of concerns would you have if a competitor did get their hands on the company's, AMR's, call volume?

[Schietinger:]           I mean, it's competitive, so you know, if a competitor of ours had seen our call volume in a particular area in the New Haven market say, you know, some of our competitors could look at their call volume drop.

                                  If our call volume increased where that would happen, what potential clients that might've happened with and that can change people's marketing strategy, production strategy of their crews, where they're going to post crews and what have you so.

(Tr. 302.) Yet despite his abject failure to provide a cogent explanation as to how call volume statistics might provide competitors with an unfair advantage, Schietinger confidently declared that “that information is *privileged*.” (Id., emphasis added.) This claim is simply too much—there is absolutely no evidentiary privilege that applies to ambulance call volume. When asked what restrictions Respondent has placed on call volume data disclosed to clients, Schietinger could not identify any. (Tr. 303.) Clearly, Schietinger was outside his comfort zone when testifying on this issue. Unfortunately, Respondent provided no other evidence to substantiate its

confidentiality claim. This showing is plainly inadequate. *Lasher Service Corp.*, 332 NLRB at 834 (“Respondent must establish confidentiality as a defense, not merely raise a naked confidentiality claim.”).

Even if we were to imagine a universe where there was some substantiation of its confidentiality claim, Respondent would still be obligated to negotiate with the Union for a way to accommodate the Union’s need for the information with the Employer’s legitimate confidentiality interest. Respondent made zero effort to do so here.

c. **The Union’s June 10 Letter & Respondent’s July 17 Reply**

In his June 10 follow-up letter, Smith explained his request for information about call volume and calls handled by non-Unit personnel:

[T]he information is relevant to the ongoing union investigation into non-bargaining unit AMR employees performing bargaining unit work in the New Haven coverage area on a frequent basis during continued brown outs.

(GC-13 at 2.) No information was forthcoming, however. With respect to the Union’s request for call volume, Respondent objected:

The Employer renews its objection to the Union's request as it is unduly broad, lacks a basis of relevance, and is proprietary in nature and is outside the Union’s jurisdiction and the collective bargaining relationship.

(GC-20 at 2.) With the exception of changing “lack” to “lacks,” this was a word-for-word repetition of Respondent’s June 7 objection. Accordingly, there really isn’t anything to add to the above analysis of that objection’s prior iteration. With respect to the Union’s requests for the number of calls handled by non-Unit personnel, the Employer also objected:

The Employer renews its objection to the Union's request as it has a right to allocate and/or reallocate Company resources and to, “...take such measures as it may determine to be necessary for an orderly operation of the business...” Additionally, any information pertaining to non- bargaining unit AMR employees is outside the Union’s jurisdiction and the collective bargaining relationship.

(GC-20 at 2.) The second sentence of this objection is merely a repetition of Respondent's June 7 objection. The only new addition is that Respondent piled on a reference to the Management's Rights clause (§ 4.01). Again, this is a non sequitur: CBA § 4.01 cannot be used to justify a violation of §§ 4.02 or 9.03. Nor can § 4.01 be used to obviate the relevance of otherwise relevant information requested by the Union to investigate or grieve an alleged violation of §§ 4.02 or 9.03.

### **3. Information About Response Times**

On June 15, the Union requested "Documentation detailing the AMR New Haven response times for the period of May 1, 2020 through today's date. (GC-14 at 2.) On July 17, Respondent denied this request, writing: "The Employer objects to the Union's request as it is overly broad, lack a basis of relevance, and is outside the Union's jurisdiction and the collective bargaining relationship." (GC-20 at 3.) Although Nupp did discuss this request with Schietinger, Nupp did not contact Smith to seek any clarification or explanation of this request before denying it. (Tr. 254, 261.) The Union repeated this request on July 22, when it asked for "Detailed log of response times for AMR New Haven for a time period of May 1, 2020 through present." (GC-21 at 2.) On July 29, Respondent wrote: "The Employer has already provided a response to the same or similar request in its letter dated 7/17/2020." (GC-24 at 2.)

On July 22, the Union requested that Respondent provide "AMR New Haven's response time policy/procedure/standard operating guidelines." (GC-21 at 2.) On July 29, Respondent denied this request not on grounds of relevance, but on grounds that: "The Employer has no responsive information regarding response time policy/procedures/standard operating guidelines for AMR New Haven." (GC-24 at 2.) Nupp testified that his response was based on Schietinger's indication that no such documentation existed. (Tr. 254.)

The relevance of the response time data is clear. Schietinger admitted that Respondent attempts to keep response times as low as possible (Tr. 324), and Montanaro’s testimony regarding employees being disciplined for “delay of call” was not credibly contradicted. (Tr. 203.) “[W]ork rules enforceable through discipline are mandatory subjects of bargaining.” *Virginia Mason Hosp.*, 357 NLRB 564, 566 (2011). “It is well established that issues affecting employee schedules constitute mandatory subjects of bargaining.” *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006). As one ALJ noted in an accretion analysis: “In an EMS system, response time is the single most critical issue in the provision of emergency medical care.” *American Medical Response, Inc.*, 335 NLRB 1176, 1184 (2001). Thus, at a minimum, the response time data would reflect an important aspect of the Unit employees’ working conditions: how quickly, or slowly, the employees were able to respond to calls. More specifically to the context of the Union’s investigation (and grievance) here, Nate Smith testified, response times would likely assist the Union in determining (1) whether Unit employees were responding to calls within the appropriate response times, and (2) how closely AMR Bridgeport ambulances were being stationed to the New Haven area. (Tr. 160-61.) Respondent made no serious effort to rebut this testimony, offering only Schietinger’s less-than-credible testimony that he did not understand why the Union was requesting information about response times. (Tr. 329.)

Respondent’s boilerplate objection that the Union’s request for response time data “is overly broad, lack a basis of relevance, and is outside the Union’s jurisdiction and the collective bargaining relationship” strains credulity. (GC-20 at 3.) Respondent was well aware that the Union was investigating cuts to Unit members’ hours—cuts that Respondent had attempted to justify based on call volume decreases. To the extent that Respondent had been overstaffed, one would expect to see that reflected in a decrease in response times. Were Respondent

understaffed, one would reasonably expect that to be reflected in increased response times. Scheitinger's testimony that response times influence his staffing decisions (Tr. 329) belies Respondent's professed ignorance of why response time data would be relevant to the Union. Moreover, as noted above, the Union filed a grievance over the subcontracting issue in July. To the extent that Respondent might argue that "mutual aid" excused the use of non-Unit employees, response times would be unquestionably germane.

Respondent's denial that it had any documents responsive to the Union's request for "AMR New Haven's response time policy/procedure/standard operating guidelines" is simply too difficult to believe. The fact that emergency responders have a statutory duty to provide such data to the cities and towns they serve, and the fact that Respondent could lose contracts for failing to meet its response time obligations, dictate that there must be some sort of policies or guidelines regarding response times. The Union clearly drafted its response broadly, indicating that it was not purporting to provide the name of the exact policy it was seeking, but rather it was seeking information regarding Respondent's policies bearing on response times. In light of Respondent's cavalier attitude toward the Union's other information requests, it is difficult to take Respondent's denials at face value. Frankly, Schietinger's testimony in several areas strongly suggests a shoot-from-the-hip attitude, particularly with respect to matters concerning the Union:

- The CBA's subcontracting provision only prohibits "prescheduling" non-Unit employees (Tr. 332.)
- Call volume is "privileged." (Tr. 302.)
- The disaster declaration gave "me authority to be flexible with what we're doing with the work conditions, the scheduling and what have you." (Tr. 297.)

- “We don’t report response times to the State.” (Tr. 317.)
- “I’m not sure what specific information goes up to the state.” (Tr. 318.)

Thus, Respondent’s arguments that the requested policy does not exist should be rejected.

### C. **Respondent’s Defenses**

#### 1. **Respondent’s arguments about waiver and/or the Region’s investigation lack merit**

Insofar as Respondent has asserted certain procedural objections to the propriety of the response time allegations in the Complaint, those objections must be rejected. Specifically, Respondent’s counsel alleged at the hearing, that “There is no allegation that the Union made in this case, for example, that there was an unlawful refusal to provide the police, the response time policy. That allegation was picked up sua sponte by the Region.” (Tr. 267.) Respondent’s counsel further claimed, “we didn’t even know that the allegation was under investigation until we got the Merit determination, be that as it may.” (Id.) This argument is more than slightly disingenuous, as Respondent cannot deny that during the investigation, the Region provided it with copies of the information requests at issue. (R-5.) Moreover, Respondent does not claim—as it cannot claim—that the Region did not attempt to settle the allegations in the Complaint weeks before prior issuance of the Complaint. Finally, as learned counsel must undoubtedly be aware:

[T]he adequacy of the preliminary investigation is administratively tested, not by an investigation of the investigation, but by the General Counsel's ability in an open hearing to demonstrate by a preponderance of the credible evidence that the respondent has engaged in the unfair labor practices alleged in the complaint.

*Redway Carriers*, 274 NLRB 1359, 1371 (1985). “The contents and issuance of the complaint, determined prior to the hearing and adjudication of the merits, are matters solely within the prosecutorial authority of the General Counsel.” *Cincinnati Enquirer*, 298 NLRB 275 (1990).

“The exercise of this authority is not reviewable by the Board, including its judges, or by the courts.” *Id.* The operative pleadings in this case are the Complaint and Answers. Respondent’s arguments that it was somehow misled during the investigation is merely a cynical attempt to distract from the fact that Respondent failed to meet its statutory obligations when presented with the Union’s information requests.

Respondent’s arguments that the Union waived its rights to the information described in the Complaint must also be rejected. To the extent that Respondent may attempt to argue that the Region’s September 4, 2020 evidence letter (R-5) constitutes some sort of waiver (Tr. 267), it bears noting that the letter is not from the Union and therefore cannot constitute any waiver by the Union. Nor can any of the Union’s correspondence after its May 7 Request constitute waivers of the information requested therein (at least with respect to the Complaint allegations) insofar as the Union’s narrowing or clarification of those requests was in response to Respondent’s unlawful refusal to provide information.

**2. The Respondent’s Challenge to the Authority of the AGC is without merit**

Respondent contests the question of whether Acting General Counsel Ohr is acting pursuant to a lawful designation under Section 3(d) of the Act, given that the vacancy he filled was created by the removal of former General Counsel Robb. As shown below, former General Counsel Robb was lawfully removed and Acting General Counsel Ohr was lawfully designated.

**a. Background: By default, federal officers are removable at the will of the appointing authority**

Before turning to the text of Section 3(d) of the Act, some background will be of assistance. The basic principle is this: in the absence of any specific statutory provision to the contrary, the power to appoint to office carries with it the power to remove from that office at will. That default rule helps ensure that the President can carry out the functions of the Executive

Branch. This section will describe the caselaw establishing that principle. The next section will show that Section 3(d) does not limit the President’s power to remove the General Counsel. Although the Constitution details how executive-branch officers may be appointed, *see* U.S. Const., Art. II, Sec. 2, Cl. 2, it is “silent with respect to the power of removal from office,” *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839), aside from the power of Congress to impeach and convict. Through the years, therefore, the Supreme Court has repeatedly been called upon to construe the nature of, and limitations on, the power to remove officers. These cases dictate a clear standard. Where Congress has not spoken to the question of removal of an officer, that officer may be removed at any time by the person or body authorized to make the appointment. *Free Enterprise Fund v. Public Co. Acct’g Oversight Bd.*, 561 U.S. 477, 493 (2010) (citing *Sampson v. Murray*, 415 U.S. 61, 70, n. 17 (1974); *Myers v. United States*, 272 U.S. 52, 119 (1926); *Ex parte Hennen*, 38 U.S. (13 Pet.) at 259-60). But where Congress has limited this authority, such limitations offend the Constitution where they would interfere with the President’s duty to “take Care that the Laws be faithfully executed.” U.S. Const., Art. II, Sec. 3, Cl. 5.

*Parsons v. United States* established long ago that merely stating a term of years for an office did not imply any limitation upon the President’s authority to remove officials from that office. 167 U.S. 324, 342 (1897). As the Supreme Court there explained, a statute providing a four-year term of office for United States Attorneys established a limitation on the period of time for which those attorneys could hold office, but did not entitle them “to hold for four years as against any power of the President to remove.” *Id.* In short, the default rule is that the President has authority to remove, at will, officers he appoints, absent clear congressional indication to the contrary.

**b. The NLRB’s General Counsel serves at the pleasure of the President**

Respondent asserts that former General Counsel Peter B. Robb could not be removed from office by President Biden. This contention is based on the Respondent’s argument that the Act *implicitly* limits the President’s power to remove the General Counsel. This argument fails.

**i. The Act does not shield the General Counsel from removal**

Section 3(a) of the Act establishes the Board, provides that members “shall be appointed for terms of five years each,” and states that “[a]ny member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.” By contrast, Section 3(d) of the Act, states that the General Counsel “shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years.”

The plain text demonstrates that the General Counsel, unlike the Board, is not insulated from removal by the President. The Board’s tenure provisions are standard for a multi-member independent administrative agency.<sup>30</sup> The General Counsel’s tenure provisions—and absence of a removal restriction—are standard for an officer carrying out a prosecutorial function. *Parsons*, 167 U.S. at 342. If the 1947 Congress, when creating the General Counsel position, had wanted to grant tenure protection, it would simply have cribbed the language it had already used regarding Board members in 1935. Cases too legion to count hold that the use of different language in analogous parts of the same statute requires that those sections be construed to have different meanings.<sup>31</sup> There is no reason that settled canon of statutory construction does not

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<sup>30</sup>*E.g.* 12 U.S.C. § 242 (Federal Reserve Act) (“each member [of the Board of Governors] shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President”); 15 U.S.C. § 41 (FTC Act) (“Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”).

<sup>31</sup> *E.g., Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (“This Court generally presumes that when Congress includes particular language in one section of a statute but omits it in another, Congress intended a difference in meaning.”) (cleaned up) (citing *Digital*

apply here. Applying the plain language according to its terms also accords with the well-entrenched default rule that removal authority follows appointment authority. *Free Enterprise Fund*, 561 U.S. at 493 (and cases cited therein). When Congress wants to alter the President’s ability “to keep [executive] officers accountable—by removing them from office, if necessary,” it does (and must) clearly express its intent to do so. *Id.* at 483.

The Act’s context further supports this plain reading of its text. Here, Section 3(d)’s language reflects that Congress had every reason to want to treat the General Counsel differently from the Board with respect to tenure. The General Counsel and Board have entirely distinct functions. The Board makes rules, 29 U.S.C. § 156, issues certificates of representative, 29 U.S.C. § 159, adjudicates unfair labor practice cases, 29 U.S.C. § 160(c), and subpoenas evidence, 29 U.S.C. § 161.

In contrast, the General Counsel’s sole statutory functions are to supervise attorneys and regional office officials, 29 U.S.C. § 153(d), and litigate unfair labor practice complaints, 29 U.S.C. § 160(b). In performing those functions, the General Counsel acts with significant prosecutorial discretion, holding the sole power to initiate or refuse to initiate an unfair labor practice case. *E.g.*, *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (“the Board’s General Counsel has

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*Realty Trust, Inc. v. Somers*, 138 S.Ct. 767, 777 (2018); *Loughrin v. United States*, 573 U.S. 351, 358 (2014)); *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (“Instead we ‘generally presum[e] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.’”) (quoting *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537 (1994)); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (“Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.”) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Fairbanks v. Superior Court*, 46 Cal. 4th 56, 62 (2009) (“The use of differing language in otherwise parallel provisions supports an inference that a difference in meaning was intended.”); *accord Lincoln Lutheran of Racine*, 362 NLRB 1655, 1659 n.18 (2015) (quoting *Russello*, 464 U.S. at 23), *overruled on other grounds*, *Valley Hosp. Med. Ctr.*, 368 NLRB No. 139 (2019), *rev. granted and remanded sub nom.*, *Local Jt. Exec. Bd. of Las Vegas v. NLRB*, \_\_ Fed. Appx. \_\_, 2020 WL 7774953 (9th Cir. Dec. 30, 2020).

unreviewable discretion to refuse to institute an unfair labor practice complaint”). The remainder of the General Counsel’s functions are delegated to that position by the Board, pursuant to Section 3(d)’s authorization to perform “such other duties as the Board may prescribe.” And while the Board has delegated *executive* functions to the General Counsel, *Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board*, 20 Fed. Reg. 2175 (April 1, 1955), at § 1(b) (court litigation to enforce the Act), two powers that the General Counsel has no authority whatsoever to exercise are the enactment of quasi-legislative rules under Section 6 and the adjudication of cases under Sections 9 and 10.<sup>32</sup>

In short, the General Counsel is a purely executive position under the plain text of the Act. Congress’s decision to provide tenure protections for the Board-member office in no way suggests Congress intended such restrictions to implicitly extend to the very different General Counsel role. The difference in treatment of those two offices was no coincidence.

Nor is this some recent *ad hoc* interpretation of the Act. To the contrary, the Executive Branch has so understood the Act since it was enacted. Current Chief Justice John Roberts, then a member of the White House counsel’s office, explained the Executive Branch position on this very question in a memorandum written in 1983.<sup>33</sup> And as that memorandum makes clear, this merely reaffirmed long-held views. *Id.*

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<sup>32</sup> Regional offices do supply hearing officers in most representation and jurisdictional-dispute cases, but such hearing officers are acting on behalf of the Regional Director and the Board, respectively, and all such cases are subject to review *by the Board*, not the General Counsel. 29 C.F.R. §§ 102.67; 102.71; 102.90.

<sup>33</sup> Memo from John Roberts to Fred Fielding, White House Counsel re: NLRB Dispute 1, 3 (July 18, 1983) (“clear” that General Counsel is “a purely executive officer and that the President has inherent constitutional power to remove him from office at pleasure”) (cleaned up).

Finally, the construction that Respondent would put on the Act may raise questions about whether such a construction would be constitutional. *Seila Law v. CFPB*, 140 S. Ct. 2183, 2199 (2020) (unconstitutional to insulate Director of the Consumer Finance Protection Bureau from removal at the President’s pleasure). If there were any ambiguity, the Board would have to construe the Act to avoid any such questions. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1987). And given that such a construction is not only readily available here, but also the best reading of the statute, there is no reason to follow the Respondent’s invitation down the proverbial primrose path.

In short, President Biden had the constitutional and statutory power and authority to remove former General Counsel Robb, and he exercised that power. *See Myers*, 272 U.S. at 119 (“This principle [that the power of removal of executive officers was incident to the power of appointment] as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since [the First Congress].”). Respondent’s arguments are contrary to the Act and seek to casually overthrow over a hundred years of settled law on the question of removal of federal officers. The judge should not entertain this request.

**3. Even assuming former General Counsel Robb’s removal was improper, Respondent has not established grounds for the Board to dismiss the Complaint.**

As shown above, Respondent’s argument is entirely without merit. But *even if* it was not, Respondent’s affirmative defense should nevertheless be denied. The Complaint in this case issued under former General Counsel Robb prior to his removal by the President. Thus, the

Regional Director and his staff were authorized by delegation to issue and prosecute the complaint.<sup>34</sup>

Indeed, courts have allowed the continued prosecution of complaints issued prior to a vacancy in the office of the General Counsel. *See Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640, 644 (2d Cir. 1952) (“Before his resignation, the General Counsel had delegated to his representative at the hearing authority to prosecute the complaint. We find no impropriety in such a procedure . . .”), *aff’g in rel. part* 96 NLRB 608, 608-09 (1951). Indeed, in *NLRB v. Gemalo*, the court compelled a party to testify in an unfair labor practice hearing that commenced after the position of General Counsel had become vacant, and rejected the same claim Respondent makes here. 130 F. Supp 500, 501 (S.D.N.Y. 1955). As the court stated, “the attorney acting for the General Counsel in requesting the subpoena and in seeking its enforcement is [not,] in effect a ‘headless horseman’” and “once a complaint has been filed while a General Counsel is in office, that complaint may be prosecuted.” *Id.* Thus, any alleged impropriety regarding Robb’s removal is irrelevant to the continued prosecution of the Complaint issued under his authority.

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<sup>34</sup> *See* 29 C.F.R. § 102.15-26, *passim* (noting General Counsel’s standing delegation to Regional Directors of authority to issue and amend complaints, set hearings, receive answers and amendments, and rule upon procedural motions); 32 Fed. Reg. 9588 § 203.1, 203.3(d) (1967) (Board Description of Organization and Functions delegating from the Regional Director to the Regional Attorney to the Field Attorney “to appear and participate as counsel in Board hearings.”).

#### IV. CONCLUSION

The evidence adduced at this hearing shows that Respondent failed to provide clearly relevant information to the Union. Counsel for the Acting General Counsel respectfully requests that Respondent be ordered to provide the information described in the Complaint and the attached Proposed Conclusions of Law, Proposed Remedy, and Proposed Order.

Respectfully submitted on March 10, 2021.

*/s/ John A. McGrath*  
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John A. McGrath  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Subregion 34  
A.A. Ribicoff Federal Building  
450 Main Street, Suite 410  
Hartford, CT 06103  
john.mcgrath@nlrb.gov

## **PROPOSED CONCLUSIONS OF LAW**

Respondent American Medical Response is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5).

The Union is, and at all material times was, the certified exclusive collective bargaining representative, within the meaning of the Act, of an appropriate unit of employees consisting of the following (hereinafter the "Unit"):

All employees included in the bargaining unit for which the Union was certified by the National Labor Relations Board as the exclusive bargaining representative in matter number 01-RC-102304. The bargaining unit shall include all full time and regular part-time Paramedics, EMTs and HandiVan Drivers employed by the Employer at its New Haven, Connecticut facility excluding all other employees, mechanics, dispatchers, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

Since about June 7, 2020, Respondent has been failing and refusing to bargain in good faith with the Union by failing to provide the Union with relevant information related to Unit employees' terms and condition of employment.

## **PROPOSED REMEDY**

Having found that Respondent engaged in certain unfair labor practices, I find they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having failed to provide the Union with relevant information related to Unit employees' terms and conditions of employment since June 7, 2020, Respondent shall provide the Union with the following information

- (1) A list of all bargaining unit members who have been removed from the schedule since March 1, 2020.
- (2) A list of all bargaining unit employees, including their seniority, affected by the "brown out" from March 1, 2020 through July 22, 2020.
- (3) Data showing the call volume in the New Haven service area from March 1, 2020 through July 22, 2020.
- (4) The number of calls in the New Haven service area, between March 1, 2020 and July 22, 2020, that were responded to by non-bargaining unit personnel.
- (5) Documents showing the AMR New Haven response times for the period from May 1, 2020 through July 22, 2020.
- (6) AMR New Haven's response time policy/procedure/standard operating guidelines.

Respondent shall post the attached Notice to Employees in English in all places where Respondent normally posts notices and keep all Notices posted for 60 consecutive days. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

## **PROPOSED ORDER**

Respondent American Medical Response of Connecticut, Inc., shall:

(1) Cease and desist from:

- a) Failing or refusing to bargain with the International Association of EMTs and Paramedics Local R1-999, NAGE/SEIU Local 5000 (the Union) as the exclusive collective bargaining representative of:

All employees included in the bargaining unit for which the Union was certified by the National Labor Relations Board as the exclusive bargaining representative in matter number 01-RC-102304. The bargaining unit shall include all full time and regular part-time Paramedics, EMTs and HandiVan Drivers employed by the Employer at its New Haven, Connecticut facility excluding all other employees, mechanics, dispatchers, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

- b) Failing or refusing to provide the Union with requested information that is relevant and necessary to the Union's role as collective-bargaining representative of the Unit employees.

(2) Take the following affirmative action necessary to effectuate the policies of the Act.

- a) Provide the Union with relevant information related to Unit employees' terms and conditions of employment that the Union requested on May 7, June 15, and July 22, 2020.
- b) Within 14 days after service by the Region, post at its New Haven, Connecticut facility copies of the attached notice marked as "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted in English by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, those notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its

employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

- c) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## **APPENDIX**

### **Notice to Employees Posted by Order of the National Labor Relations Board An Agency of the United States Government**

#### **FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** fail or refuse to bargain with the International Association of EMTs and Paramedics Local R1-999, NAGE/SEIU Local 5000 (the Union) as the exclusive collective bargaining representative of:

All employees included in the bargaining unit for which the Union was certified by the National Labor Relations Board as the exclusive bargaining representative in matter number 01-RC-102304. The bargaining unit shall include all full time and regular part-time Paramedics, EMTs and HandiVan Drivers employed by the Employer at its New Haven, Connecticut facility excluding all other employees, mechanics, dispatchers, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

**WE WILL NOT** fail or refuse to provide the Union with requested information that it needs to represent you.

**WE WILL NOT** in any like or related manner interfere with your rights under Federal law described above.

**WE WILL** bargain collectively and in good faith with the Union as the exclusive collective bargaining representative of all full time and regular part-time Paramedics, EMTs and HandiVan Drivers employed by the Employer at its New Haven, Connecticut facility.

**WE WILL** provide the Union with the following requested information that it needs to represent you.

1. A list of all bargaining unit members who have been removed from the schedule since March 1, 2020.
2. A list of all bargaining unit employees, including their seniority, affected by the “brown out” from March 1, 2020 through July 22, 2020.
3. Data showing the call volume in the New Haven service area from March 1, 2020 through July 22, 2020.
4. The number of calls in the New Haven service area, between March 1, 2020 and July 22, 2020, that were responded to by non-bargaining unit personnel.
5. Documents showing the AMR New Haven response times for the period from May 1, 2020 through July 22, 2020.
6. AMR New Haven's response time policy/procedure/standard operating guidelines.

