Healthbridge Management, LLC; 107 Osborne Street Operating Co. II, LLC d/b/a Danbury HCC; 710 Long Ridge Road Operating Co. II, LLC d/b/a Long Ridge of Stamford; 240 Church Street Operating Co. II, LLC d/b/a Newington Health Care Center; 1 Burr Road Operating Co. II, LLC d/b/a Westport Health Care Center; 245 Orange Avenue Operating Co. II, LLC d/b/a West River Health Care Center; 341 Jordan Lane Operating Co. II, LLC d/b/a Wethersfield Health Care Center *and* New England Health Care Employees Union District 1199, SEIU, AFL–CIO and Care Realty, LLC, party in interest.[1] Cases 34–CA–012964 and 34–CA–013064

May 22, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On July 20, 2012, Administrative Law Judge Steven Davis issued the attached decision. The Respondent[2] filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

I.

HealthBridge Management, LLC (HealthBridge) manages six Connecticut health care facilities where the events at issue in this case occurred. Briefly, in response to an earlier complaint issued by Region 34 against HealthBridge and these six facilities,[4] the Union prepared flyers and stickers stating that the Respondent had been "Busted" by the National Labor Relations Board for violating Federal labor law. On March 25, 2011, the "Busted" flyer was posted on the Union's bulletin board at each of the six facilities, and employees at each of the facilities wore the "Busted" stickers. That same day, Lisa Crutchfield, HealthBridge's senior vice president of labor relations, directed facility managers to remove the flyers from the union bulletin boards and to inform employees that they had to remove the stickers when in patient care areas or while providing patient care. Employees at four of the six facilities were so informed, but those at the other two were categorically prohibited from wearing the stickers in all areas of those facilities.

As explained below, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by removing the "Busted" flyer from union bulletin boards and by prohibiting employees from wearing the "Busted" sticker. We also affirm the judge's dismissal of an unrelated allegation that the Respondent violated the Act by unilaterally discontinuing dues checkoff after the parties' collective-bargaining agreement expired.

II.

We agree, for the reasons stated by the judge, that the Respondent unlawfully removed the "Busted" flyer from the Union's bulletin boards at the six Connecticut facilities. We reject the Respondent's argument that it was privileged to remove the flyers because Crutchfield had previously ordered the removal of other union flyers she deemed improper. The parties' collective-bargaining agreement provides that each health care center "will furnish a bulletin board for posting of proper Union notices." The Respondent, however, has provided no evidence that it had the right under the contract unilaterally to determine which Union notices were proper and to remove any notices or flyers it deemed improper. Nor is there any evidence to suggest that the Union knew of the Respondent's interpretation of its authority under the stated contract provision or acquiesced in that interpretation. Further, although Crutchfield testified that she ordered the removal of three other flyers prior to her order

[1] At the hearing, the General Counsel filed a "Notice of Intent to Amend Complaint" (Notice). Pursuant to the terms of the parties' joint stipulations and a guarantee agreement executed by Care Realty, LLC, the Notice removes "Care Realty a/k/a CareOne" as a Respondent from both complaints in this case and lists "Care Realty, LLC" as the party in interest. In the case caption of his decision, the judge inadvertently listed "Care Realty, LLC a/k/a CareOne" as the party in interest. As noted by the Respondent, it is clear from the Notice and the parties' joint stipulations and guarantee agreement that "Care Realty, LLC" is the party in interest in this proceeding, and we have corrected the case caption accordingly.

[2] HealthBridge Management, LLC and the six Connecticut health care facilities involved in this case admit that they are a joint employer for purposes of this proceeding. Accordingly, they are referenced jointly as the Respondent.

[3] We have modified the judge's recommended Order to provide for electronic posting pursuant to *J. Picini Flooring*, 356 NLRB 11 (2010), and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

[4] Administrative Law Judge Steven Fish issued his decision on this complaint (Case 34–CA–012715) on August 1, 2012, finding several violations of Sec. 8(a)(1) and (5) of the Act. The case is pending before the Board.

to remove the "Busted" flyers, the Respondent has not established that the Union knew of Crutchfield's prior orders or that the flyers were, in fact, removed. Indeed, the record indicates that Crutchfield attempted to conceal the removal of at least one flyer, directing her managers to act "discreetly."

III.

We also agree with the judge that the Respondent unlawfully prohibited its employees from wearing the "Busted" sticker. It is well established that employees have a protected right to wear union insignia at work in the absence of "special circumstances." See *London Memorial Hospital*, 238 NLRB 704, 708 (1978); *Ohio Masonic Home*, 205 NLRB 357 (1973), enfd. 511 F.2d 27 (5th Cir. 1975); see also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). In healthcare facilities, however, the Board and the courts have refined that basic rule due to concerns about the possibility of disruption to patient care. In nonpatient care areas, restrictions on wearing insignia are presumptively invalid in accordance with the basic rule, and it is the employer's burden to establish special circumstances justifying its action. See *Casa San Miguel*, 320 NLRB 534, 540 (1995); see also *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979); accord *St. John's Hospital*, 222 NLRB 1150, 1150–1151 (1976). By contrast, restrictions on wearing insignia in immediate patient care areas are presumptively *valid*. See *Baptist Hospital*, above. That presumption of validity, however, does not apply to a selective ban on only certain union insignia in immediate patient care areas. See *Saint John's Health Center*, 357 NLRB 2078, 2079 (2011). In those circumstances, it remains the employer's burden to establish special circumstances justifying its action; specifically, that its action was "necessary to avoid disruption of health-care operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, 437 U.S. 438, 507 (1978).

Under this precedent, the Respondent's ban on employees at Newington Health Care Center and Westport Health Care Center from wearing the "Busted" sticker in *all* areas of the facility was presumptively invalid. In addition, the Respondent's ban on employees at Danbury Health Care Center, Long Ridge of Stamford, West River Health Care Center, and Wethersfield Health Care Center from wearing the "Busted" sticker in immediate patient care areas was not entitled to a presumption of validity because it was a selective ban on only the "Busted" sticker. In both circumstances, then, the question is whether the Respondent established "special circumstances" justifying its action. We agree with the judge that the Respondent failed to do so.

The Board has consistently held that an employer who presents only generalized speculation or subjective belief about potential disturbance of patients or disruption of operations fails to establish special circumstances justifying a ban on union insignia.[5] Here, the only evidence the Respondent presented in support of its "special circumstances" argument was the testimony of Senior Vice President of Labor Relations Crutchfield and that of an outside expert witness, Dr. Ilene Warner-Maron. As to Crutchfield, we agree with the judge that her decision to ban the "Busted" sticker was based on her "belief and conjecture" that the sticker would upset the patients. Her testimony about why she banned the sticker was not based on any specific experience with a patient, family member, or employee. Nor did she present any specific evidence of harm or likelihood of harm to patients from employees wearing the sticker. Further undercutting Crutchfield's stated concern that patients would be disturbed by the sticker is the fact that, both before and after Crutchfield banned the stickers, the Respondent itself sent letters to the patients and their families regarding the ongoing labor dispute between the Respondent and the Union and, in one letter, specifically addressed the Board complaint referenced in the Busted sticker.

As to Dr. Warner-Maron, who testified at the unfair labor practice hearing but was not consulted prior to Crutchfield's decision to ban the sticker, we agree with the judge that she provided only speculative testimony about the effect of the sticker on the patients. Her opinion was not informed by actual information about or experience with the facilities, their staff, or their patients. Indeed, she never spoke to any patients, family members, or care givers in the facilities at issue.[6] Further, in providing her testimony at the hearing, Dr. Warner-

[5] See *UCSF Stanford Health Care*, 335 NLRB 488, 532 (2001) (testimony from human resources director regarding unsubstantiated complaints about solicitation not sufficient to justify respondent's ban on solicitation in healthcare facility), enfd. 325 F.3d 334 (D.C. Cir. 2003); *Mt. Clemens General Hospital*, 335 NLRB 48, 50 (2001) (testimony by a hospital official that a union button could cause possible disruptions, absent evidence of complaints from patients or their families, not sufficient evidence to establish special circumstances), enfd. 328 F.3d 837 (6th Cir. 2003); and *St. Luke's Hospital*, 314 NLRB 434, 435 (1994) (respondent's contention that patients might be upset by a union button, without any evidence, such as patient complaints, to support the supposition not sufficient to establish special circumstances); see also *Saint John's Health Center*, supra at 2079 (special circumstances not established where respondent presented no evidence that patients were aware of union campaign to increase facility safety such that they would be disturbed or disrupted by union insignia related to the campaign).

[6] Contrary to the Respondent's argument in its exceptions brief, the judge did not simply reject Dr. Warner-Maron's testimony. Rather, he considered it but found that it was based on mere speculation and subjective belief as to the possible effect the sticker might have had on the patients, and thus did not establish special circumstances. We agree.

Maron failed to consider the impact of the Respondent's own communications with patients and their families about the ongoing labor dispute in arriving at her opinion about the effect of the sticker on the patients. In these circumstances, we agree with the judge that Crutchfield's and Warner-Maron's general and speculative testimony about how patients may be affected by the Busted sticker, without more, is insufficient to establish the "special circumstances" necessary to justify the bans imposed by the Respondent here.

Our dissenting colleague would find that the Respondent did not violate Section 8(a)(1) by banning employees from wearing the "Busted" sticker in immediate patient care areas. He asserts that it is presumptively valid for an employer to ban employees from wearing some union insignia in immediate patient care areas, while permitting employees to wear other unofficial insignia those areas. The Board rejected this same argument, however, in *Saint John's Health Center*, above, slip op. at 2 fn. 3. As explained there, although a presumption of validity applies to a healthcare facility's ban on all nonofficial insignia in immediate patient care areas, it does not apply to a selective ban on only certain union insignia. Id. at 1–2.

Our colleague also contends that even if the Respondent's ban was not presumptively valid, the Respondent established special circumstances justifying it. Citing the Board's decision in *Sacred Heart Medical Center*, 347 NLRB 531 (2006), enf. denied sub nom. *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577, 583 (9th Cir. 2008), he asserts that the judge improperly rejected Crutchfield's and Warner-Maron's testimony as evidence justifying the ban. But the great weight of Board precedent—cases decided before and after *Sacred Heart*[7]—establishes that evidence amounting to more than speculative concern by an administrator or expert witness is necessary to establish special circumstances justifying a ban on union insignia. Contrary to our colleague's view, our decision does not require actual harm or a disturbance to patients in order to establish special circumstances. What we require, consistent with the Board precedent, is specific evidence, not the general and speculative testimony that the Respondent provided here. See *NLRB v. Baptist Hospital*, above, 442 U.S. at 782–783.[8]

Finally, our colleague asserts that Warner-Maron's testimony should not be discounted merely because the Respondent did not consult her until after making the decision to ban the "Busted" sticker. We are aware of no case, and our colleague cites none, finding the testimony of an expert witness, not consulted until the unfair labor practice hearing, to be sufficient to justify an employer's ban on union insignia. In fact, under similar circumstances, the Board rejected an employer's post-hoc rationalization for its actions. See *UCSF Stanford Health Care*, above, 335 NLRB at 532.

For all of those reasons, we agree with the judge that the Respondent violated Section 8(a)(1) by prohibiting employees at Newington Health Care Center and Westport Health Care Center from wearing the "Busted" sticker in all areas of the facility[9] and by selectively prohibiting employees at Danbury Health Care Center, Long Ridge of Stamford, West River Health Care Center, and Wethersfield Health Care Center from wearing the "Busted" sticker in immediate patient care areas.

IV.

Reasoning that he was bound by the rule of *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), affd. in relevant part sub nom. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), the judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by ceasing to honor employees' dues-checkoff authorizations after the expiration of the parties' collective-bargaining agreement. After the judge issued his decision, the Board overruled *Bethlehem Steel* and its progeny "to the extent they stand for the proposition that dues checkoff does not survive contract expiration." *WKYC-TV*, 359 NLRB 286, 295 (2012). We held in *WKYC-TV* that "an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in that contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer." Id. We also decided, however, to apply the new rule prospectively only. Id. Thus, as in *WKYC-TV*, we shall apply *Bethlehem Steel* in the present case. Accordingly, we adopt the judge's finding that, because the Respondent was privileged under *Bethlehem Steel* to cease honoring the dues-checkoff arrangement after the expiration of the parties' collective-bargaining agreement, the Respondent did not violate the Act as alleged.[10]

[7] See fn. 5, above.

[8] Our dissenting colleague suggests that the testimony presented here is equivalent to the testimony presented in *Baptist Hospital*. We disagree. In *Baptist Hospital*, the respondent presented "extensive evidence" from three witnesses, id. at 782, all of whom worked at the hospital at issue. These witnesses provided specific testimony, basing their medical opinions about the effect of solicitations on the patients at that hospital on their experiences with the hospital's patients and prior situations that led to patient disruptions.

[9] We amend the judge's third Conclusion of Law, pertaining to this finding, to include the words "in violation of Section 8(a)(1) of the Act," which appear to have been inadvertently omitted from the end of the sentence.

[10] For the reasons stated in former Member Hayes's partial dissent in *WKYC-TV*, supra, Member Miscimarra would adhere to the

ORDER

The National Labor Relations Board orders that the Respondents, HealthBridge Management, LLC, Fort Lee, New Jersey; Danbury Health Care Center, Danbury, Connecticut; Long Ridge of Stamford, Stamford, Connecticut; Newington Health Care Center, Newington, Connecticut; Westport Health Care Center, Westport, Connecticut; West River Health Care Center, Milford, Connecticut; and Wethersfield Health Care Center, Wethersfield, Connecticut, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Removing union flyers from the Union's bulletin boards.

(b) Selectively prohibiting employees at Danbury Health Care Center, Long Ridge of Stamford, West River Health Care Center, and Wethersfield Health Care Center from wearing stickers in immediate patient care areas stating that these health care centers were "Busted" on March 21, 2011, by the National Labor Relations Board for violating federal labor law.

(c) Prohibiting employees at Newington Health Care Center and Westport Health Care Center from wearing stickers in all areas of the facility stating that these health care centers were "Busted" on March 21, 2011, by the National Labor Relations Board for violating Federal labor law.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Rescind the selective prohibition against employees at Danbury Health Care Center, Long Ridge of Stamford, West River Health Care Center, and Wethersfield Health Care Center from wearing the "Busted" sticker in immediate patient care areas.

(b) Rescind the prohibition against employees at Newington Health Care Center and Westport Health Care Center from wearing the "Busted" sticker in all areas of the facility.

(c) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix" at the following facilities: HealthBridge Management, LLC, Fort Lee, New Jersey; Danbury Health Care Center, Danbury, Connecticut; Long Ridge of Stamford, Stamford, Connecticut; Newington Health Care Center, Newington, Connecticut; Westport Health Care Center, Westport, Connecticut; West River Health Care Center, Milford, Connecticut; and Wethersfield Health Care Center, Wethersfield, Connecticut.[11] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents 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, 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 in question customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If any Respondent has gone out of business or closed the facility involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by that Respondent at any time since March 25, 2011.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act by removing the "Busted" flyer from the Union's bulletin boards and by prohibiting

longstanding rule that dues checkoff does not survive contract expiration.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

We find that a common notice for HealthBridge and the six health care facilities involved in this proceeding is appropriate here. Although the violations related to the "Busted" sticker varied slightly among the six facilities—employees at four facilities were prohibited from wearing the sticker in immediate patient care areas, while employees at two facilities were prohibited from wearing the sticker in all areas of the facility—the "considerable similarity in the nature of the unfair labor practices" committed at the different facilities warrants a common notice. *Albertson's Inc.*, 307 NLRB 787, 788 (1992), enf. denied mem. 8 F.3d 20 (5th Cir. 1993); see also *G.C. Murphy Co.*, 216 NLRB 785 (1975). As explained below, Member Miscimarra would find lawful the Respondent's prohibition of the "Busted" sticker at the four facilities where the prohibition was limited to immediate patient-care areas. Accordingly, he would not order a common notice because only one unfair labor practice—the removal of the flyers from the Union's bulletin boards—is common across all six facilities. See *Wal-Mart Stores*, 350 NLRB 879, 885 (2007).

employees at two facilities from wearing the "Busted" sticker in all areas of those facilities. I disagree, however, with their finding that the Respondent violated Section 8(a)(1) by ordering the removal of the "Busted" sticker in immediate patient-care areas at Danbury Health Care Center, Long Ridge of Stamford, West River Health Care Center, and Wethersfield Health Care Center. Contrary to the majority in *Saint John's Health Center*, 357 NLRB 2078 (2011), it was not incumbent on the Respondent to ban *all* insignia in immediate patient-care areas for its prohibition of the "Busted" sticker in immediate patient-care areas to be presumptively valid. "In healthcare facilities, restrictions on the wearing *of union-related buttons* are presumptively valid in immediate patient care areas." *Sacred Heart Medical Center*, 347 NLRB 531, 531 (2006) (emphasis added).[1]

In my view, the notion that an insignia ban must be categorical to be presumptively valid disregards the rationale underlying the presumption: that patients and their families—"irrespective of whether [they] are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one reminding of the tensions of the marketplace in addition to the tensions of the sick bed." *NLRB v. Baptist Hospital*, 442 U.S. 773, 783 fn. 12 (1979) (internal quotations omitted).[2] This reasoning aligns with the Board's statement of the rule in *Sacred Heart Medical Center*. Under the majority's contrary view in *Saint John's Health Center*, a button rule, to be presumptively valid, must indiscriminately prohibit all unofficial buttons, including those bearing innocuous messages that promote a "relaxing and helpful atmosphere." Because the prohibition announced at Danbury Health Care Center, Long Ridge of Stamford, West River Health Care Center, and Wethersfield Health Care Center was presumptively valid, and the General Counsel did not rebut that presumption, I would find that prohibition lawful.

I also believe that the judge imposed an unreasonably high and unrealistic burden on the Respondent—a burden not required by *Saint John's Health Center*—to demonstrate special circumstances that warranted Respondent's direction to refrain from wearing the "Busted" sticker in patient-care areas. The judge rejected Senior Vice President Crutchfield's testimony (that she imposed the ban in immediate patient-care areas out of concern for residents and their care) simply because there was no evidence that the stickers *actually* upset residents. That is not the applicable test. Evidence of actual disturbance of patients is not required to demonstrate special circumstances, and such a standard would be especially objectionable in a healthcare facility. "[A] hospital [or other healthcare facility] need not wait for the awful moment when patients or family are disturbed by a button before it may lawfully be restricted." *Sacred Heart Medical Center*, supra at 533; see also *Nordstrom, Inc.*, 264 NLRB 698, 701 fn. 12 (1982) (holding, in the retail-sales context, that an employer "need not await customer complaint before it takes legitimate action to protect its business"), and *Pathmark Stores*, 342 NLRB 378, 379–380 (2004) (citing *Nordstrom*, supra).

Relying on experience, intuitive reasoning and common sense, Crutchfield took responsible action before any residents could be adversely affected.[3] Under the judge's incorrect standard, an objectionable button could be prohibited only if it were first permitted (even though managers reasonably believed it would upset patients or their families). Such an approach was specifically rejected by the Board in *Sacred Heart Medical Center*, supra at 532, where the Board made clear that the reasoned judgment of health care professionals concerning potential harm to patients may be relied upon to impose an insignia ban.[4] I believe the judge also improperly rejected the uncontroverted expert testimony of Dr. Ilene Warner-Maron regarding the likely impact of the "Busted" stickers in patient-care areas. Here, the judge reasoned that Dr. Warner-Maron's expert opinion "was not informed by speaking to any patients, family members or care givers." Again, this aspect of the standard applied

[1] Petition for review granted and remanded on other grounds sub nom. *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577 (9th Cir. 2008). The Ninth Circuit disagreed with the Board's "special circumstances" finding. However, it endorsed the Board's statement of the presumptive validity rule, reiterating that "[i]n the healthcare context, restrictions on the wearing of union insignia in 'immediate patient care' areas are presumptively valid." In addition, although former Member Liebman dissented in *Sacred Heart Medical Center* as to "special circumstances," she did not take issue with the majority's statement of the presumptive validity rule.

[2] *Baptist Hospital* concerned a no-solicitation rule, but the Board has applied that decision to union-insignia rules for at least 27 years. See *Mesa Vista Hospital*, 280 NLRB 298 (1986).

[3] At the relevant time, Senior Vice President of Labor Relations Crutchfield had more than 10 years' experience advising healthcare facilities regarding labor and human resource issues.

The majority asserts that the Respondent's letters to patients and their families, informing them about the ongoing labor dispute, undercut Crutchfield's stated concerns. In fact, the opposite is true. Unlike the stickers, the Respondent's communications served to provide assurances that normal operations and care would remain unaffected by the dispute, underscoring the Respondent's commitment to taking actions necessary to maintain an atmosphere of care.

[4] See also *NLRB v. Baptist Hospital*, 442 U.S. at 782–783. My colleagues cite *Baptist Hospital* in support of their finding that the evidence presented by the Respondent was insufficiently specific to establish special circumstances. But the evidence the Court found sufficient in *Baptist Hospital* was testimony concerning *potential* harm to patients—just like the testimony in this case of Crutchfield, who had been employed by the Respondent for over 5 years at the time of the events at issue, and Dr. Warner-Maron.

by the judge is circular, suggesting that an objectionable button must first be permitted before it can be prohibited. The record also clearly establishes that Dr. Warner-Maron was well qualified to render an opinion regarding the clinical impact of the "Busted" sticker.[5] The above-cited cases likewise show that experience and common sense may furnish a sufficient basis for a finding that "special circumstances" warrant an insignia ban.[6] In any event, as stated above, a "special circumstances" finding is not necessary here because the prohibition of the "Busted" sticker in immediate patient-care areas was presumptively valid.

For these reasons, I respectfully dissent from my colleagues' finding that Respondent violated the Act by ordering the removal of the "Busted" sticker in immediate patient-care areas at the four facilities described above.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives 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 remove union flyers from the Union's bulletin boards.

WE WILL NOT selectively prohibit employees at Danbury Health Care Center, Long Ridge of Stamford, West River Health Care Center, and Wethersfield Health Care Center from wearing stickers in immediate patient care areas stating that these health care centers were "Busted" on March 21, 2011, by the National Labor Relations Board for violating federal labor law.

WE WILL NOT prohibit employees at Newington Health Care Center and Westport Health Care Center from wearing stickers in all areas of the facility stating that these health care centers were "Busted" on March 21, 2011, by the National Labor Relations Board for violating Federal labor law.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our selective prohibition against employees at Danbury Health Care Center, Long Ridge of Stamford, West River Health Care Center, and Wethersfield Health Care Center from wearing the "Busted" sticker in immediate patient care areas.

WE WILL rescind our prohibition against employees at Newington Health Care Center and Westport Health Care Center from wearing the "Busted" sticker in all areas of the facility.

HEALTHBRIDGE MANAGEMENT, LLC AND DANBURY HEALTH CARE CENTER, LONG RIDGE OF STAMFORD, NEWINGTON HEALTH CARE CENTER, WESTPORT HEALTH CARE CENTER, WEST RIVER HEALTH CARE CENTER, AND WETHERSFIELD HEALTH CARE CENTER

The Board's decision can be found at www.nlrb.gov/case/34-CA-012964 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Jennifer Dease and *John A. Mcgrath, Esqs.,* for the General Counsel.

George W. Loveland, II and *Nicole H. Bermel, Esqs. (Littler Mendelson, P.C.),* of Memphis, Tennessee, for the Respondent.

[5] Dr. Warner-Maron holds master's degrees in social gerontology, health administration, and law and social policy, and a doctorate in health policy. She is a gerontological nurse and has worked as an administrator in nursing facilities.

[6] The judge and my colleagues also improperly discount the expert's testimony merely because the Respondent failed to consult the expert before banning the stickers. This reasoning is similarly flawed. The above-cited cases establish that a manager may reasonably rely on her own common sense and experience when determining that objectionable insignia would cause upset to patients and family members in patient-care areas. It is relevant and probative when a qualified witness provides expert testimony stating that the manager's judgment was reasonable, without regard for whether the expert was consulted at the time of the events in question. Regardless whether Crutchfield was aware of the expert's views when the ban was imposed, the expert's opinion bolsters the Respondent's "special circumstances" showing.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge and an amended charge filed in Case 34–CA–012964 by New England Health Care Employees Union, District 1199, AFL–CIO (the Union) on April 14 and July 28, 2011, respectively, and based on a charge filed in Case 34–CA–013064 by the Union on July 28, 2011, complaints were issued on September 30 and October 27, 2011, respectively, against HealthBridge Management and Danbury Health Care Center, Long Ridge of Stamford, Newington Health Care Center, Westport Health Care Centre, West River Health Care Center, Wethersfield Health Care Center (Respondents, but herein collectively called the Respondent).[1] On October 27, 2011, the complaints (the complaint) were consolidated for hearing.

The consolidated complaint alleges, essentially, that after the Union publicized, by means of flyers and stickers (the "Busted" flyers and stickers) the fact that a complaint had been issued against the Respondent, the Respondent removed those flyers from the union bulletin boards at its health care centers, and prohibited employees from wearing the stickers in immediate patient care areas while permitting employees to wear other stickers, buttons, or insignia in immediate patient care areas at its health care centers.

The complaint further alleges, that since late March 2011, the Respondent prohibited its employees from wearing the stickers at its Newington, Westport, and West River Health Care Centers, while permitting employees to wear other stickers, buttons or insignia at the Respondent's health care centers.

The complaint also alleges that, following the expiration of certain collective-bargaining contracts between the Respondents and the Union at the Danbury, Long Ridge, Newington, Westport, and Wethersfield facilities on about March 17, 2011, the Respondent unlawfully ceased deducting from employees' wages, union dues and fees, and ceased remitting to the Union the dues and fees which were provided for in those expired contracts. The complaint alleges that by not giving the Union prior notice of its actions and without affording the Union an opportunity to bargain with the Union regarding such conduct, The Respondent failed to bargain with the Union.

The Respondents' answers to the complaints denied the material allegations thereof, and on January 4, March 5 through 8, and on May 1, 2012, a hearing was held before me in Hartford, Connecticut. Upon the evidence presented in this; proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent HealthBridge (HealthBridge), a New Jersey limited liability corporation with its principal offices located in Fort Lee, New Jersey, and regional offices in other States including Massachusetts and Connecticut, has been engaged in the management of nursing homes and health care facilities in multiple States, including the following nursing homes (the Health Care Centers).

Danbury Health Care Center, located at 107 Osborne Street, Danbury, Connecticut; Long Ridge of Stamford, located at 710 Long Ridge Road, Stamford, Connecticut; Newington Health Care Center, located at 240 Church Street, Newington, Connecticut; Westport Health Care Center, located at 1 Burr Road, Westport, Connecticut; West River Health Care Center, located at 245 Orange Avenue, Milford, Connecticut; and Wethersfield Health Care Center, located at 341 Jordan Lane, Wethersfield, Connecticut.

During the 12-month periods ending August 31, 2011, and September 30, 2011, HealthBridge, in conducting its business operations, derived gross revenues in excess of $100,000 and provided services valued in excess of $50,000 in States outside the State of New Jersey.

At all material times, each of the Health Care Centers has been engaged in the operation of a nursing home and long-term care facility providing convalescent and skilled nursing care to its residents including physical therapy, occupational therapy, speech therapy, IV hydration, and assistance with activities of daily living. During the 12-month periods ending August 31, 2011, and September 30, 2011, each of the Health Care Centers, in conducting its business operations, derived gross revenues in excess of $100,000, and received at its respective facility goods valued in excess of $5000 directly from points outside the State of Connecticut.

The Respondent HealthBridge and the six Health Care Centers agree for the purposes of the instant cases only, that:

> Any actions taken by or on behalf of any or all of the Health Care Centers by HealthBridge or by any agents or officials of HealthBridge are binding on each respective Health Care Center for which such actions were taken.

Any action taken by or on behalf of any or all of the Health Care Centers by any of the Health Care Centers or by any agents or officials of Health Care Centers are binding on HealthBridge.

At all material times HealthBridge has been a joint employer with each of the Health Care Centers of the employees of each of the Health Care Centers set forth in the 2004–2011 collective-bargaining agreements.

Health Care Centers and HealthBridge admit that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Union has represented the employees at each of the six Centers for at least 10 years. Each of the six Centers has a separate collective-bargaining agreement with the Union which ran for the same period of time. The 2004–2011 collective-bargaining agreements, which expired by their terms on March 16, 2011, each describe a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act. Health Care Centers and HealthBridge admit that at all material times, the Union has been the exclusive collective-bargaining representative of the respective units.

[1] The Respondent Health Care Centers and Respondent HealthBridge each admits receipt of the charges and amended charges.

The "Busted" Flyers

On March 21, 2011, Region 34 of the Board issued a complaint against the six Health Care Centers involved in this case. The complaint alleged, inter alia, that certain housekeeping employees employed at Long Ridge, Newington, and Westport were informed that they were no longer employed by a subcontractor. The complaint also alleged that the Respondent committed other unfair labor practices including discharging those housekeepers, threatening employees, failing to continue in effect certain terms of the collective-bargaining agreements, and delaying in furnishing the Union with certain information.

Each of the six Health Care Centers has "delegates" who are active union members. They act in behalf of the Union by posting notices on the union bulletin board and distributing stickers and notices to the Union's members employed at the Center.

On March 25, the "Busted" flyer was posted on the union bulletin board in the break room at each of the six Health Care Centers. The collective-bargaining agreements with the six Health Care Centers involved here contain essentially the same provision regarding union bulletin boards:

> The Center will furnish a bulletin board for posting of proper Union notices. Such bulletin board shall be placed in a location conspicuous and accessible to workers in the course of employment.

The flyer was printed on an 8-½" x 11" sheet of paper. T he top third had a judge's gavel and sound block with the words "HealthBridge" and "BUSTED." The text of the message includes the following:

> HealthBridge Management/Care One LLC will do ANYTHING- even violate labor law-in their ruthless pursuit of more profit. HealthBridge Management/CareOne LLC, the big, out-of-state corporations that own and operate the (name of Health Care Center),[2] are trying to "divide and conquer" residents and caregivers at their nursing homes-resorting to scare tactics, fear-mongering and illegal behavior to get their way.
>
> They are trying to frighten residents and their families and divide us, the caregivers, from the people we care for. To fill their own pockets, they want to empty ours. They want to destroy our jobs, our families and our neighborhoods-and undermine the loving care and relationships we've built together over all our years. On March 21st, the National Labor Relations Board issued an 18-page federal complaint against them for massive violations of federal law.
>
> Every year, HealthBridge/Care One accepts hundreds of millions of dollars in public funding-our tax dollars-from Medicaid and Medicare. But that's not enough for them. Instead of trying to avoid a strike, they're trying to provoke one, even refusing to sign a contract extension like most other nursing home operators. And it's all in the name of reaping even higher profits.
>
> This is another case of greedy, national corporations exploiting the elderly and their caregivers by lying, cheating and even law-breaking. But we won't let them get away with it.
> Call Care One today at (201) 242–4000 or call (name of Health Care Center, Administrator and phone number). Tell them no company can set themselves above the law.

Lisa Crutchfield, the senior vice president of labor relations for HealthBridge, learned at about 9 a.m. on March 25 that employees were wearing stickers and that the "Busted" flyers were posted regarding the issuance of the March 21 complaint. She advised her managers that flyers "that contain inappropriate materials should be removed immediately." Shortly thereafter, after having actually seen the flyer, she advised her managers that the "flyers should be removed." They were then immediately removed from the Union's bulletin boards at each of the Health Care Centers.

Crutchfield testified that she ordered the removal of the flyers based on her interpretation of the contract's language that the boards are provided for the posting of "proper" union notices, but conceded that she was not involved in the negotiation leading to that contractual language. She stated that a "proper" union notice is one that provides information about an event, a meeting, a date and time of negotiations, or the notification of employees of upcoming events, such as a visit by a member of the Union's training fund.

Crutchfield stated that the "Busted" flyer is not a "proper" union notice because it is derogatory and disparaging of the Respondent and contains statements which are not accurate or truthful. For example, she stated that, although it claims that the Respondent was "busted," at the time the stickers and flyers were distributed no hearing on the complaint had been held, and there had been no finding that the Respondent had committed any unfair labor practices.

Crutchfield testified that, prior to March 25, she ordered the removal of other union flyers from union bulletin boards which she deemed "not proper." For example, on June 10, 2010, she directed the removal of a flyer relating to the subcontracting of unit work.[3] The flyer asked "how does HealthBridge reward dedicated staff? By kicking them out the door." That flyer also stated that the Respondent "robbed employees of hundreds of hours of vacation time." On June 10, Crutchfield directed the Center's administrator to remove the flyer "discretely, but we are covered by the contract on this. In particular, the contract provides that only proper union notices may be posted on the bulletin board. This notice is defamatory and not proper."

She also ordered the removal of a flyer in January 2011 which stated that "HealthBridge wants to take away every single thing we've fought for. HealthBridge wants to rob from us our rights and our voice, pensions, paid lunch . . . . HealthBridge has no respect for us or our residents—all they want is to strip us of our rights, destroy our standards, cripple our ability to give quality care and turn our nursing home into a sweatshop."[4]

Another flyer was ordered removed on about March 18, 2011.[5] That flyer stated that HealthBridge was "creating hyste-

[2] Separate flyers bearing the name of the appropriate Center were produced for each of the six Centers.

[3] GC Exh. 11.

[4] GC Exh. 13.

[5] GC Exh. 14.

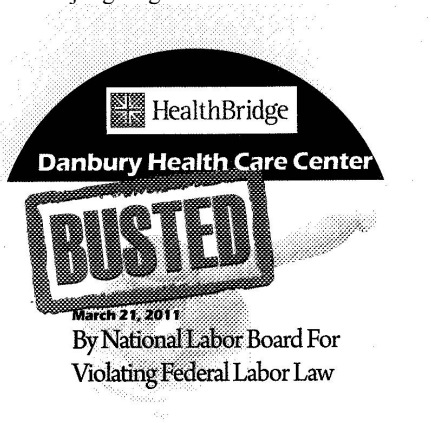
ria in our facilities" regarding its proposals in negotiations.

Another flyer which stated that "Grinch threatens lock out" was also ordered removed from the Union's bulletin boards.[6] The flyer stated that HealthBridge has, and continues to break the law.[7] Crutchfield also ordered the removal of another flyer on which someone had written certain "profanities."

All the above flyers were removed for the same reason according to Crutchfield. They were not proper because they were defamatory and derogatory toward the Center, and contained untruthful statements. However, employees were not prohibited from distributing the flyers in the employee break rooms and lunchrooms. No grievances were filed concerning the removal of the flyers. Crutchfield did not inform the Union that the flyers were being removed.

The "Busted" Sticker

On March 25, the same day that the "Busted" flyer was distributed, the Union gave stickers to employees at each of the six Health Centers. The round sticker, which is 2-½" in diameter, states, in the top third of the sticker "HealthBridge Danbury Health Care Center.[8] The middle part of the sticker has a 3/4" rectangular box in red ink framing the word "BUSTED." Below the box is the following: "March 21, 2001 By National Labor Board For Violating Federal Labor Law." The sticker has a picture of a judge's gavel and sound block.



The stickers were distributed at the start of the workday, at about 7 a.m., and the workers wore them until about 1 p.m. that day. At that time, after seeing black and white copies of the stickers, Crutchfield conducted a conference call with her managers at the six Health Care Centers in which she told them that employees could wear the stickers when they were not providing resident care or in resident care areas. However, when they were in resident care areas or providing resident care they had to remove the sticker. She gave the managers examples of resident care areas as resident rooms, corridors immediately outside the residents' rooms, resident dining rooms, resident activity lounges, treatment rooms, shower rooms, rehabilitation gyms where residents were receiving therapy, and medical examination rooms.[9]

Crutchfield told her managers to advise their employees of the above policy, and also to tell them that if they refused to remove the sticker they should be told that they would have to punch out and leave, but that no discipline would be given to them. The managers then acted to advise the employees in the six Centers of this policy. Later, at about 3 p.m., during another conference call, Crutchfield learned that all the employees complied with the requests of their managers to remove the stickers in resident care areas.

Crutchfield testified that she made the decision that the stickers be removed in resident care areas out of concern for the residents, in order to ensure that their care was not interrupted, and that they did not have unnecessary concern regarding an issue that might be confusing to them or lead them to believe that the Respondent had committed some kind of crime due to the image of a judge's gavel and the word "busted." She was concerned that the residents may believe that something the Respondent had done may impact the care they received, thereby upsetting them.

Dr. Ilene Warner-Maron, a registered nurse specializing in nursing home care and geriatric care, has master's degrees in social gerontology, health administration, and law and social policy, and a Ph.D. degree in health policy. She has served as an acting director of nursing, a nursing facility administrator and an adjunct college professor. Dr. Warner-Maron gave expert testimony that in her opinion, the "busted" sticker, worn by a caregiver who is giving care to a nursing home resident would tend to disturb the patient or disrupt patient care.

It was Dr. Warner-Maron's opinion that the word "busted," framed in red and accompanied by a judge's gavel, when worn at chest level by a caregiver and seen by a vulnerable adult having physical and/or cognitive impairments, and who is dependent on the caregiver for her care, would have a negative impact on the resident. She stated that the word "busted" implies that a legal judgment has been rendered, that something is negative, is in trouble, is broken, someone or thing has been arrested, or that the facility is in danger of becoming bankrupt.

Dr. Warner-Maron further opined that, when seeing the sticker, the resident could easily become agitated, upset, worried, and concerned that the facility had violated some law which might cause the facility to close, resulting in the patient being moved from the facility, both constituting a threat to the safety and security of the resident. She stated that the sticker increases the risk that patients would feel threatened and emotionally abused. However, she noted that the sticker "in and of itself" does not constitute abuse of patients, but that its wording "is easily viewed as an implied threat" that something is wrong and threatening because of the use of the word "busted."

Dr. Warner-Maron also stated that federal and state regulations require that skilled nursing facilities must provide a safe,

[6] The Grinch is a fictional character created by Dr. Seuss in the children's book, *How the Grinch Stole Christmas*. The Grinch, a green-colored figure, is opposed to the holiday spirit of Christmas and has a rough, exploitative attitude.

[7] GC Exh. 16.

[8] Separate stickers bearing the name of the appropriate Center were produced for each of the six Centers.

[9] Crutchfield's description of resident care areas is essentially consistent with those areas set forth in the Respondent's no-solicitation policy.

secure, nonthreatening atmosphere to their patients, and that the "busted" sticker would cause the resident to become fearful that the facility is in legal trouble, thereby causing the patient to become emotionally stressed and feel threatened.

Dr. Warner-Maron gave her opinions based on her expertise, knowledge, education, training, and experience, and her knowledge of working with older adults in nursing home settings, and based on her understanding of the connotations of the word "busted." She did not speak to any residents, family members or caregivers in reaching her opinion. There was no evidence that Crutchfield or any Respondent agent sought advice from Dr. Warner-Maron before deciding to ban the wearing of the "Busted" stickers.

There was no evidence that residents or family members complained about the "Busted" stickers or claimed that they were abusive in any way.

The General Counsel points out that the Respondent sent letters addressed to its residents and their family members in March 2011, in which it discussed the ongoing contract negotiations. In the letters, the Respondent referred to the "tremendous pressures facing our industry," and that the expired union contact "is no longer realistic," and raised the possibility that the employees may strike their facility given the Union's "long history of calling strikes." Its letters assure the residents that operations at the Health Care Centers will continue uninterrupted with "replacement staff in the event we need them." The Respondent's March 14 letter referred to its filing of a charge against the Union with the Board.

In its March 28 letter, the Respondent objected to the "Busted" flyers "which are full of misleading and false statements . . . designed to try and harm the reputation of our Center in the community," adding that by doing so the Union "hurt the employees who work here or unnecessarily upset our residents and their families." That letter stated that the "Busted" flyer referred to a "complaint issued against our Center by the National Labor Relations Board. There has not been any ruling or finding by any judge in this case. At the July hearing evidence will be presented to an Administrative Law Judge who will then issue a decision. We intend to present a full slate of facts that directly counter all of the baseless allegations in the complaint and we look forward to the Judge's fair and impartial review of the case."

Danbury Health Care Center

Licensed practical nurse Eileen Underwood wore the "Busted" sticker on her upper right chest while working in patient care areas and elsewhere. She testified that administrator Michael Pescatello approached her as she was sitting at the nurse's station with Angela Magrino, from the HealthBridge regional office who works with Minimum Data Set recording patient information.

Pescatello pointed at Underwood's sticker and told her she had to remove it. She asked why and he said that "it's solicitation." Underwood replied that she was "surrounded by solicitation," explaining that her supervisor sells photographs at work and had a sample on her desk. Magrino replied that they were not speaking about "that type of solicitation." Pescatello that "it's not that kind of solicitation. You can't wear it on the floor; you can only wear it in the break room." Underwood challenged him, saying that she should be able to wear it on the floor because he, Pescatello, on a weekly basis, interrupts the patient care the employees deliver to speak to them about the Union's actions, such as going on strike, and that they could withdraw from the Union if they wanted. She said that such discussions make the staff feel anxious, nervous and upset, "and yet my sticker seems to be causing a problem."

Pescatello repeated that she had to remove it and could only wear it in the breakroom. Underwood then removed the sticker.

Pescatello testified that he spoke to about 12 groups of employees in the dietary, laundry, and housekeeping departments. He was accompanied by Magrino who did not speak to the workers. Pescatello advised the workers of the instructions given to him regarding wearing the sticker in resident care areas as given to him by Crutchfield, set forth above. He stated that he asked Underwood to remove the sticker while she was working in direct care with residents, but said that she could wear it in other parts of the building. When Underwood asked why she had to remove it, Pescatello told her that there was some "concern" by a couple of residents who wanted to know "what was going on." Underwood asked why that should be a concern since management was distributing letters to residents concerning the negotiations. Pescatello responded that that issue was not relevant to their discussion.

Certified nurse's aide, Noreen Strempski, wore the "Busted" sticker on the left side of her chest or upper shoulder. She was present only during that part of the conversation between Underwood and Pescatello in which he told Underwood that she could not wear the stickers "here" and during her reply that Pescatello distributed letters to the staff.

Licensed practical nurse Dolores Casey testified that she wore the "Busted" sticker on the upper left chest area of her jacket. She stated that she was sitting at the nurse's station when Pescatello told her that "you need to remove that sticker." She removed the sticker from her jacket, and put the sticker on her uniform. She then closed the jacket over her uniform so that sticker was not visible.

Pescatello testified that he asked Casey to remove the sticker while she was working in patient care areas. When she asked why, Pescatello replied that there were concerns from residents. Casey removed the sticker and put it on her uniform and covered it.

Long Ridge of Stamford

Certified nurse's aide, Ria Pemberton, testified that she first wore the "Busted" sticker when she arrived at work at about 8 a.m. on March 25. She placed one sticker on her left arm and one on her left front pocket. She wore the stickers until 2 p.m. in patient care areas and in other areas of the Center.

Pemberton stated that at about 2 p.m., Administrator Larry Condon approached her as she stood at the nurse's station with other employees. He said, "[Y]ou have to take the stickers off." Pemberton asked if that was an order? Condon said it was, and that "it was not appropriate to be worn in patient areas," adding that she could wear them in nonpatient areas such as the lunchroom or outside the building. Condon added that if

she did not remove the sticker he would ask her to punch out and leave the building. Pemberton and the other two employees then removed their stickers.

Certified nurse's aide, Claudette Parks-Hill, wore the "Busted" sticker on the top left chest area of her uniform on March 27. She stated that at about 8 a.m. on that date, admitted Nurse Supervisor Lenora Abela approached her and said, "[Y]ou must take off the sticker. Larry [Condon] said we had to take the sticker off." Parks-Hill replied that she would ask her head delegate, Patrick Atkinson. Atkinson advised her to continue to wear the sticker but to make sure that she was wearing her identification badge.

About 2 hours later, Abela returned to the floor and noticed that Parks-Hill was still wearing the sticker. Abela said, "[T]his doesn't look good in the facility [because] people are looking down at the facility." She added that Condon said that employees who refuse to remove the sticker must punch out and leave. Atkinson was summoned to the unit and the group was told that Condon ordered that they remove the sticker. They did so. Atkinson testified, essentially confirming what Abela told Parks-Hill and the group at that time.

Condon testified that following his conference call with Crutchfield, he walked through the building to the three nurse's stations on all three floors and the dietary and laundry departments. He spoke with about 20 employees who were wearing the "Busted" stickers, and asked them to remove them in accordance with Crutchfield's instructions set forth above. After speaking to those employees, Condon advised Assistant Administrator Polly Schnell and Nursing Supervisor Abela of Crutchfield's instructions. Abela later told Condon that she received some "resistance" from employees when she first told them where they could wear the stickers.

Newington Health Care Center

Tania Beckford, a certified nurse's aide, testified that she wore two "Busted" stickers on her upper shoulder on both sides of her uniform. She wore them while she worked in patient care areas and when she was in other areas of the Center.

Beckford, a delegate, was told by delegate Elaine Ewart that supervisors were asking employees to remove the stickers from their uniforms. Beckford, Ewart, and other employees went to the office of Administrator Jarrett McClurg at about 2 p.m. Beckford asked why the employees had to remove their stickers. McClurg replied that it is not a part of their uniform. Beckford answered that she always wore stickers. McClurg replied that they could not wear them and had to remove them. A woman who said that she was from the corporate or human resources department repeated that the stickers were not a part of their uniform.

Westport Health Care Center

Jacqueline Beliard, a housekeeper, testified that as she left a patient's room, she was told by Administrator Kim Coleman that she should remove the sticker. Beliard did not do so, and Coleman walked away but then returned and ordered her to "take it off right now." Beliard removed it.

West River Health Care Center

Philip Bradeen, a dietary chef, wore the "Busted" sticker on his upper left chest area on the tray line in the kitchen. He stated that at 9:30 a.m. on March 25, Christopher McCenerney, his admitted supervisor and director of dietary services, approached him and asked him to remove the sticker because "the rights of the residents is not to know about what was going on. They had no reason to know and it was upsetting the residents." Bradeen replied that he has a right to wear it, adding that the residents should know what kind of company they are dealing with. He did not remove the sticker.

McCenerney denied seeing Bradeen wearing the sticker, denied having any conversation with him regarding the sticker, and specifically denied asking him to remove it. He stated that he reported to Administrator Joanne Wallak that he had seen the sticker. She told him that employees could wear the sticker in the kitchen area but they had to remove or cover them if they visit a resident care area or areas adjacent to resident care areas.

Bradeen stated that later that day, at about 1:30 p.m. as he was eating in the breakroom, Suzan Birt, the business office manager, but not an admitted supervisor, asked him to remove the sticker because the "residents are getting upset and they don't have a right to know what it's about." Bradeen refused, explaining that he was in the breakroom, a "neutral zone" and not in contact with any resident, adding that he had a right to wear a sticker if he wanted.

Birt testified that she had not been at the West River Center until April 1, 2011, inasmuch as she was hired effective that date, and therefore could not have spoken to any employee, Bradeen regarding the "Busted" sticker. Moreover, she denied seeing any employee wearing the "Busted" sticker, and denied speaking to Bradeen about the sticker.

Berta Linarte, a certified nurse's aide, wore the "Busted" sticker on the upper left chest area of her uniform. She testified that while doing rounds a woman who worked in the admissions department told her that she could not wear the sticker "in the building." Linarte took it off and then later put it back on. As she was doing some paperwork in the dining room she was told by Susan from the NDNS office to remove the sticker, adding that she could wear it "outside, not inside."

Wethersfield Health Care Center

Certified nurse's aide, Pauline Dunchie-Legg, testified that she wore the "Busted" sticker on her top left chest area upon entering the Center at the start of her workday. She stated that Administrator David Santoro told her at that time, that he wanted to speak with her. They went to his office with employee Sharon Thomas. Also present was Administrator Robert Whitten who was scheduled to replace Santoro shortly. Santoro said that he wanted to speak about the "Busted" sticker they were wearing, adding that he received a "directive from corporate" that employees must not wear the sticker in patient care areas. He said that the sticker could be worn in breakrooms and other areas, but not in patient care areas. He repeated that message again, this time adding that the sticker sent a "bad message to the residents."

Eva Bermudez, a union organizer, testified that on the day she distributed the "Busted" stickers, she received calls from employees who told her that they were ordered to remove their

stickers. She visited the facility and spoke with Santoro and Whitten with delegate Dunchie-Legg.

Santoro told Bermudez that HealthBridge management called and told him that the stickers were not permitted to be worn because they did not like the word busted which was inaccurate and not true. Bermudez replied that the word "busted" represents the fact that the Board issued a complaint on the unfair labor practices and that "since there is validity, there is truth to the complaint." Santoro repeated that the word "busted" was inappropriate and farfetched, adding that the sticker should not be used in patient care areas, but could be worn in breakroom areas away from patients' rooms.

Bermudez asked Santoro what an immediate patient care area was, and he replied that it included patient rooms, hallways, and the areas adjacent to patient rooms. Bermudez asked whether she could wear the stickers in nonpatient care areas but then passing those areas on their way to the breakroom. Santoro answered that they should be removed when the employee is walking through the hallway on her way to the breakroom, and then put them on when in the breakroom.

Bermudez then asked why they had to remove the stickers since they had worn stickers previously. Santoro replied that "this is coming from upper management from HealthBridge—the busted ticker is inappropriate."

The Respondent Permits the Wearing of Other Insignia

Employees wore numerous buttons and pins throughout their employment with the Respondent. They included a 1-½" pin bearing the inscription 1199 New England Health Care Employees Union SEIU, a 1-½" square pin stating "one vision one fight one union 1199," a 2" x 3" rectangular pin with a picture of Dr. Martin Luther King speaking at a podium bearing an 1199 sign, a 1-½" square pin stating "we are stronger together 1199 delegate," a 2-¼" round pin stating "seiu for Obama." They also wore one inch pins stating "make a difference," "certified nursing assistants make every day brighter," "nurse's aide," great staff great team," "extraordinary service our facility is in good hands," "nursing assistants caring hands loving hearts," and a pin with the image of an angel. In addition, the employees wore a 2-½" diameter sticker which stated "HealthBridge—A real life story of how the Grinch stole Christmas 1199."

It was stipulated that the Respondent permitted its employees to wear all the pins and stickers, above, at all material times[10] and in all places in the facility for each of the Health Care Centers. Further, there were no restrictions concerning where the employees could wear those items, and that they wore them wherever they wanted to in the buildings, which would include patient care areas.

[10] There was evidence that "all material times" means that those other stickers and pins were worn before, during, and after the "Busted" stickers were worn on March 25.

The Cessation of Dues Deductions and Dues Remissions to the Union

The six Health Care Centers' collective-bargaining agreements with the Union contained the following essentially identical provisions concerning the deduction of dues and remission of dues to the Union:

> Upon receipt of a written authorization from an Employee in the form annexed hereto as Exhibit A, the Center shall pursuant to such authorization, deduct from the wages due said Employee each month, starting not earlier than the first pay period following the completion of the Employee's first 30 days of employment; and remit to the Union regular monthly dues and initiation fee, as fixed by the Union. The initiation fee shall be paid in two consecutive monthly installments beginning the month following the completion of the probationary period.
>
> The Center shall be relieved from making such "check-off" deductions upon (e) revocation of the check-off authorization in accordance with its terms or with applicable law. . . .

The dues-checkoff authorization states as follows:

> You are hereby authorized and directed to deduct an initiation fee from my wages or salary as required by the New England Health Care Employees Union, District 1199 as a condition of membership and in addition thereto, to deduct each month my monthly membership dues from my wages or salary and to remit all such deductions so made to the New England Health Care Employees Union, District 1199 no later than the tenth of each month immediately following the date of deduction. This authorization shall be irrevocable for a period of one year or until the termination of the collective bargaining agreement, whichever is sooner, and shall, however, renew itself from year to year unless the employee gives written notice addressed to the New England Health Care Employees Union, District 1199 at least 15 days prior to any termination date of the revocation of this authorization.

The complaint alleges that following the expiration of certain collective-bargaining contracts between the Respondents and the Union at the Danbury, Long Ridge, Newington, Westport, West River, and Wethersfield facilities on about March 17, 2011, the Respondent unlawfully ceased deducting the union dues and fees and ceased remitting to the Union the dues and fees which were provided for in those expired contracts. The complaint alleges that by such conduct the Respondent failed to bargain with the Union without giving the Union prior notice of its conduct and without affording the Union an opportunity to bargain with the Respondent with respect to such conduct.

It was stipulated that each of the Health Care Centers ceased making deductions of union dues and fees from employees' wages and remitting any such deducted monies to the Union on March 24, 2011, the first dues-deduction date following the expiration of the 2004–2011 collective-bargaining agreement.

It was also stipulated that, by a letter distributed to employees at each of the Health Care Centers, the Respondent informed its employees who were represented by the Union that it would no longer be deducting union dues from their

paychecks. No previous notice was provided to the Union regarding these actions by the Respondent.

The letter informed the employees that "the dues check-off provisions do not survive the expiration of the old contract. Since our Center will not be deducing any union dues from your paychecks while there is no contract in effect, you will have to make arrangements directly with the Union for the payment of any union dues or fees that you may owe the Union."

Analysis and Discussion

The "Busted" Flyers

As set forth above, on March 25, the Respondent directed that the "Busted" flyer be removed from the Union's bulletin boards in all its Health Care Centers. The flyer claimed that the Respondent had been "busted," and that it would do "anything—even violate labor law—in their ruthless pursuit of more profit."

The collective-bargaining agreement provided for the posting of "proper" union notices. Respondent official Crutchfield determined that the flyer was not "proper" because it was inflammatory, derogatory to the Respondent, and inaccurate and untruthful. In stating that the flyer was not "proper" she relied on the facts that, although it claimed that the Respondent had been "busted," no hearing on the complaint had been held, and there had been no finding that the Respondent had committed any unfair labor practices.

The contract language did not define the word "proper" and did not reserve to the Respondent the power to decide which notices were not proper or the right to remove flyers which it deemed were improper. In *Monongahela Power Co.,* 314 NLRB 65, 68 (1994), the Board decided a case similar on its facts to the instant case. The contract's language there provided that the union may post "reasonable and proper notice covering legitimate union business." A newsletter posted by the union on the bulletin board referred to the discharge of an employee and stated that the matter may be the subject of an unfair labor practice charge. The newsletter was removed by the employer because it defamed the company, made it "look bad," was "contrary to the image of the company," and contained "misinformation, lies, half-truths and the expression of opinion." The judge, in finding that the employer violated the Act by removing the newsletter, stated that the newsletter's material "may be considered to be biased, prounion opinion but that is hardly surprising." He also stated that the material in the newsletter does "not approach any reasonable concept of defamatory, profane, outrageous, or inflammatory language by any objective standard . . . . The possibility that some statements may have been factually inaccurate (for example, because of a lack of full knowledge on the part of the union) does not justify the removal, without consultation, of the entire newsletter."

In addition, the word "busted," when used in the context of what actually occurred, cannot be considered inaccurate. Thus, a complaint had issued against HealthBridge and the flyer expressly stated that the "National Labor Relations Board issued an 18-page federal complaint against them for massive violations of federal labor law." The flyer did not state that the Respondent had been found guilty of unfair labor practices or that a trial had taken place. In addition, I cannot find that the flyer was inflammatory or derogatory to the Respondent.

The Respondent's removal of the flyers from the Union's bulletin boards was based on the Respondent's belief that they were not "proper" union notices. The Union's bulletin boards were for its use in communicating to the workers it represents. As such, the Union's notification to the employees by means of this flyer that the regional office of the Board had issued a complaint against their employer for violating the Act is a legitimate form of communication to them. The flyer did not claim that the Respondent had violated the law, only that a complaint had issued against it. If employees might have been misled into believing that the Respondent had actually been found guilty of committing unfair labor practices, the Employer could have corrected that misconception in its communications with employees. But it cannot be said that the flyer, on its face, was not a proper notice. In removing the flyers the Respondent improperly acted to censor what the employees could and could not be told by the Union that represented them.

Similarly, in *Roll & Hold Warehouse & Distribution Corp*., 325 NLRB 41, 51 (1997), the Board noted that the parties had agreed that the posted notices not contain materials "detrimental" to the employer. The Board noted that the word "detrimental" was never defined by the parties. The Board found that, "under Board law, having established the bulletin board, "the employer" was not free to regulate its use selectively or disparately." The Board found that the removal of the posting "was an attempt to stifle communication about allege unfairness" in the employer's treatment of its workers. The Board also found that the "accuracy of the content . . . is not relevant, and that the "effected censorship tended to have a 'chilling and coercive effect' on employees rights under Section 7 of the Act and thus was violative of the Act."[11]

Here, even assuming that the word "busted" implies that the Respondent has been found guilty of unfair labor practices, such a communication would constitute a factually inaccurate statement, which does not provide the Respondent with a reason for its removal of the flyers. *Monongahela*, above. At most, it would constitute "biased, prounion opinion" which the Board in *Monongahela* found permissible. As set forth above, "the accuracy of the content is not relevant." *Roll & Hold*, 325 NLRB at 51.

While it is true that the Respondent has, prior to March 25, removed other flyers which it deemed inflammatory, derogatory or untruthful, it cannot be said that such actions permitted HealthBridge to remove the "Busted" flyer. The fact that the Union did not protest the prior removals or file a grievance as to the removal of any of the flyers, including the "Busted" flyer, likewise did not constitute the Union's agreement that the Respondent had the power to remove the Union's flyers at its discretion. See *Roll & Hold*, above at 51.

I accordingly find and conclude that the Respondent's removal of the "Busted" flyer from the Union's bulletin boards

[11] In *Monongahela*, the Board found it unnecessary to rely on the judge's characterization of the employer's actions as "censorship" and an "infringement of the union's free speech rights," 314 NLRB 65 fn. 3, but in *Roll & Hold,* 325 NLRB at 51, the Board did not comment on the judge's identical comments.

violated Section 8(a)(1) of the Act.

The "Busted" Stickers

The complaint alleges that the Respondent prohibited its employees from wearing the "Busted" stickers in immediate patient care areas while permitting employees to wear other stickers, buttons, or insignia in immediate patient care areas at its health care centers.

The complaint further alleges, that since late March 2011, the Respondent prohibited its employees from wearing the stickers at its Newington, Westport, and West River Health Care Centers, while permitting employees to wear other stickers, buttons, or insignia at the Respondent's health care centers.

The Board in *Saint John's Health Center*, 357 NLRB 2078, 2078–2079 (2011), summarized the law on the issue of wearing union insignia in healthcare facilities:

> It is well established that employees have a protected right to wear union insignia at work in the absence of "special circumstances." In healthcare facilities, however, restrictions on wearing insignia in immediate patient care areas are presumptively valid, while restrictions on insignia in other areas of a hospital are presumptively invalid.
>
> The Board, with court approval, has created a presumption that protects an employer from liability if the employer bans . . . . the wearing of insignia in immediate patient care areas. *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979). The basis of the presumption is that such solicitations or insignia "might be unsettling to patients—particularly those who are seriously ill and thus need quiet and peace of mind." *St. John's Hospital*, 222 NLRB 1150, 1150 (1972). Although this presumption protects a healthcare facility's ban on all nonofficial insignia in immediate patient care areas, it does not protect a selective ban on only certain union insignia.
>
> In the latter type of case, the burden is on the hospital to show that the selective ban is "necessary to avoid disruption of health-care operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978). (Certain citations omitted)

Accordingly, the law may be distilled as follows: A ban on *all* nonemployer insignia in immediate patient care areas is presumptively valid because such insignia might be "unsettling to patients." However, a selective ban on only certain union insignia is not presumptively valid. If a healthcare facility bans only certain union insignia, it must show "special circumstances"—it has the burden of proving that the selective ban was necessary to avoid disruption of health-care operations or disturbance of patients.

Were the Stickers Banned in Immediate Patient Care Areas?

Regarding the Danbury Health Care Center, I find that administrator Pescatello properly advised employees that they could not wear the "Busted" sticker in immediate patient care areas. Thus, nurse Underwood admitted that Pescatello told her that she could not wear the sticker "on the floor." That expression clearly contemplates that Underwood was properly being directed that she could not wear the sticker in patient care areas. Nurse Strempski implicitly confirmed Pescatello's testimony in that she was present only at the time she heard him tell Underwood that she could not wear the stickers "here," which, at the time, was the nurse's station which is in an immediate patient care area.

Although nurse Casey testified that Pescatello told her that she must remove the sticker without other explanation, Casey was at the nurse's station at the time, a patient care area. I cannot find that Pescatello would have varied his instructions to the nurses. Thus, he testified that he gave the same direction to all the employees he spoke to—that they had to remove the sticker in patient care areas. I accordingly credit Pescatello's testimony that he gave the proper instruction to nurse Casey to remove the stickers she wore in patient care areas.

As to Long Ridge, nurse's aide Pemberton conceded that on March 25, Administrator Condon gave her and other employees detailed instructions at the nurse's station that they could not wear the "Busted" sticker in patient areas but could wear them in nonpatient areas. I accordingly find that Condon gave Pemberton the proper direction as to where she could not wear the sticker.[12]

Regarding Newington, I credit employee Beckford's uncontradicted testimony that administrator McClurg told her and others that they had to remove their "Busted" stickers because it was not a part of their uniform. McClurg did not testify. I accordingly find that McClurg did not give the proper instructions to the employees that they could not wear the stickers in patient care areas.

As to Westport, I credit employee Beliard's testimony that administrator Coleman told her that she must remove her "Busted" sticker immediately. Coleman did not testify. The Respondent asserts that simply because Beliard was given that order as she left a resident's room, she must have been told that the sticker could not be worn in patient care areas. There is no evidence to support that view and I reject it. Accordingly, Beliard was not told that she could not wear the sticker in patient care areas.

Concerning West River, Chef Bradeen testified concerning conversations he had with two individuals, Supervisor McCenerney, and business office manager, Suzan Birt, who is not an admitted supervisor. I cannot credit the testimony of Bradeen because his testimony concerning his conversation with Birt could not have taken place. Undisputed documentary evidence, supported by Birt's testimony, established that she had not yet been hired by HealthBridge, and had not yet visited West River when she allegedly spoke to Bradeen. On that basis, I must also credit McCenerney who denied telling Bradeen to remove the "Busted" sticker.

Bradeen gave detailed testimony concerning his conversation with McCenerney regarding McCenerney's belief that the residents' right not to learn about the labor dispute and their right not to become upset permitted the Respondent to prohibit em-

[12] Employees Parks-Hill and Atkinson testified that Supervisor Abela told them that they had to remove their stickers, without limiting such a restriction to patient care areas. Abela did not testify. Inasmuch as the counsel for the General Counsel did not allege in her complaint, amended complaint, or in her brief that Long Ridge had impermissibly banned the stickers, I shall not issue an order regarding Long Ridge.

ployees from wearing the sticker. Nevertheless, I find that McCenerney's testimony that he did not see Bradeen wearing the sticker and his denial that he spoke to him about it is more credible. I further cannot credit Bradeen because he quoted office manager Birt as giving him the same reason as McCenerney did as to why he could not wear the sticker. Thus, Bradeen stated that Birt told him, as he was told by McCenerney, that the residents had no right to know the nature of the labor dispute. I accordingly credit Birt's denial that she saw anyone wearing the sticker or that she spoke to Bradeen about his wearing it.

Even assuming that I credit the testimony of Linarte, that she was told to remove the "Busted" sticker by a woman who works in the admission office and also given the same instruction by "Susan" from another office, there has been no evidence that either individual is a supervisor with authority to bind the Respondent. I accordingly, first, do not find that Linarte was given such a direction, and secondly, that even if she was, the unnamed people so directing her have not been proven to be supervisors or those in a position to bind the Respondent.

Regarding Wethersfield, employee Dunchie-Legg and union organizer Bermudez confirmed that administrator Santoro advised that the "Busted" sticker may not be worn in patient care areas.

Based on the above, I find that at Health Care Centers in Newington and Westport, employees were told that they must remove the "Busted" stickers and were not told that they had to remove them in patient care areas.

It is significant that employees were not issued written memos advising them where they could and could not wear the sticker. In the absence of a written memo, the oral instructions delivered from Crutchfield to the managers, and then from the managers to the employees, seem to have been lost in the transmission at Newington and Westport. Accordingly, the reliability of what was said by the managers to the employees, and the fact that certain managers did not testify, combine to contribute to a lack of confidence in the messages as they were given by Crutchfield to the managers, and then from the managers to the workers.

The Selective Nature of the Ban and Special Circumstances

Since the Respondent permitted the wearing of a variety of pins, buttons, and other insignia in patient care areas before, during and after the "Busted" sticker was banned, the Respondent therefore did not ban *all* nonemployer insignia in immediate patient care areas. Accordingly, its ban on certain union insignia, the "Busted" sticker, is not presumptively valid. The Respondent's selective ban on only the "Busted" sticker deprives it of the presumption of validity unless the Respondent can show that the ban was put in place based on a showing of "special circumstances"—that the selective ban was necessary to avoid disruption of health care operations or disturbance of patients.

The only reason presented for the banning of the stickers which predated their removal was Crutchfield's testimony. The Respondent has the burden of proving that the ban was necessary to avoid disruption of health-care operations or disturbance of patients.

Crutchfield stated that she made the decision that the stickers be removed in resident care areas out of concern for the residents, and in order to ensure that their care was not interrupted, and that they did not have unnecessary concern regarding an issue that might be confusing to them or lead them to believe that the Respondent had committed some kind of crime due to the judge's gavel and the word "busted." She was concerned that the residents may believe that something the Respondent had done may impact the care they received, thereby upsetting them.

There was no evidence that Crutchfield's determination that residents could be upset or concerned by the sticker was based on any complaint she received from residents or family members, or any complaint she received from employees or supervisors that the sticker was, in fact, upsetting to, or a cause of concern for the residents. Thus, Crutchfield's decision was based only on her belief and conjecture that the sticker would have that affect on patients and was therefore entirely speculative.

The Respondent offered the expert testimony of Dr. Warner-Maron as proof that the ban on the sticker was necessary to avoid disruption of health-care operations or disturbance of patients. But Dr. Warner-Maron's opinion was not informed by speaking to any patients, family members or care givers. *UCSF Stanford Health Care*, 335 NRB 488, 528–532 (2001). Nor were complaints received from any source. Her theory was not the basis for the banning of the stickers since she was only consulted after the complaint had issued. *UCSF Stanford.* Accordingly, her opinion as to the effect of the sticker on the resident constituted "mere speculation, unsubstantiated surmise and subjective belief." UCSF S*tanford*.

It must be noted that the stickers were worn for part of one day, from about 7 a.m. to about 1 p.m. on March 25. If the stickers were disturbing to patients by implying that the Respondent had been found guilty of unfair labor practices, the Respondent lessened the impact of the sticker's alleged implications on its residents by its March 28 letter to them which explained that only a complaint had been issued by the Board, and not any "ruling or finding by any judge." The letter stated that a decision by a judge would only be issued after a hearing in July.

Further, countering the concern expressed by Dr. Warner-Maron that residents would be disturbed if they believed that the sticker implied that the center would be closed and they would not receive care from their regular caregivers, the Respondent only added to such disturbance by stating in its March 28 letter that the Union's "long history of calling strikes" may result in a strike in which their caregivers would be replaced.

In *Sacred Heart Medical Center*, 347 NLRB 531 (2006), rev. *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577, 583 (9th Cir. 2008),[13] the Board found that the respondent had established special circumstances permitting it to ban a button that said 'RNs demand Safe Staffing.' The Board noted that the message "is one that would inherently disturb patients. A reasonable person would construe the 'Safe Staffing' button as a claim that the Respondent's staffing levels are unsafe. Such a

[13] The court's decision was accepted by the Board as the law of the case in 353 NLRB 147 (2008).

claim is likely to cause unease and worry among patients and their families, and disturb the tranquil hospital atmosphere that is necessary for successful patient care." The Board noted that the message on the button "relates directly to issues of patient care and hospital safety." The Board also held that the "button's demand that staffing be made safe sends a clear message to patients that their care is currently in jeopardy." The Board noted thereafter in *Saint John's Health Center* that in view of the Ninth Circuit's reversal of the Board's decision, *Sacred Heart* is of "questionable continued vitality." 357 NLRB 2078, at 2080 fn. 9.

In *Saint John's Health Center*, above, the Board found that a ribbon stating "Saint John's RNs for Safe Patient Care" did not establish special circumstances necessary to support a finding that the ribbon must be banned to avoid disruption of healthcare operations or disturbance of patients. The respondent's justification of the ban on the ribbon was part of the union's campaign to show that patient care was not safe. The Board found that the employer presented no evidence that patients were aware of the union's campaign, or that the ribbon was likely to disturb patients or otherwise disrupt healthcare operations. Moreover, the employer issued an identical ribbon with its own message.

In, *UCSF Stanford Health Care*, above, at 528–532, the Board found that the employer's no-solicitation/no-distribution rule was overly broad on its face because the employer did not demonstrate that the rule was necessary to avoid disruption of health care operations or disturbance of patients with respect to areas which were not immediate patient care areas. The Board, adopting the judge's discussion of the expert testimony presented in behalf of the respondent in that case, stated, as here, the expert testimony was properly "experience based."

In that case, the issue concerned whether patients were disturbed by union solicitation and distribution engaged in by employees among their coworkers. There, the experts' theories were not based on their first hand observations of solicitation and distribution among the employees. The experts' opinions that conversations that did not deal with patient care could be upsetting to patients "had no greater reliability than mere speculation" and were "merely unsubstantiated surmise and subjective belief." There, as here, there were no complaints from patients or families concerning the employee solicitation and distribution. In that case, the Board noted that the respondent "itself, on several occasions, permitted distribution of its antiunion flyers in undisputed patient care areas where respondent mentioned the potential for strike . . . and did not . . . insure the distribution of this material was done in a manner that it was not visible to patients and their families." In contrast, here, the Respondent's rebuttal to the Union's stickers was in the form of letters addressed directly to the patients.

Further, the Board stated that the opinions of the experts were "not the genesis or other impetus in the issuance of the solicitation and distribution policy." Similarly, Dr. Warner-Maron's opinion was not sought or obtained prior to the banning of the stickers. Finally, the Board stated that "the testimony of Respondent's witnesses appears to be post hoc to the formation and issuance of the rule, thus, this evidence did not reliably establish the need for the rule since the reasons advanced by these witnesses were not shown to be predicate for its formation."

The Respondent, relying on cases decided before *Saint John's*, argues that it may show that "special circumstances"—that the sticker disrupted patient care and disturbed patients—existed regardless of whether the ban on wearing the stickers was limited to immediate patient care areas. It also argues that only those Centers which failed to limit the banning of stickers to immediate patient care areas may be found to have violated the Act by such banning.

I cannot agree. *Saint John's* was very clear in its analysis. First, the presumption of validity of a banning of the stickers does not apply because the Respondent did not ban all nonofficial insignia in immediate patient care areas. It may selectively ban certain union insignia only if it can show that special circumstances where the restriction is necessary to avoid disruption of operations or disturbance of patients.

Here, I have found that the Respondent has not established that special circumstances permitted it to ban the "Busted" sticker in immediate patient care areas. Under Board precedent even before *Saint John's*, a ban would not be permitted outside immediate patient care areas in any event.

Conclusions as to the "Busted" Stickers

I have found, above, that the Respondent unlawfully banned the "Busted" stickers in immediate patient care areas at Danbury Health Care Center, Long Ridge of Stamford, West River Health Care Center, and Wethersfield Health Care Center.

I have also found that the Respondent unlawfully banned the "Busted" stickers in all areas at the Health Care Centers in Newington, and Westport while permitting employees to wear other stickers, buttons or insignia at those Health Care Centers.

The Cessation of Dues Deductions and Dues Remissions to the Union

The General Counsel argues that by unilaterally ceasing making deductions of union dues and fees from employees' wages, and ceasing remitting to the Union the dues and fees which were provided for in those expired contracts on March 24, 2011, the first dues-deduction date following the expiration of the contracts, the Respondent violated Section 8(a)(1) and (5) of the Act. The Respondent admits taking the actions set forth above and doing so without notice to or bargaining with the Union, but denies that it violated the Act in doing so.

In *NLRB v. Katz*, 369 U.S. 736, 743 (1962), the Supreme Court held that a unilateral change in a term or condition of employment without bargaining violates the Act. Accordingly, an employer's unilateral cessation of the dues-checkoff provision should violate the Act as a unilateral change. However, in *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), although the Board stated that union security and check off are matters related to wages, hours, and other terms and conditions of employment within the meaning of Section 8(d) of the Act, and are mandatory subjects of bargaining about which the employer must bargain with the Union, the Board held that certain terms of a contact, including union dues deduction agreements, may be terminated after the expiration of the contract.

The Board in *Bethlehem* reasoned that the checkoff provisions in the collective-bargaining agreement "implemented the

union security provisions. The Union's right to such check offs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force. . . . Consequently, when the contacts terminated, the respondent was free of its checkoff obligations to the union."

The General Counsel concedes that *Bethlehem* represents the current law on this issue, but argues that that case should be overruled. The Board may do so, but I cannot. "It is a judge's duty to apply established Board precedent which the Supreme Court has not reversed." *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984), citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1963); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004).

In *Hacienda Resort Hotel & Casino* (*Hacienda I*), 331 NLRB 665, 666 (2000), the Board, citing numerous Board and court cases, emphasized that it is a "well-established precedent that an employer's obligation to continue a dues-checkoff arrangement expires with the contract that created the obligation." The Board noted that, although certain mandatory subjects of bargaining cannot be changed unilaterally upon the expiration of a contract, some, including union shop and dues checkoff, "have historically been treated as exceptions to this general rule."

The union appealed that decision to the Ninth Circuit Court of Appeals which remanded the case to the Board with instructions to "articulate a reasoned explanation for the rule it adopted, or adopt a different rule and present a reasoned explanation to support it." *Local Joint Executive Board of Las Vegas, Culinary Workers Local 226 v. NLRB*, 309 F.3d 578, 586 (9th Cir. 2002). On remand, the Board again found that the dues-checkoff provisions ended upon the expiration of the contract, but this time relied on the language in the checkoff provisions which specifically limited the dues-checkoff obligation to the term of the collective-bargaining agreement. *Hacienda II*, 351 NLRB 504 (2007).

The union again appealed, and the Ninth Circuit again asked the Board to articulate a reasoned explanation for its ruling in *Hacienda I* or adopt a different rule and present a reasoned explanation to support it. 540 F.3d 1072 (9th Cir. 2008). The court posed the question: "Whether dues checkoff is a mandatory subject of bargaining." The Board's decision on remand stated that its four members had reached opposing views, set forth in two separate concurring opinions, and that, accordingly, had decided to follow existing precedent, and dismissed the complaint. It should be noted that Chairman Liebman and Member Pearce expressed "substantial doubts about the validity of *Bethlehem*." *Hacienda III,* 355 NLRB 742, 742 (2010). In again considering the union's appeal, the Ninth Circuit stated that a third remand to the Board would be inappropriate, but decided that the employer violated the Act by unilaterally ceasing dues checkoff before bargaining to impasse on the issue. The court remanded the matter to the Board to determine what relief was appropriate in light of its opinion.

The General Counsel, consistent with the dissenting opinion in *Hacienda I*, argues that no "principled rationale . . . or statutory basis . . . exists for excluding checkoff from the unilateral change rule" that following the expiration of a contract, an employer is obliged to maintain the status quo regarding employees' terms and conditions of employment until the parties agree on changes or bargain to impasse.

It is important to note that the General Counsel's arguments regarding *Hacienda* must be considered in relation to the fact that those cases were decided in a "right-to-work" State where union-security clauses conditioning employment upon membership in a union are prohibited, and therefore, dues checkoff could not lawfully be linked with union security arrangements in those states. Indeed, the Ninth Circuit did not express its opinion of the validity of *Bethlehem* in a nonright-to workstate. 657 F.3d 865 (9th Cir. 2011). In the instant case, Connecticut is not a right-to-work State, and therefore, the union security clause here may be considered, consistent with *Bethlehem,* to have been properly linked with the dues-checkoff provisions.

Counsel for the General Counsel further cites a variety of reasons why *Bethlehem* should be overruled. I need not discuss them here. Inasmuch as the Board's most recent decision on the issue, *Hacienda III,* in the absence of a three-member majority to overrule it, essentially reaffirmed *Bethlehem,* that case remains the outstanding current Board law on the subject.

I accordingly find and conclude that the Respondent's unilateral cessation of dues check off and fees from employees' wages on March 24, 2011, and its failure to remit any such sums which were due following the expiration of the collective-bargaining agreements between the Health Centers and the Union on March 16, 2011, did not violate Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Since on about March 25, 2011, the Respondent removed the "Busted" flyers from the union bulletin boards at Danbury Health Care Center, Long Ridge of Stamford, Newington Health Care Center, Westport Health Care Centre, West River Health Care Center, and Wethersfield Health Care Center in violation of Section 8(a)(1) of the Act.

2. Since on about March 25, 2011, the Respondent prohibited its employees from wearing the "Busted" stickers in immediate patient care areas at its Health Care Centers at Danbury Health Care Center, Long Ridge of Stamford, West River Health Care Center, and Wethersfield Health Care Center in violation of Section 8(a)(1) of the Act.

3. Since on or about March 25, 2011, the Respondent prohibited its employees from wearing the "Busted" stickers in all areas at its Health Care Centers in Newington and Westport while permitting its employees to wear other stickers, buttons or insignia at those Health Care Centers.

4. By ceasing deducting union dues and fees from its employees' wages, and by ceasing remitting to the Union those dues and fees required in its expired collective-bargaining agreements with the Union, the Respondent did not violate Section 8(a)(5) and (1) of the Act.

REMEDY

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

[Recommended order omitted from publication.]